

# No. 21-80

## United States Court of Appeals FOR THE SECOND CIRCUIT

---

10012 HOLDINGS, INC., DBA GUY HEPNER,  
*Plaintiff-Appellant,*

v.

SENTINEL INSURANCE COMPANY, LTD,  
*Defendant-Appellee.*

- and -

HARTFORD FIRE INSURANCE COMPANY,  
*Defendant.*

---

Appeal from the U.S. District Court for the Southern District of New York  
Case No. 20-cv-4471 – Judge Lorna G. Schofield

---

**BRIEF OF THE RESTAURANT LAW CENTER, NEW YORK  
STATE RESTAURANT ASSOCIATION, AND NEW YORK CITY  
HOSPITALITY ALLIANCE, AS AMICI CURIAE  
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

---

Jeremy M. Creelan  
Michael W. Ross  
JENNER & BLOCK LLP  
919 Third Avenue  
New York, NY 10022  
(212) 891-1678  
jcreelan@jenner.com

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

*Counsel for Amici Curiae*

## **CORPORATE DISCLOSURE STATEMENT**

*Amici curiae* certify that they have no outstanding shares or debt securities in the hands of the public, and do not have a parent company. No publicly held company has a 10% or greater ownership interest in *amici curiae*.

/s/ Gabriel K. Gillett  
Gabriel K. Gillett

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	7
I.    Restaurants Are Critical To New York’s Economy And Culture, And Sought Insurance Coverage To Help Survive Unprecedented Hardship.....	7
A.    The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.....	7
B.    Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under “All Risk” Insurance Policies.....	9
II.   This Is An Important Case Of First Impression Where The Court Applies <i>De Novo</i> Review. ....	12
III.  Policy Language, Interpretation Principles, And Precedent Support Finding Executive Shutdown Orders Caused Physical Loss Or Damage.....	16
A.    Policy Language And Policy-Interpretation Principles Support Reversal.....	17
B.    Recent and Longstanding Precedent Supports Reversal.....	22
CONCLUSION.....	27

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>10E, LLC v. Travelers Indem. Co.</i> , 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) .....	15
<i>Bernheim v. Litt</i> , 79 F.3d 318 (2d Cir. 1996) .....	13
<i>Best Rest Motel, Inc. v. Sequoia Ins. Co.</i> , 2020 WL 7229856 (Cal. Super. Ct. Sept. 30, 2020).....	14
<i>Blue Springs Dental Care, LLC v. Owners Ins. Co.</i> , 488 F. Supp. 3d 867 (W.D. Mo. 2020).....	14, 18
<i>Cajun Conti LLC v. Certain Underwriters at Lloyd’s, London</i> , 2020 WL 6993790 (La. Civ. Dist. Ct. Nov. 4, 2020).....	14
<i>Certain Underwriters at Lloyd’s London v. Advance Transit Co.</i> , 188 A.D.3d 523 (1st Dep’t 2020) .....	18
<i>CGS Indus., Inc. v. Charter Oak Fire Ins. Co.</i> , 720 F.3d 71 (2d Cir. 2013) .....	13, 17
<i>Chapparells Inc. v. Cincinnati Ins. Co.</i> , 2020 WL 7258117 (Ohio Ct. C.P. Oct. 21, 2020).....	14
<i>Cherokee Nation v. Lexington Ins. Co.</i> , No. CV-2020-00150 (Okla., Cherokee Cnty., Jan. 29, 2021) .....	13
<i>Derek Scott Williams PLLC v. Cincinnati Ins. Co.</i> , 2021 WL 767617 (N.D. Ill. Feb. 28, 2021).....	14, 23
<i>Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.</i> , 2020 WL 7258114 (Ohio Ct. C.P. Nov. 17, 2020).....	14
<i>Dundee Mut. Ins. Co. v. Marifjeren</i> , 587 N.W.2d 191 (N.D. 1998) .....	26-27

*Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*,  
2020 WL 7249624 (E.D. Va. Dec. 9, 2020).....14, 24

*Francois Inc. v. The Cincinnati Ins. Co.*,  
No. 20CV201416 (Ohio Ct. C.P. Sept. 29, 2020) .....14

*Goodwill Indus. of Orange Cnty. v. Phila. Indem. Co.*,  
2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021) .....14

*Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*,  
2014 WL 6675934 (D.N.J. Nov. 25, 2014) .....26

*Henderson Rd. Rest. Sys. Inc. v. Zurich Am. Ins. Co.*,  
2021 WL 168422 (N.D. Ohio Jan, 19, 2021) .....14, 18, 23

*Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*,  
No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020).....25

*Hughes v. Potomac Ins. Co. of District of Columbia*,  
199 Cal. App. 2d 239 (1962) .....25, 26

*JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*,  
2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020) .....14

*Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters  
Ins. Co.*,  
2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021) .....13

*Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*,  
2020 WL 6556842 (Fla., Pinellas Cnty. Sept. 22, 2020).....14

*K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*,  
2020 WL 6483108 (W.D. Mo. Aug. 12, 2020) .....14, 18

*In re Liberty Mut. Fire Ins. Co.*,  
75 A.D.3d 967 (3d Dep’t 2010).....17

*Lombardi’s, Inc. v. Indem. Ins. Co. of N. Am.*,  
No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020).....14

*Mazzola v. Cnty. of Suffolk*,  
143 A.D.2d 734 (2d Dep’t 1988).....17

*MDW Enters., Inc. v. CNA Ins. Co.*,  
4 A.D.3d 338 (2d Dep’t 2004).....5, 17, 18

*Murray v. State Farm Fire & Cas. Co.*,  
203 W.Va. 477 (1998) .....26

*Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*,  
No. 20STCV16681 (Cal. Super. Ct. Feb. 1, 2021).....13

*N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*,  
942 F.2d 189 (3d Cir. 1991) .....15

*New Castle Cnty. v. Hartford Accident & Indem. Co.*,  
933 F.2d 1162 (3d Cir. 1991) .....15

*Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*,  
17 F. Supp. 3d 323 (S.D.N.Y. 2014) .....21, 22

*North State Deli, LLC v. The Cincinnati Ins. Co.*,  
2020 WL 6281507 (N.C. Sup. Ct. Oct. 9, 2020) .....18, 24

*Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*,  
2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020).....14

*Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*,  
2016 WL 3267247 (D. Ore. June 7, 2016) .....27

*Pepsico, Inc. v. Winterthur Int’l Am. Ins. Co.*,  
24 A.D. 3d 743 (2d Dep’t 2005).....22

*Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins.*,  
2020 WL 7258116 (Wash., Spokane Cnty. Nov. 23, 2020).....14

*Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*,  
2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021) .....13

*Roundabout Theater Co. v. Cont’l Cas. Co.*,  
302 A.D. 2d 1 (1st Dep’t 2002) .....21

*Scott Craven DDS v. Cameron Mut. Ins. Co.*,  
2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021) .....13

*Sentinel Mgt. Co. v. New Hampshire Ins. Co.*,  
563 N.W.2d 296 (Minn. Ct. App. 1997).....27

*In re Society Insurance Co.*,  
MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) .....12, 14, 18, 23

*Studio 417, Inc. v. Cincinnati Ins. Co.*,  
478 F. Supp. 3d 794 (W.D. Mo. 2020).....14, 18, 25

*Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*,  
2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020).....14

*Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*,  
2020 WL 5939172 (M.D. Fla. Sept. 24, 2020).....14, 18

*White v. Cont’l Cas. Co.*,  
9 N.Y.3d 264 (2007) .....5, 17

*Zervos v. Verizon N.Y., Inc.*,  
252 F.3d 163 (2d Cir. 2001) .....13

**Other Authorities**

9 Couch on Ins. § 127:11 (2020) .....15

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).....7

Americas Soc’y et al., *Bringing Vitality to Main Street: How  
Immigrant Small Businesses Help Local Economies Grow* (Jan.  
2015) .....8

Fed. R. App. P. 29.....1

Heather Lalley, *Report: Up To 85% of Independent Restaurants  
Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020) .....9

Merriam-Webster Dictionary .....19

Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant  
Industry* (2020).....7, 8

Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).....9

Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).....9

Nat'l Restaurant Ass'n, *New York Restaurant Industry at a Glance* (2019).....7

Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).....8

Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021).....8

Penn Law, *Covid Coverage Litigation Tracker*.....13

Press Release, Am. Prop. Cas. Ins. Ass'n, *APCIA Releases New Business Interruption Analysis* (Apr. 6, 2020) .....12, 13



## STATEMENT OF INTEREST<sup>1</sup>

*Amicus* Restaurant 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 establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small family-run neighborhood locations, 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, the Restaurant Law Center provides courts with the industry's perspective on legal issues in cases that may have industry-wide implications.

