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California Supreme Court
350 McAllister Street
San Francisco, CA

Re: *Montrose Chemical Corporation of California v. Superior Court of the State of California, County of Los Angeles*, No. S293914
Amicus Letter Supporting Grant of Review

Honorable Justices,

Pursuant to California Rules of Court, rule 8.500(g), Pillsbury Winthrop Shaw Pittman LLP submits this letter in support of review. As set forth below, Pillsbury believes this case presents significant issues of insurance law that warrant this Court's review.

I. Interest of the Amicus Curiae

Pillsbury's Insurance Recovery & Advisory practice is one of the first policyholder-focused insurance practices in the United States—dating back to the Great San Francisco Earthquake and Fire of 1906, when the firm helped its clients recover from their insurers and set the legal precedent needed to rebuild the city. Today, the practice is one of the country's largest and most diverse insurance departments, with more than 70 dedicated lawyers in Los Angeles, San Francisco, Washington, DC, New York, Miami, and Houston. Our team represents corporate policyholders across the country from the earliest stages of coverage placement through claims, arbitrations, litigation, trial, and appeals. The firm litigates and negotiates long-tail environmental claims similar to Montrose's on behalf of many of its clients, including on behalf of policyholders with potential exposure in California. Disputes regarding coverage of long-tail environmental claims remain among the most common, recurring, and expensive types of insurance coverage disputes that policyholders face.

II. Reasons for Granting Review

Montrose's petition ably explains why this Court should grant review and interpret the "qualified" pollution exclusion—added to standard-form comprehensive general liability ("CGL") insurance policies in the 1970s, and routinely invoked by insurers to avoid coverage for environmental claims based on purportedly gradual releases of pollutants—consistent with extrinsic evidence of its intended meaning, including the insurance industry's historic representations to state insurance regulators. Such evidence establishes unequivocally that the "sudden and accidental" exception to the pollution exclusion was represented to regulators as preserving coverage for releases

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that were unexpected or unintended, regardless of whether they were temporally abrupt. Pillsbury writes separately to underscore the decisive nature of these representations and the practical impact of failing to credit the insurance industry's own prior words.

"The events leading up to the creation of the pollution exception by the insurance industry are 'well-documented and relatively uncontroverted.'" (*United Nuclear Corp. v. Allstate Ins. Co.* (N.M. 2012) 2012-NMSC-032, ¶ 36 [quoting *Morton Int'l v. General Accident Ins. Co.* (N.J. 1993) [629 A.2d 831, 848] (cleaned up)].)[1] Beginning in the 1940s, the basic provisions of CGL insurance policies were drafted on an insurance industry-wide basis by predecessors of what became the Insurance Services Office ("ISO"). As relevant here, these entities included (1) the Insurance Rating Board ("IRB"), previously known as the National Bureau of Casualty Underwriters ("NCBU"), which consisted of representatives of stock insurance companies; and (2) the Mutual Insurance Rating Bureau ("MIRB"), which consisted of representatives of mutual insurance companies. In addition to drafting the relevant language, these insurance industry groups made representations to state regulatory authorities concerning the nature and intent of policy language proposed for their approval.

In 1966, the NCBU and MIRB revised the standard form CGL policy to provide coverage for an insured's liability for third-party injuries caused by an "occurrence," as opposed to the prior form's provision of coverage for injuries caused by an "accident." This revision defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Among other things, this revision clarified that "coverage was provided for all accidents so long as the insured did not expect or intend to cause damage," including coverage for "ongoing events." (*Clearing Muddy Waters*, 75 Cornell L. Rev. at p. 624 & n.55.)

A few years later, these drafting organizations resurrected the pre-1966 "accident" concept in what became Exclusion "f" of the standard ISO form CGL policy, also known as the "qualified" pollution exclusion:

> This insurance does not apply . . . (f) to 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*

[1] This letter's summary of the relevant history is largely drawn from Nancy Ballard and Peter Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion* (1990) 75 Cornell L. Rev. 610 (hereafter, "*Clearing Muddy Waters*").

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> *exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.* [2]

The proper interpretation of the exception to this exclusion (and its common variants) lies at the heart of Montrose's petition.

