No. 21-1203

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TJBC, INC.,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Illinois,
Case No. 3:20-cv-00815-DWD
Hon. David W. Duggan, District Court Judge

BRIEF OF THE RESTAURANT LAW CENTER AND ILLINOIS RESTAURANT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1203

Short Caption: TJBC, Inc. v. The Cincinnati Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Restaurant Law Center and Illinois Restaurant Association as Amici Curiae

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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N/A

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: /s/ Angelo I. Amador Date: April 5, 2021

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STATEMENT REGARDING CONSENT

Plaintiff-Appellant and Defendant-Appellee each consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

Amicus Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets that represent a broad and diverse group of owners and operators—from large national outfits with hundreds of locations and billions in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs on behalf of the industry, the Law Center provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

Amicus Illinois Restaurant Association ("IRA") is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 members statewide—including restaurant

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry that includes more than 25,000 restaurant owners and operators, and has employed nearly 600,000 workers across the state. The Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for its members' interests.

Amici and their members have a significant interest in the important issues raised by this case. Many businesses in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented executive shutdown orders. Many of those restaurants have been unreasonably and categorically denied coverage on the basis that they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders. Therefore, although whether Plaintiff-Appellant TJBC, Inc. has stated a claim for coverage depends on the specific factual allegations in its pleadings, *amici* and their members have a strong interest in highlighting for the Court why certain issues raised in this appeal are important to the broader restaurant industry as a whole.[2]

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[2] Amici also have a strong interest in other appeals pending in this Court that raise similar issues under Illinois law, and where the district court similarly erred in dismissing business interruption claims. *See, e.g.*, *Bradley Hotel Corp. v.*

SUMMARY OF ARGUMENT

Amici write to provide this Court—which is among the first appellate courts in the country to address these issues—with additional context about this case, practical perspectives on potential outcomes, and to emphasize how restaurant and foodservice companies have suffered physical "loss or damage" as a result of executive shutdown orders.

I. The restaurant industry is a significant sector of the Illinois economy and a major driver of economic activity across the country. The industry creates many employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in Illinois and beyond.

For years, restaurants in Illinois and elsewhere have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurant owners bought this insurance believing that it would cover income lost as a result of physical "loss or damage" to their property, as they understood those plain, ordinary, everyday words to mean.

Aspen Specialty Insurance Co., No. 21-1173; *Crescent Plaza Hotel Owner LP v. Zurich American Insurance Co.*, No. 21-1316; *The Bend Hotel Development Co. LLC v. Cincinnati Insurance Co.*, No. 21-1559; and *Sandy Point Dental, PC v. Cincinnati Insurance Co.*, No. 21-1186.

Yet when the Governor of Illinois and others issued executive orders that caused precisely what these restaurant owners believed to be physical "loss or damage" to property—by detrimentally altering physical property, imposing physical changes, and materially impairing physical spaces that rendered property nonfunctional for its intended purposes—insurers denied coverage without legitimate justification. Facing catastrophic losses, hundreds of restaurants have already closed and countless more will be forced to close—*permanently*. Accordingly, restaurants have turned to the courts to obtain the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. That is especially appropriate here. The district court committed some of the same interpretive and analytical errors as the cases it relied on and failed to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them. In addition, many other trial courts—both within this Circuit and across the country—have found in well-reasoned decisions that a plaintiff sufficiently stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of executive shutdown orders. As courts have done in other hotly contested insurance coverage cases, this Court should thus review the allegations of the complaint as well as the policy language, apply longstanding principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. This Court should reverse the district court's decision. Bedrock canons of insurance policy interpretation require that undefined terms be given their "plain and ordinary" meaning. *Gulino v. Econ. Fire & Cas. Co.*, 2012 IL App (1st) 102429, ¶ 18. A court should not inject extrinsic terms or conditions into the policy. A provision susceptible to more than one reasonable interpretation is ambiguous and should be construed in accordance with a policyholder's reasonable expectations of coverage. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co., v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). "Plain and ordinary" terms require no judicial redefinition: they are to be construed according to what a reasonable consumer would expect.