*Amicus* New York State Restaurant Association is the leading business association for the restaurant and hospitality industry in New York State. It advocates for businesses and employees in the industry, which serves as the cornerstone of the state economy and offers opportunities for career advancement and community involvement.

*Amicus* the New York City Hospitality Alliance is a not for profit association representing and serving New York City's restaurant and nightlife industry. The

---

<sup>1</sup> All parties consent to the filing of this *amici* brief. No party's counsel authored this brief in whole or in part, and no money intended to fund preparing or submitting this brief was contributed by a party or party's counsel or anyone other than *amici*, its members, or its counsel. *See* Fed. R. App. P. 29.

Alliance is committed to advancing an agenda focused on opportunity, economic investment and job creation, and on advocating on behalf of its members at all levels of government.

*Amici* and their members have a significant interest in the important issues in this case. Many 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. 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.

Whether Plaintiff-Appellant (“Holdings”)—an art gallery, not a restaurant—has stated a claim will depend on the specific allegations in its pleadings. Still, *amici* and their members have a strong interest in highlighting why issues raised in this appeal are important to the restaurant industry. *Amici* also have a strong interest in ensuring the Court recognizes that, depending on a complaint’s allegations, restaurants may adequately plead that executive shutdown orders caused direct physical loss or damage to property.

## SUMMARY OF ARGUMENT

*Amici* write to provide this Court—which is among the first appellate courts 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 New York economy and a major driver of economic activity across the country. The industry creates 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 New York and beyond.

For years, restaurants in New York 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. Restaurants 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.

Yet when the Governor and other officials 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.

By contrast, many other trial courts across the country have found in well-reasoned decisions that a plaintiff stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of executive shutdown orders. Indeed, roughly half of state courts to decide these state-law questions have found policyholders stated a claim. That supports the conclusion that the district court misapplied state law and wrongly dismissed Holdings’s claims.

Recent pro-policyholder decisions also reinforce that allegations matter. Whatever the outcome here, a restaurant has stated a claim by alleging that it’s purposefully designed property suffered physical loss or damage when executive

orders caused the loss of its vibrant physical space and dispossessed the restaurant of its tangible area by mandating real, material, detrimental physical alterations to the premises. As courts have done in other hotly contested insurance coverage cases, this Court should review the allegations of the complaint and the policy language, apply basic 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 “unambiguous provisions of an insurance contract must be given their plain and ordinary meaning.” *White v. Cont’l Cas. Co.*, 9 N.Y.3d 264, 267 (2007). 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. “In construing an insurance contract, the tests to be applied are ‘common speech’ and ‘the reasonable expectation and purpose of the ordinary businessman.’” *MDW Enters., Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 340 (2d Dep’t 2004). The policy’s terms require no judicial redefinition: they should be construed according to what a reasonable consumer would expect.

Holdings’s policy requires Sentinel to “pay for the actual loss of ‘Business Income’” resulting from “direct physical loss of or physical damage to property.”

Dkt. 1 at 23.<sup>2</sup> Holdings has alleged as a factual matter that it “suffered a direct physical loss of and damage to its property” from the shutdown orders, which rendered Holdings’s property non-functional “for its intended purpose” because “the function of Plaintiff’s property has been eliminated or destroyed.” *E.g.* Dkt. 1, ¶¶ 29, 45, 67. Many other courts have found that similar allegations and executive-mandated physical alterations to property qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent—including in cases against Sentinel and involving New York law—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 Holdings supposedly had not alleged the “Civil Order physically damaged Plaintiff’s property” and “loss” does not encompass “loss of use.” Dkt. 34 at 5. But the Complaint pleads that Holdings suffered physical loss and damage, the policy does not define “loss,” and reasonable consumers would expect a policy that covers “loss” or “damage” to include protection if the property was forcibly altered by virtue of an executive order. Moreover, the district court’s decision contravenes the core principle that policy terms are to be construed as they would be understood by a reasonable ordinary

---

<sup>2</sup> Citations to “Dkt. \_\_\_” refer to the district court record.

person, and improperly relies on inapposite and non-binding caselaw, without fairly considering decisions to the contrary. The district court thus erred.

