No. 20-14812

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SA PALM BEACH LLC,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.,*

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida,
Miami Division
Case No. 9:20-cv-80677-UNGARO

BRIEF OF THE RESTAURANT LAW CENTER, AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW, 7th Floor
Washington, DC 20036
(202) 492-5037
aamador@restaurant.org

John H. Mathias Jr.
David M. Kroeger
Gabriel K. Gillett
Counsel of Record
Michael F. Linden
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amicus Curiae

SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London, et al.
Eleventh Circuit No. 20-14812

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amicus curiae* hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-2(b), *amicus curiae* here certify that, to the best of their knowledge, the CIP contained in Plaintiff-Appellant's brief is complete except for the following:

Amador, Angelo I. – Counsel for *amicus curiae* Restaurant Law Center

Gillett, Gabriel K. – Counsel for *amicus curiae* Restaurant Law Center

Jenner & Block LLP – Counsel for *amicus curiae* Restaurant Law Center

Linden, Michael F. – Counsel for *amicus curiae* Restaurant Law Center

Kroeger, David M. – Counsel for *amicus curiae* Restaurant Law Center

Mathias, John H., Jr. – Counsel for *amicus curiae* Restaurant Law Center

Restaurant Law Center – *Amicus curiae*

Amicus curiae further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Gabriel K. Gillett
Gabriel K. Gillett

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT REGARDING CONSENT

Plaintiff-Appellant consents to the filing of this *amicus* brief. Defendant-Appellee does not. *Amicus* has filed a motion for leave to file this brief.[1]

STATEMENT OF INTEREST

The 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.

The Law Center and its members have a significant interest in the important issues raised by this case. Many businesses in the restaurant industry have sought

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* states that no 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 the *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

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 SA Palm Beach, LLC ("Sant Ambroeus") has stated a claim for coverage depends on the specific factual allegations in its pleadings, the Law Center and its 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 well.[2]

STATEMENT OF THE ISSUES

Whether the district court erred in finding Sant Ambroeus failed to state a claim for business interruption coverage when it alleged it suffered "physical loss" as a result of executive orders that detrimentally altered and materially impaired its physical spaces, rendering them nonfunctional for their intended purposes.

[2] RLC also has a strong interest in other pending appeals that raise similar issues under Florida law, and where the district court similarly erred in dismissing business interruption claims. *See, e.g.*, *Emerald Coast Restaurants Inc. v. Aspen Specialty Ins. Co.*, No. 21-10190 (11th Cir.).

SUMMARY OF ARGUMENT

To complement Sant Ambroeus's arguments, *amicus* writes to provide this Court—which is among the first appellate courts in the country to address these issues—with additional context about this case and to emphasize why reversal is warranted.

I. The restaurant industry is a significant sector of the Florida 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 Florida and beyond.

For years, restaurants in Florida 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 of or damage to" their property, as they understood those plain, ordinary, everyday words to mean.

Yet when the Governor of Florida and others issued executive orders that caused precisely what these restaurant owners believed to be "physical loss of or

damage to" property—by detrimentally altering their physical property, requiring physical changes to it, and materially impairing their physical spaces, thereby rendering them nonfunctional for their intended purposes—insurers denied coverage without legitimate justification. Those improper denials come at a particularly challenging time for the industry. 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 because the district court committed some of the same interpretive and analytical errors as the cases it relied on, and because many other trial courts across the country have found 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. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC,* 746 F.3d 1008, 1024 (11th Cir. 2014) (citation omitted). A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed in accordance with a policyholder's reasonable expectations of coverage. "[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street' when construed by a court." *State Farm Fire & Cas. Co. v. Castillo*, 829 So. 2d 242, 244 (Fla. Dist. Ct. App. 2002). Unambiguous terms require no judicial redefinition: they are to be construed according to what a reasonable consumer would expect.