TJBC's policy provides that Cincinnati "will pay for the actual loss of 'Business Income'" resulting from "direct physical 'loss' to property" at the insured premises, and defines "loss" to mean "accidental loss or damage." (Dkt. 54 at 3.)[3] TJBC has alleged as a matter of fact that it has "experienced substantial losses and damage as a result of the presence of COVID-19" and the executive orders shutting down restaurants. (Dkt. 15, ¶¶ 8-11.) Many other courts have found a restaurant's materially similar allegations and executive-mandated physical alterations to property qualify as direct physical loss or damage for purposes of stating a claim for coverage. Those rulings are consistent

[3] Citations to "Dkt. __" refer to the district court record below.

with longstanding precedent across the country holding that a property may be physically lost or damaged when it is rendered nonfunctional for its intended purpose or when its appearance or form is altered.

The district court reached a different conclusion because plaintiff had not alleged the "property structure was physically altered by the Covid-19 virus." (Dkt. 54 at 5-6.) But those added words appear nowhere in the policy and reasonable consumers would not expect the policy that covers "loss or damage" to include such a requirement. Moreover, a reasonable consumer would understand that an insurer's agreement to cover "loss or damage" would include protection if the property was "forcibly altered to prohibit indoor dining." (*See id.* at 8.) Yet the executive shutdown orders did just that, as the district court recognized. The district court thus erred by reading the policy to preclude coverage and by dismissing TJBC's claim.

ARGUMENT

I. Restaurants Are Critical To Illinois's Economy And Culture, And Sought Insurance Coverage To Help Survive Unprecedented Hardship.

A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant and foodservice industry is the lifeblood of Illinois's economy. In 2019, the industry accounted for an estimated $32 billion in sales across 25,851 locations in Illinois. It employed nearly 600,000 in 2020 and is expected to employ nearly 7% more people over the next decade.[4]

[4] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* 7 (2020) ("*Factbook*").

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by the state's shutdown orders—returns approximately two dollars to the state's economy, not to mention the positive impact on the state's tax revenue.[5] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[6] That is certainly the case in Illinois, where ample and diverse dining opportunities drives tourism across the state.

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization.[7] Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish." *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶ 18. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry. They are "a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area." *Id.*

Indeed, the restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was

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[5] Nat'l Restaurant Ass'n, *Illinois Restaurant Industry at a Glance* (2019), https://restaurant.org/downloads/pdfs/state-statistics/illinois.pdf.

[6] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020), https://media-cdn.getbento.com/accounts/cf190ba55959ba5052ae23ba6d98e6de/media/EmH1JsVMRNylmKAeF2FJ_Report.pdf.

[7] *Id.* at 13.

an entry-level position. Even more restaurant managers say the same.[8] Restaurants also provide opportunities for historically disadvantaged communities. There are more women and minority managers in the restaurant industry than in any other industry,[9] and restaurants provide opportunity for immigrants to the United States to work and also own their own businesses.[10]

The past successes of the restaurant industry are neither self-sustaining nor guaranteed. In the last twelve months, nationwide restaurant and foodservice sales were "down $270 billion from expected levels."[11] Compared to February 2020, the industry has lost millions of employees—reflected in decreased employment in every single state and the District of Columbia.[12] As of late 2020, 17% of restaurants—more than 110,000 establishments—were closed permanently or long-term.[13] Those restaurants had, on average, been in business for more than sixteen years. The restaurant industry's recovery, in other words, is likely to be "measured in years and not months."[14]

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[8] *Factbook*, *supra* note 4.

[9] *Id.*

[10] Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

[11] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021), https://restaurant.org/articles/news/restaurant-sales-pulled-back-from-january.

[12] Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021), https://restaurant.org/articles/news/forty-states-and-dc-lost-jobs-in-january.

[13] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020), https://www.restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in.

[14] Nat'l Restaurant Ass'n, *Restaurant employment fell for the third consecutive month* (Feb. 5, 2021), https://www.restaurant.org/articles/news/restaurant-employment-fell-for-the-third-month.

Illinois restaurants have not been spared. Compared to February 2020, employment in Illinois restaurants is down more than 30%, representing over 140,000 jobs.[15] The numbers for independent restaurants are even starker.[16] These closures can be devastating to neighborhoods. Nearly 90% of adults say "restaurants are an important part of their community."[17] And the harm from closures reverberates through communities, impacting other local businesses and industries as well. As the National Restaurant Association put it, "[v]irtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[18]

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses as a result of executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants throughout Illinois and across the country turned to their insurers for coverage under "all risk" commercial property insurance policies that included protection for business interruption.