After drafting the qualified pollution exclusion (and other contemporaneous revisions to the CGL policy form), the MIRB and IRB sought and obtained regulatory approval of the revisions on behalf of their member companies. Such review is critical to the integrity of the insurance industry, particularly because the use of form language largely prevents individual policyholders from renegotiating the common, standardized terms of coverage. Indeed, as one court emphasized, "state regulators as a practical matter often are the only parties who are in a position to negotiate language changes in proposed commercial insurance contracts." (*Textron, Inc. v. Aetna Cas. & Sur. Co.* (R.I. 2000) 754 A.2d 742, 753.) Accordingly, the IRB and MIRB submitted explanatory memoranda to various state insurance commissions in 1970, in support of their proposed revisions to the standard form CGL policy. As to Exclusion "f," these memoranda explained that the qualified pollution exclusion merely clarified the preexisting scope of occurrence-based coverage:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages *can be said to be expected or intended* and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident[.][3]

Such representations were credible because the insurance industry had long used the term "sudden and accidental" to mean "unexpected and unintended," and courts had construed it as such, in boiler and machinery insurance policies.[4] Well aware of the

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[2] (ISO form GL 00 02, Ed. 01-73 (emphasis added) [quoted in *Clearing Muddy Waters*, 75 Cornell L. Rev. at p. 613].)

[3] (*See, e.g.*, *Textron*, 754 A.2d at 753 (emphasis added) [quoting IRB memorandum submitted to Rhode Island Department of Business Regulation]; *Morton*, 629 A.2d at 851 [quoting identical language from memorandum filed with the New Jersey Department of Insurance]; *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.* (W.Va. 1992) 421 S.E.2d 493, 498-99 [quoting identical language from memorandum submitted to the West Virginia Insurance Commissioner].)

[4] (*See Morton*, 629 A.2d at 863-65 [citing *New England Cas & Elec. Ass'n v. Ocean Acc. & Guar. Corp.* (1953) 330 Mass. 640 [116 N.E.2d 671]; *Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.* (1959) 53 Wash.2d 404 [333 P.2d 938]; *Julius Hyman & Co. v. American Motorists Ins. Co.* (D. Colo. 1955) 136 F.Supp. 830; and *City of Detroit Lakes v. Travelers Indem. Co.* (1937) 201 Minn. 26 [275 N.W. 371].)

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existing judicial interpretation of the term, insurers could reasonably expect the same construction to be accepted as a basis for the regulatory submissions.

Notwithstanding this representation, various state insurance regulators raised concerns about the potential scope of the qualified pollution exclusion. For example, West Virginia held public hearings to determine whether the exclusion was:

> inconsistent, ambiguous, or misleading, or deceptively affected the risk purported to be assumed in the general coverage of the contract, or if such forms limited the overall insurance coverage to the extent that such coverage was no longer sufficiently broad to be in the public interest.[5]

In response, the MIRB reaffirmed that the exclusion preserved coverage for accidental releases, without any suggestion that the exclusion narrowed such coverage solely to the subset of accidental releases that also were temporally abrupt:

> This endorsement is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended.[6]

Similarly, the IRB represented to the Georgia Insurance Department that:

> the impact of the [pollution exclusion clause] on the vast majority of risks would be no change. It is rather a situation of clarification . . . Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued[.][7]

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[5] (Pollution and Contamination Exclusion Filings, Admin. Hearing n.70, W. Va. Ins. Dep't (June 26, 1970) (Notice of Administrative Hearing) (cleaned up) [quoted in *Clearing Muddy Waters*, 75 Cornell L. Rev. at p. 626].)

[6] (Letter from the MIRB to the West Virginia Insurance Department dated July 30, 1970 [quoted in Pendygraft, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, (1988) 21 Ind. L. Rev. 117, p. 154]; *see also Morton*, 629 A.2d at 853 [quoting same]; *Clearing Muddy Waters*, 75 Cornell L. Rev. at p. 627 [discussing same; "At the West Virginia hearing, the MIRB maintained that exclusion 'f' was merely intended to clarify the term 'occurrence.'"].)

[7] (Letter from R. Stanley Smith, Manager of the Insurance Rating Board, to the Georgia Insurance Department dated June 10, 1970 [quoted in *Claussen v. Aetna Casualty & Sur. Co.* (S.D. Ga. 1987) 676 F.Supp. 1571, 1573, *question certified by* (11th Cir.) 865 F.2d 1217, *certified question answered by* 259 Ga. 333 [380 S.E.2d 686], *answer to certified question conformed to* (11th Cir. 1989) 888 F.2d 747, *on remand* (S.D. Ga. 1990) 754 F.Supp. 1576]; *see also Morton*, 629 A.2d at 853 [quoting same].)