Sant Ambroeus has alleged as a matter of fact that it has "suffered a direct physical loss of [its] property" because it has "been unable to use [its] property for its intended purpose." (Dkt. 1 ¶ 44.[3]) Sant Ambroeus's policy provides that Lloyd's "will pay for the actual loss of Business Income" resulting from "direct physical loss of or damage to property" at the insured premises. (Dkt. 24-1 at 60.) Many other courts have found allegations that a restaurant suffered physical loss or damage as a result of materially similar orders to be sufficient to state a claim in cases involving

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

the same or similar policy language. And courts across the country have long held that a property may be physically lost or damaged when it is rendered nonfunctional for its intended purpose, even if it is not structurally damaged.

The district court reached a different conclusion based on its redefinition of the policy's physical "loss of or damage to property" requirement as mandating that the policyholder show "an *actual* change" in the insured property. But those added words appear nowhere in the policy, and reasonable consumers would not expect the policy to include such a requirement. The district court thus erred by reading those terms into the policy and dismissing Sant Ambroeus's claim.

ARGUMENT

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

A. The Restaurant Industry, Which Drives Billions Of Dollars In Revenue And Employs Millions Of Workers, Is In Crisis.

The restaurant and foodservice industry plays a major role in Florida's economy. In 2019, the industry accounted for an estimated $52.5 billion dollars of sales across 42,275 locations in Florida.[4] The restaurant industry is also a considerable source of employment in the state, providing jobs to more than a

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

million people in 2019.[5] Over the next decade, that number is expected to grow by more than 14%.[6]

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.[7] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels.[8] That is certainly the case in Florida, where ample and diverse dining opportunities drives tourism across the state.

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization.[9] That is particularly true of the many small restaurants—often family-owned—that make up the vast majority of the industry. Indeed, the restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same.[10]

---

[5] *Id.* at 77.
[6] *Factbook* at 77.
[7] Nat'l Restaurant Ass'n, *Florida Restaurant Industry at a Glance* (2019), https://restaurant.org/downloads/pdfs/state-statistics/florida.pdf
[8] 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).
[9] Amel, et al., *supra* note 8 at 13.
[10] *Factbook*, *supra* note 2.

Restaurants also provide opportunities for historically disadvantaged communities. There are more women and minority managers in the restaurant industry than in any other industry,[11] and restaurants provide opportunity for immigrants to the United States—not only for employment, but also business ownership.[12]

The successes of the restaurant industry are neither self-sustaining nor guaranteed. Today, the industry is more at risk than ever before as restaurants have suffered catastrophic financial losses and continue to face unprecedented challenges.[13] As of April 2020, over eight million restaurant employees nationally—nearly two-thirds of the restaurant workforce—had been laid off or furloughed. By May, almost 40% of all restaurants across the country were shuttered, and the industry lost over $80 billion in sales. Economists predict those numbers will only continue to rise, and that the industry will have lost approximately $250 billion in revenues in 2020.[14]

---

[11] *Id.*

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

[13] Nat'l Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), https://www.restaurant.org/downloads/pdfs/business/covid19-infographic-impact-survey.pdf.

[14] *Id.*

Florida restaurants are in a moment of crisis. Conservatively, researchers estimate 15 to 20% of restaurants will permanently close nationwide.[15] More than 110,000 restaurants—17% of restaurants in the country—have already closed permanently or long-term.[16] These closures can be devastating to communities. 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.

The numbers for independent restaurants are even more dire, with up to 85% at risk for closure.[18] 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."[19]

---

[15] Danny Klein, *It Will Take Years for the Restaurant Industry to Recover*, FSR Magazine (June 2020).

[16] Joanna Fantozzi, *'Free-fall': 10,000 restaurants have closed over the past three months, according to the National Restaurant Association*, Nation's Restaurant News (Dec. 7, 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] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

[19] 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.

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 Florida and across the country turned to their insurers for coverage under "all risk" commercial property insurance policies that included protection for business interruption.