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[15] Nat'l Restaurant Ass'n, *supra* note 12.
[16] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).
[17] Bruce Grindy, *Consumers are Worried their Restaurants will not Survive the Pandemic*, Nat'l Restaurant Ass'n (Aug, 18, 2020), https://www.restaurant.org/articles/news/consumers-are-worried-restaurants-will-not-survive.
[18] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for "all risks" of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many in the restaurant industry, business interruption coverage is triggered when a restaurant suffers direct "loss or damage" to its premises. These policies provide consumers with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair their businesses.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies that included business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed that their policies would cover business income losses from any and all non-excluded risks. Those risks, in the eyes of a reasonable policyholder, include executive shutdown orders causing direct physical "loss or damage," as policyholders understood those words to mean.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to

produce food. Those dining areas are built out, often at significant expense, to create the kind of warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical space and layout play a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner—whether as restaurants, bars, venues, or another type of food service business—and based on the available square footage at the outset of the policy period. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when executive orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring on-premises dining, the executive orders caused the loss of millions of square feet of vibrant physical space that once served guests. The orders dispossessed restaurants of their tangible spaces and forced very real, material detrimental physical changes and alterations to their premises. Dining rooms closed or limited. Areas blocked off. Barriers erected. Physical layout altered. Fixtures and furniture removed. Self-service stations eliminated. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials are frequently rapid, featuring boilerplate language asserting that coverage is excluded because the restaurant supposedly has not satisfied the industry-standard "loss or damage" requirement. Those denials follow the telegraphed statements by insurers and trade groups.[19] Those denials also frequently issued without meaningful (if any) investigation, regardless of the information provided by the policyholder.

Many restaurants in Illinois, and thousands of restaurants across the country, have challenged these wrongful denials and sought relief in the courts. Without such relief, many restaurants will be out of business entirely, many restaurant-industry employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply longstanding principles of policy interpretation, and resolve this case of first

[19] For example, Society Insurance all but denied coverage "preemptively and *en masse*" through a memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states limited operations of certain businesses—"observing that 'a quarantine of any size,'" or a "a widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109, at *4 (N.D. Ill. Feb. 22, 2021). In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 7, 2020), https://insurancenewsnet.com/oarticle/american-property-casualty-insurance-association-releases-new-business-interruption-analysis.

impression based on the unprecedented circumstances under which it arises. That is particularly so here, for three reasons.

First, "[t]he construction of an insurance policy is a question of law" subject to *de novo* review. *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684, 687 (7th Cir. 2008). This Court thus interprets the policy "without deference to the district court." *Trujillo v. Rockledge Furniture LLC*, 926 F.3d 395, 397 (7th Cir. 2019). Indeed, because "de novo review is compelled, no form of appellate deference is acceptable." *Oneida Tribe of Indians of Wis. v. State of Wis.*, 951 F.2d 757, 760 (7th Cir. 1991) (citation omitted). Reviewing the complaint "in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor," the "issue is not whether a plaintiff will ultimately prevail but whether the [plaintiff] is entitled to offer evidence to support the claims." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Second, this Court's review of the important issues in this case comes at a time when shutdown-related business interruption litigation is in its early stages. More than 1,400 business interruption lawsuits have been filed but only a small fraction have been decided so far. *See* Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/.

Among the trial-level decisions in state courts to date, a substantial number have found a plaintiff stated a claim for business interruption coverage—

including in cases against Cincinnati.[20] Many federal district courts, applying state law, have reached the same conclusion—including in cases against Cincinnati.[21]

While other decisions have favored insurers, often they overlook important differences in factual allegations. Other decisions fail to apply the reasonable-

[20] *See, e.g.*, *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378, at *1 (Ohio Ct. C.P. Jan. 7, 2021); *Chapparells Inc. v. Cincinnati Ins. Co.*, 2020 WL 7258117, at *2 (Ohio Ct. C.P. Oct. 21, 2020); *Francois Inc. v. The Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. C.P. Sept. 29, 2020); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); Minute order, *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681 (Cal. Super. Ct. Feb. 1, 2021); Order and opinion, *Cherokee Nation v. Lexington Ins. Co.*, No. CV-2020-00150 (Okla., Cherokee Cnty., Jan. 29, 2021); *Goodwill Indus. of Orange Cnty. v. Phila. Indemnity Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, 2020 WL 7229856 (Cal. Super. Ct. Sept. 30, 2020); Order denying mot. to dismiss, *Lombardi's, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins.*, 2020 WL 7258116 (Wash., Spokane Cnty. Nov. 23, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114 (Ohio Ct. C.P. Nov. 17, 2020); *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, 2020 WL 6556842 (Fla., Pinellas Cnty. Sept. 22, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 6993790 (La. Civ. Dist. Ct. Nov. 4, 2020).