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The insurance industry's representations that the qualified pollution exclusion preserved coverage for all unexpected and unintended releases of pollutants were critical to securing regulatory approval. This is best illustrated by the West Virginia Insurance Commissioner's written order approving the exclusion, which stated:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached;
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions[.] [8]

Moreover, insurers continued to interpret the qualified pollution exclusion narrowly for years after it was adopted—in communications with state insurance regulators, at least. For example, in 1982, Travelers Insurance Company assured New York State insurance regulators that the exclusion preserved coverage for unintended gradual pollution:

> [T]here is nothing in the term "sudden and accidental" which requires the elimination of gradually occurring events from the collective. A number of court decisions in many jurisdictions have essentially reached the same conclusion: there is nothing which prevents gradually occurring events from being construed to be "sudden and accidental" as long as there is no intent to cause injury or damages.[9]

This is but a snapshot of the history that "courts from around the country have examined . . . to decode the intended scope of the clause, and have concluded that the insurance industry introduced the clause merely to clarify its stance on intentional pollution, not to substantively change the coverage itself." (*United Nuclear*, *supra*, 2012-NMSC-032 at ¶ 36 (collecting cases).) At minimum, the insurance industry's regulatory advocacy establishes that Montrose's proffered interpretation of the qualified pollution exclusion is a reasonable one. *See, e.g.*, *id.* ("Under these circumstances, it is reasonable to hold insurers to the representations they made to regulators when seeking approval for a

[8] (*Joy Technologies*, 421 S.E.2d at 499.) The West Virginia Insurance Commissioner reaffirmed this point through an affidavit filed in the *Joy Technologies* case, in which he reiterated that he approved the qualified pollution exclusion based on the insurance industry's representations "in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so." (*Ibid.*)

[9] (*Textron*, 754 A.2d at 753 [quoting January 13, 1982 letter from secretary of Travelers' Product Management Division to New York State's associate insurance examiner].)

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pollution exclusion clause like this one, which is susceptible to more than one plausible interpretation.").[10] Yet judicial interpretation of this form exclusion remains far from uniform, as other courts instead adopted the insurance industry's later assertion that the exclusion also imposes a requirement that pollution be temporally abrupt in order to remain covered under the "sudden and accidental" clause.

This ongoing schism impedes effective resolution of environmental coverage disputes, particularly for policyholders facing potential exposure across multiple states. So long as there is a chance that the "temporally abrupt" interpretation categorically bars coverage for unintended gradual pollution, an insurer has powerful reason to refuse to resolve such claims amicably, even on a compromise basis. Instead, the status quo incentivizes a race to litigation, as both policyholder and insurer are rewarded for filing-first in a venue whose choice-of-law principles are more likely to steer the dispute towards their preferred interpretation of the clause. As a practical matter, this means many coverage disputes that should be resolved without litigation are not, and many disputes that do go to litigation are contested in multiple forums, often for an extended period, and at tremendous expense to both insurers and policyholders.

Of course, this Court's review of Montrose's petition would not, standing alone, harmonize the law nationwide. But this Court's voice is perhaps the most significant absence in the longstanding debate over the qualified pollution exclusion's reach. As the nation's largest economy, California is home to a disproportionate number of sites raising potential environmental insurance claims.[11] By granting review, this Court can finally provide clarity on one of the most important legal disputes raised by such claims. And by crediting historical evidence surrounding the exclusion's drafting—and reversing the Court of Appeal's refusal to do so below—this Court would ensure that policyholders subject to California law will receive the coverage promised by the insurance industry.

[10] Some courts have gone further, holding that such representations bind insurers as a matter of regulatory estoppel, such that the qualified pollution exclusion must be interpreted to preserve coverage for gradual pollution regardless of how the court might otherwise interpret the "sudden and accidental" exception. (*See generally Morton*, 134 N.J. 1; *see also, e.g.*, *Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co.* (3d Cir. 1996) 89 F.3d 976, 991-92 [holding that *Morton*'s regulatory estoppel holding applies equally to insurers that did not "affirmatively deceive" regulators in securing approval of the exclusion]; *Sunbeam Corp. v. Liberty Mut. Ins. Co.* (2001) 566 Pa. 494, 499-500 [holding trial court erred in refusing the consider regulatory estoppel argument].)

[11] For example, as of July 3, 2025, nearly 100 of the 1343 Superfund sites on the EPA's "National Priorities List" were located in California. (*See* "National Priorities List (NPL) Sites – by State," https://www.epa.gov/superfund/national-priorities-list-npl-sites-state.)

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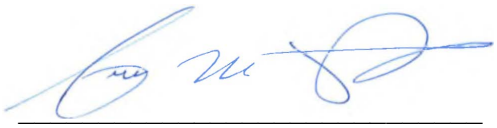
For these reasons, Pillsbury respectfully urges this Court to grant review to address the critical insurance law issues raised by Montrose's petition.

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: 

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