"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 "physical loss of or damage to" (or "physical loss or damage" to) its premises. These policies therefore 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" property insurance 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,

including executive shutdown orders, causing "direct physical loss of or damage to" their restaurants, 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 caused both property loss and property damage by dispossessing restaurants of their tangible spaces and forcing 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 "physical loss or damage" requirement. Those denials follow the telegraphed statements by insurance industry executives and trade groups.[20] Those denials are also frequently issued without meaningful (if any) investigation, regardless of the information provided by the policyholder.

[20] For example, Rick Parks, CEO of Society Insurance, Inc., prospectively concluded

Many restaurants in Florida, and thousands of restaurants across the country, have challenged these wrongful denials and sought relief in the courts. Without such relief, the restaurant industry is in serious danger. Many restaurants will be out of business entirely, many restaurant-industry employees will be 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 impression based on the unprecedented circumstances under which it arises. That is particularly so here, for three reasons.

First, "[q]uestions of contract interpretation are pure questions of law," so this Court "review[s] the interpretation of an insurance contract *de novo*." *Geico Marine Ins. Co. v. Shackleford*, 945 F.3d 1135, 1139 (11th Cir. 2019). As this Court has put it, "*de novo* review requires us to look at a question as if we are the first court to

---

in an ostensibly private memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states had "taken steps to limit operations of certain businesses"—that Society's policies would likely not cover losses caused by a "widespread governmental imposed shutdown." Compl. at Ex. A, *Big Onion Tavern Grp., LLC v. Society Ins., Inc*., No. 20-cv-02005 (N.D. Ill. Mar. 27, 2020), ECF No. 1-1 https://propertycasualtyfocus.com/wp-content/uploads/2020/04/Big-Onion-v-Society-Insurance.pdf. 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. 6, 2020).

consider it." *United States v. Williams*, 340 F.3d 1231, 1237 (11th Cir. 2003). "Put simply, it is definitionally impossible to give deference of any sort to a decision being reviewed *de novo*." *Id.*

In reviewing the district court's grant of a motion to dismiss, "the … complaint's allegations must be taken as true and read in the light most favorable to the plaintiffs." *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). "A complaint may not be dismissed unless the plaintiff can prove no set of facts which would entitle him to relief." *Id.*

Second, this Court is set to be among the first appellate courts to address the important issues presented by this case. This Court's review 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 against insurance companies, but only a small fraction have been decided so far.[21]

Among the trial-level decisions in state courts to date, a substantial number have found a plaintiff stated a claim for business interruption coverage and sufficiently pleaded physical loss or damage from executive shutdown orders.[22]

---

[21] *See* Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/.

[22] *See, e.g.*, 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); Minute order, *Goodwill Indus. of Orange County v. Phila. Indemnity*

Many federal district courts, applying state law, have reached the same conclusion.[23]

While other decisions have favored insurers, often they overlook important differences in factual allegations, fail to apply the reasonable-interpretation rule, or appear to be the result of a self-fulfilling feedback loop. Those cases simply repeat the same error that other courts committed in failing to properly apply the basic rules of insurance policy interpretation. As an example, an unreported decision from the Central District of California has already been cited by many other courts—

Co., No. 30-2020-01169032 (Cal. Super. Ct. Jan. 28, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 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).

[23] *See, e.g.*, *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); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.,* 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020).

including the district court here (*see* Dkt. 44 at 10)—even though the unreported decision 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.). It is therefore all the more important for this Court to carefully and seriously consider the issues here, take Sant Ambroeus's allegations as true, and apply core principles of policy interpretation in evaluating whether Sant Ambroeus has sufficiently stated a claim.

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts have the opportunity to 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. To date, many courts have concluded that the impact of executive shutdown orders satisfied that requirement, while others have disagreed. Those courts that have disagreed have often done so by relying on extrinsic redefinitions of the plain words of the policy, construing "physical loss" or "damage" not based on the language in the policy but instead based on case law or arcane legal publications—sources which ordinary laypersons would never consult.