[21] *See, e.g.*, *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.,* 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Henderson Road Rest. Sys. Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

interpretation rule and other basic rules of insurance policy interpretation—including by redefining the policy language based on extrinsic case law or arcane legal publications that ordinary people would never consult. Yet other decisions appear to be the result of a reflexive self-fulfilling feedback loop. As an example, an early yet unremarkable decision has already been cited more than fifty times—even though the unreported opinion is not particularly detailed or persuasive, dismissed without prejudice, and has not yet been subject to appellate review. *See 10E, LLC v. Travelers Indem. Co.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending* No. 20-56206 (9th Cir.); *see also Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690 (N.D. Ill. 2020) (cited by the court below and dozens of others). It is therefore all the more important for this Court to carefully consider the issues here, liberally construe the complaint's allegations, and apply core policy-interpretation principles in determining whether a claim has been stated.

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, "the meaning of the standard pollution exclusion clause's exception for discharges that are 'sudden and accidental' … precipitated 'a legal war … in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford*

Accident & Indem. Co., 933 F.2d 1162, 1196 (3d Cir. 1991). And many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

This Court faces a similar task in interpreting the meaning of the industry-standard physical "loss or damage" requirement. The very real disagreement among trial courts about whether plaintiffs have stated a claim merely reinforces that this Court is on solid ground in reversing the decision below. This Court should conclude that the plain meaning of the undefined, disjunctive terms physical "loss or damage"—as a normal layperson would understand them—applies to cover losses allegedly incurred as a result of executive shutdown orders that imposed material physical alterations on restaurants.

III. Policy Language, Interpretation Principles, And Precedent Support Finding Executive Shutdown Orders Caused Physical Loss Or Damage.

As a result of a series of executive orders issued by Governor Pritzker in March 2020, TJBC's property was physically altered, materially impaired, and no longer functional as a restaurant. (*See* Dkt. 15, ¶¶ 10-12, 63-104.)

Cincinnati, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused physical "loss or damage" to property. Cincinnati, like other insurers, further contends that only events like hurricanes and fires can cause the type of loss required to trigger business interruption coverage. But Cincinnati's position is inconsistent with the policy's language and foundational principles for interpreting it. Cincinnati's position is also contrary to both historical and recent precedent. The district court was therefore wrong to dismiss the complaint.

A. Policy Language And Policy-Interpretation Principles Support Reversing The Decision Below.

Under Illinois law, policy provisions and exclusions are "to be construed liberally in favor of the insured and 'most strongly against the insurer.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.,* 158 Ill. 2d 116, 122 (1994) (citation omitted); *see Phusion Projects, Inc. v. Selective Ins. Co.,* 2015 IL App (1st) 150172, ¶¶ 38-40. "[A] policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005).

"[I]f a provision of the insurance policy can reasonably be said to be ambiguous, that provision will be construed in favor of the insured." *Abrams v. State Farm Fire & Cas. Co.*, 306 Ill. App. 3d 545, 549 (1st Dist. 1999). A provision of an insurance policy is "ambiguous" if "the words … are susceptible to more than one reasonable interpretation." *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992).

When construing an insurance policy, a court gives undefined terms their "plain and ordinary" meaning. *Gulino*, 2012 IL App (1st) 102429, ¶ 18. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]," *Travelers Ins. Co.*, 197 Ill. 2d at 301 (citation omitted). Such a meaning "can be derived from a

dictionary." *Gulino*, 2012 IL App (1st) 102429, ¶ 18. It should not be derived from arcane legal sources or other materials that "most people" would not consult.

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by executive orders that physically impaired restaurants. Cincinnati agreed to pay for "direct physical loss" and "loss or damage" to property. The policy provides coverage if the policyholder shows physical loss **or** damage to property. "The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.'" *In re Society Ins. Co.*, 2021 WL 679109, at *8-10. As many courts have recently held in the business interruption context—including in this Circuit and applying Illinois law—to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage." *Id.*[22]

Had Cincinnati wished for "loss" and "damage" to mean the same thing, or to narrow the meaning of "loss or damage" it was obligated to do so by defining or limiting those terms: "if [an] insurer relies on an exclusionary provision, it must be 'clear and free from doubt' that the policy's exclusion prevents coverage." *Atl. Mut. Ins. Co. v. Am. Acad. of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 560 (1st Dist. 2000). But Cincinnati chose not to define those terms even though these terms can reasonably be construed (and indeed have been construed by

[22] *See, e.g.*, *Henderson Road*, 2021 WL 168422, at *11-12; *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020); *Studio 417*, 478 F. Supp. 3d at 799-801; *Blue Springs Dental*, 488 F. Supp. 3d at 873-74; *Urogynecology Specialist of Fla.*, 2020 WL 5939172, at *4; *K.C. Hopps*, 2020 WL 6483108, at *1.

courts) more broadly than the narrow self-serving definition that Cincinnati contends should provide the terms' only meaning. Each of those terms must be given its plain and ordinary meaning consistent with the knowledge and expectations of an ordinary, reasonable consumer—not an expert steeped in insurance law and practice.

Here, construing its allegations in the most favorable light, TJBC has met its burden to plead that it has suffered direct physical "loss or damage" to property consistent with the plain and ordinary meaning of those terms. Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[23] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[24] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world. Indeed, TJBC has been "deprived" of its property in a way that is perceptible through the senses because, during the effective period of the executive orders, TJBC no longer possessed the same rights to its property as it did before and large swaths of its property have been rendered non-functional.

The district court erred in finding otherwise. The district court read caselaw to require a plaintiff to plead that the "property structure was physically altered" to state a claim. (Dkt. 54 at 5-6.) But that requirement does not appear

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[23] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed Apr. 1, 2021).

[24] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last accessed Apr. 1, 2021).

in any relevant portion of the policy. Cincinnati defined "physical loss" to require "loss or damage," not "physical alteration." And no reasonable policyholder would have understood "loss," as distinct from "damage," to require "physical alteration" to the structure of the premises, much less closely read judicial decisions to discern the supposed true meaning of the policy's language.

By contrast, reasonable policyholders would understand that interposing barriers, blocking off physical space, and changing property in other material physical ways constitute physical alterations. Therefore, even under the district court's (mis)interpretation of the meaning of the policy language, restaurants have suffered physical "loss or damage" as a result of executive shutdown orders.

Policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. A policy term means what "the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co.*, 197 Ill. 2d at 301. Plain and ordinary policy terms require no judicial redefinition or clarification.

The language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that TJBC has sufficiently alleged as a matter of fact that the executive orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. TJBC's case against Cincinnati should

proceed and ultimately test whether TJBC can provide sufficient evidentiary support for its claims to obtain a jury verdict in its favor.

B. Precedent Supports Reversing The Decision Below.

In reversing the judgment below, this Court will be squarely within the mainstream of coverage decisions in this Circuit and elsewhere that have found restaurants and other businesses adequately alleged that they suffered physical "loss or damage" as a result of executive shutdown orders.

Top of mind are two recent decisions from the Northern District of Illinois. Judge Chang, presiding over a MDL involving claims against Society Insurance, denied Society's motion to dismiss under the law of Illinois and other states. *In re Society Ins. Co.*, 2021 WL 679109, at *1 (N.D. Ill. Feb. 22, 2021). The court found that plaintiffs "need not plead or show a change to the property's physical characteristics," because the policies at issue covered "loss" in addition to "damage." *Id.* at *8. The court further reasoned that a jury could find plaintiffs suffered physical losses because the shutdown orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Id.* at *9.