More importantly, this disagreement among other courts 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 the loss which Sant Ambroeus has alleged it incurred due to the executive shutdown orders.

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

Sant Ambroeus alleged in its complaint that, as a result of a series of executive orders issued by Governor Ron DeSantis in March 2020, Sant Ambroeus "lost the physical use of its property and was forced to suspend and curtail business operations." (Dkt. 1 ¶ 45.) Sant Ambroeus also alleged that it "suffered a direct physical loss to the property in the form of diminished value, lost business income, and forced physical alterations during a period of restoration." (*Id.*)

Lloyd's, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused "direct physical loss of or damage to property." Lloyd's, like other insurers, further contends that alleging physical loss or damage is insufficient to state a claim for coverage under the policy because only events like hurricanes and fires can cause the type of loss required to trigger business interruption coverage.

Lloyd's position is inconsistent with the policy's language and foundational principles for interpreting it. Lloyd's position is also contrary to both historical and recent precedent—including in the insurance coverage context. The district court was therefore wrong to dismiss the complaint.

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

Under Florida law, "insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. Dist. Ct. App. 1999). When construing an insurance policy, a court in Florida "examine[s] the natural and plain meaning of a policy's language." *Anderson v. Auto-Owners Ins. Co.,* 172 F.3d 767, 769 (11th Cir. 1999). "[T]erms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *Castillo,* 829 So. 2d at 244.

When words are undefined in a policy, "'[o]ne looks to the dictionary for the plain and ordinary meaning of words.'" *Winn-Dixie.* 746 F.3d at 1024; *see also Hegel v. First Liberty Ins. Corp.,* 778 F.3d 1214, 1221 (11th Cir. 2015) ("In construing insurance-policy terms, Florida courts 'commonly adopt the plain meaning of words contained in legal and non-legal dictionaries.'").

Of course, it is well-settled that if the "relevant policy language is susceptible to multiple reasonable interpretations, one providing coverage and another denying it, the insurance policy is ambiguous[,]" *Anderson,* 172 F.3d at 769, and "must be construed against the insurer and in favor of coverage," *Washington Nat'l Ins. Corp. v. Ruderman,* 117 So. 3d 943, 945 (Fla. 2013). Finally, when an insurance coverage dispute exists, "the Court begins its analysis with an examination of the source of the coverage itself." *Zurich Am. Ins. Co. v. Nat'l Specialty Ins. Co.,* 246 F. Supp. 3d 1347, 1356 (S.D. Fla. 2017) (citation omitted).

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by the executive orders that physically impaired restaurants. Lloyd's agreed to pay for "direct physical loss of or damage to property." The policy provides coverage if the policyholder shows physical loss **or** physical damage to property. Black letter contract interpretation requires that the terms—separated by the disjunctive "or"—be given distinct meanings. *See Ferox, LLC v. ConSeal Int'l, Inc.*, 175 F. Supp. 3d 1363, 1371 (S.D. Fla. 2016). As many courts have recently

held in the business interruption context, to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage."[24]

Had Lloyd's wished for "loss" and "damage" to mean the same thing, or to narrow the meaning of "physical loss" or "physical damage," it was obligated to do so by defining or limiting those terms: "[S]trict construction is required of exclusionary clauses in insurance contracts … in the sense that the insurer is required to make clear precisely what is excluded from coverage." *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So. 2d 397, 401 (Fla. Dist. Ct. App. 1996), *on reh'g* (Aug. 20, 1996), *approved*, 711 So. 2d 1135 (Fla. 1998). But Lloyd's chose not to define those terms—even though it knew, or should have known, that these terms can reasonably be construed (and indeed have been construed by courts)more broadly than the narrow self-serving definition that Lloyd's contends should provide the terms' only meaning. As a result, each of those terms must be given its plain and ordinary meaning consistent with the knowledge and expectations of an ordinary, reasonable consumer.