Similarly, in *Derek Scott Williams PLLC v. Cincinnati Insurance Co.*, Judge Kennelly denied a motion to dismiss business interruption claims in a putative class action against Cincinnati Insurance. 2021 WL 767617, at *1 (N.D. Ill. Feb. 28, 2021). Applying Texas law (though noting no "appreciable difference" among the law of the various states) the court found that Cincinnati's proposed interpretation "writes the term 'loss' out of the definition, which contradicts the basic principle that 'each word [in a contract] has some significance and

meaning.'" *Id.* at *3-4 (citation omitted). The court was "persuaded" that a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of [plaintiff's] business premises." *Id.*

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). Applying policy-interpretation principles like those in Illinois, the district court granted summary judgment for the policyholder and found that executive orders caused "physical loss" under the plain language of the policy at issue because "the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id.* at *10. Notably, the court in *Henderson Road* explicitly rejected the contrary conclusions in the cases on which the district court relied heavily in erroneously dismissing TJBC's claims.

Courts around the country have come to similar conclusions. In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, a district court in Virginia denied an insurer's motion to dismiss a claim for business income coverage under a policy that required a "direct physical loss," explaining that the term's meaning was ambiguous because "if Defendants wanted to limit liability of 'direct physical loss' to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly." 2020 WL 7249624, at *6-10 (E.D. Va. Dec. 9, 2020).

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court, applying policy interpretation principles like Illinois's, reasoned that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or

possess something in the real, material, or bodily world." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020). The court concluded that "'direct physical loss' describes the scenario" where policyholders "lose the full range of rights and advantages of using or accessing their business property," which was "precisely the loss caused by" executive orders that forbade the policyholders from "putting their property to use for the income-generating purposes for which the property was insured." Granting summary judgment to the plaintiff, the court then concluded that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered."

Numerous other courts have ruled against Cincinnati and other insurers for the same reasons. *See, e.g.*, *Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 796, 801 (W.D. Mo. 2020) (holding that "loss" and "damage" must be given separate meanings, and that "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose"); Order at 6, ¶¶ 30-31, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020) (finding "direct physical loss" as "an average lay person would understand by [that] phrase" when insured's "property could not physically be used for its intended purpose," *i.e.*, it "was deprived from using it"); *see also, e.g.*, *supra* notes 20-21.

These cases favoring policyholders are consistent with longstanding precedent across the country. For example, more than fifty years ago, a California appellate court considered the case of a couple whose home was left "standing on the edge of and partially overhanging a newly formed 30-foot cliff,"

the result of a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962). The insurer argued the policy only insured the house itself not the land underneath it. *Id.* at 245-46. The court rejected that argument, reasoning that it would "render the policy illusory." *Id.* at 248-49.

To accept the insurer's argument, the court held, "would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." *Id.*

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, the Supreme Court of West Virginia considered a case where large boulders had fallen from a man-made highwall onto two homes, leaving the homes of two other plaintiffs at risk of further rockfalls. 203 W. Va. 477 (1998). The insurer argued that, while the policies might cover the damage to those homes actually hit by rocks, they "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 492-93. The court reasoned that "'[d]irect physical loss' provisions require only that a covered property be injured, not destroyed." *Id.* at 493 (citation omitted).

The court continued: the insured properties "were homes, buildings normally thought of as a safe place in which to dwell or live .... The record suggests that until the highwall on defendant Harris' property is stabilized, the plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* It therefore held that the "direct physical loss[es]" covered by the policy, "including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property." *Id.*[25]

TJBC has alleged that its insured property suffered direct "physical loss" and has been rendered non-functional as a restaurant. Focusing exclusively on structural damage, as the district court erroneously did, ignores that even if a restaurant remains standing it suffers cognizable physical loss if it is materially physically altered or impaired. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional and can no longer serve customers on premises as intended.

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[25] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage because covered properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose"); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss to property under an all-risk insurance policy" when "a building's function may be seriously impaired or destroyed").

This Court should conclude that TJBC has sufficiently stated a claim by alleging the executive orders caused "physical loss" of its property and rendered the property non-functional for its intended purpose.

CONCLUSION

The judgment below should be reversed.

April 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Seventh Circuit Rule 29 because this brief contains 6,768 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 12 point Bookman Old Style font for the main text and footnotes.

Dated: April 5, 2021

/s/ *Gabriel K. Gillett*
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on April 5, 2021, I caused the foregoing **Brief of the Restaurant Law Center and Illinois Restaurant Association, as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF procedure (h)(2) and circuit rule 31(b), and upon notice of this court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the **Brief of the Restaurant Law Center and Illinois Restaurant Association, as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** to be transmitted to the court via UPS overnight delivery, delivery fee prepaid within five days of that date.

/s/ *Gabriel K. Gillett*
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