Here, construing its allegations in the most favorable light, Sant Ambroeus has met its burden to plead that it has suffered direct physical loss of or damage to

[24] *See, e.g.*, *Henderson Road*, 2021 WL 168422, at *11-12; *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507, *3 (N.C. Sup. Ct. Oct. 9, 2020); *Studio 417*, 2020 WL 4692385, at *4; *Blue Springs Dental*, 2020 WL 5637963, at *4; *Urogynecology Specialist of Fla.,* 2020 WL 5939172, at *4; *K.C. Hopps*, 2020 WL 6483108, at *1.

property consistent with the plain and ordinary meaning of those terms. In determining the "plain and ordinary sense" of terms used in an insurance contract, Florida courts "may look[] to the dictionary" for their meaning. *Winn-Dixie*, 746 F.3d at 1024. Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[25] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[26] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world. Indeed, Sant Ambroeus has been "deprived" of its property in a way that is perceptible through the senses because, during the effective period of the executive orders, Sant Ambroeus no longer possessed the same rights to its property as it did before.

The district court erred in finding otherwise. The district court relied on case law to read into "loss of or damage to property" a requirement that the policyholder show "an *actual* change" in the insured property. (Dkt. 44 at 7.) But that requirement that does not appear in any relevant portion of the policy. Lloyd's did not define loss as requiring "actual change." No reasonable policyholder would have understood "loss" (as distinct from "damage," perhaps) to require "actual change" to the

[25] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical.

[26] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss.

structure of the premises, much less closely read judicial decisions to discern the supposed true meaning of the policy's language.

As Florida courts have held, "terms utilized in an insurance policy should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *Castillo*, 829 So. 2d at 244. 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. Unambiguous terms should require no judicial redefinition or clarification.

The plain language of the policy—in conjunction with the settled rules that undefined terms are given their ordinary meaning and ambiguities are construed in favor of a reasonable policyholder's expectations—dictates that Sant Ambroeus 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. Sant Ambroeus's case against Lloyd's should proceed and ultimately test whether Sant Ambroeus 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 district court's decision, this Court will be squarely within the mainstream of coverage decisions, including well-reasoned case law on this very question.

A prime 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 Florida's, 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 *10E,* 2020 WL 5359653 at *1, *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020), and *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020)—the cases on which the district court relied heavily in erroneously dismissing Sant Ambroeus's claims.

Courts around the country have come to similar conclusions. In *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. 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).

Likewise, in *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court, applying policy interpretation principles like Florida'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, *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."

As in *Henderson Road* and *Elegant Massage*, the *North State Deli* court held that the policy was ambiguous and, construing that ambiguity against the insurer, found that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered." The court therefore granted summary judgment to the plaintiff.

Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *Studio 417*, 2020 WL 4692385, at *1, *5 (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."); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1, Order at 6, ¶¶ 30-31 (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* nn.22-23.

These cases favoring policyholders are consistent with longstanding precedent across the country, including in Florida. *See, e.g.*, *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) ("direct physical loss" may occur even with "no damage to the structure"); *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017) ("'direct' and 'physical' loss" occurs when property fails "to perform its function").

For example, more than 50 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 properly be injured, not destroyed."

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.*[27]

Sant Ambroeus has alleged that its insured property suffered physical loss and has been rendered materially non-functional. Focusing exclusively on structural damage ignores the well-reasoned analysis which suggests that even if a restaurant remains standing, it suffers physical loss if it can no longer function as intended. 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.

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

CONCLUSION

The district court's decision should be reversed.

---

[27] *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").

February 9, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW, 7th Floor
Washington, DC 20036
(202) 492-5037
aamador@restaurant.org

John H. Mathias Jr.
David M. Kroeger
Gabriel K. Gillett
Counsel of Record
Michael F. Linden
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 6,476 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

/s/ Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Gabriel K. Gillett
Gabriel K. Gillett