## ARGUMENT

### **I. Restaurants Are Critical To New York’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 New York’s economy. In 2019, the industry accounted for an estimated \$54.5 billion in sales across 49,032 locations in New York. It employed 881,400 in 2020 and is expected to employ 5.3% more people over the next decade.<sup>3</sup>

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 roughly two dollars to the state’s economy, not to mention the positive impact on the state’s tax revenue.<sup>4</sup> A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.<sup>5</sup> That is certainly the case in New York, where ample and diverse dining opportunities drives tourism across the state.

---

<sup>3</sup> Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant Industry* (2020).

<sup>4</sup> Nat’l Restaurant Ass’n, *New York Restaurant Industry at a Glance* (2019).

<sup>5</sup> 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).

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and have a strong interest in seeing their neighborhoods grow and thrive. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry and are a vibrant part of the communities where they operate.

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first industry job was an entry-level position. Even more restaurant managers say the same.<sup>6</sup> Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and own their own businesses.<sup>7</sup>

The past successes of the industry are neither self-sustaining nor guaranteed. In the past year, nationwide restaurant and foodservice sales were “down \$270 billion from expected levels” and industry employment has decreased in every state and the District of Columbia.<sup>8</sup> As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were closed permanently or long-term.<sup>9</sup>

---

<sup>6</sup> *Factbook*, *supra* note 3.

<sup>7</sup> *Id.*; Americas Soc’y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

<sup>8</sup> Nat’l Restaurant Ass’n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat’l Restaurant Ass’n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).

<sup>9</sup> Nat’l Restaurant Ass’n, *Restaurant Industry in Free Fall; 10,000 Close in Three*



New York restaurants have not been spared. Restaurant employment is down more than 30%, representing over 240,000 jobs.<sup>10</sup> The numbers for independent restaurants are even starker.<sup>11</sup> These closures can devastate neighborhoods as the harm from closures reverberates, impacting other local businesses and industries. “Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains.”<sup>12</sup>

**B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under “All Risk” Insurance Policies.**

Faced with unprecedented losses caused by executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants in New York and across the country turned to their insurers for coverage under “all risk” 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

---

*Months* (Dec. 7, 2020).

<sup>10</sup> Nat’l Restaurant Ass’n, *supra* note 8.

<sup>11</sup> Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

<sup>12</sup> Nat’l Restaurant Ass’n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

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 with business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed 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. 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,<sup>13</sup> and frequently issued without meaningful (if any) investigation.

Many restaurants in New York and across the country have challenged these wrongful denials. Without judicial 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 well-established principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants, for three reasons.

---

<sup>13</sup> 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 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).

*First*, “interpretation of an insurance agreement is a question of law,” so “the district court’s construction of the Policy [is reviewed] de novo.” *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 76 (2d Cir. 2013). “*De novo* review is review without deference,” meaning the “review is independent and plenary ... as though it had come to the courts for the first time.” *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001). In reviewing the complaint, the “Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff.” *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Id.*

*Second*, this Court’s review comes at a time when shutdown-related business interruption litigation is in its early stages. More than 1,400 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, roughly half have found a plaintiff stated a claim for business interruption coverage.<sup>14</sup> Many federal district

---

<sup>14</sup> *See id.*; *see, e.g., Scott Craven DDS v. Cameron Mut. Ins. Co.*, 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 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); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378, at \*1 (Ohio Ct. C.P. Jan. 7,

courts, applying state law, have reached the same conclusion.<sup>15</sup>

While other decisions have favored insurers, many turn on the specific facts or business circumstances alleged. Others fail to apply the reasonable-interpretation rule and other basic policy interpretation principles—including by redefining the policy based on extrinsic case law or arcane publications that ordinary people would never consult. Yet other decisions may be the result of a reflexive self-fulfilling

---

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); *Goodwill Indus. of Orange Cnty. v. Phila. Indemnity Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, 2020 WL 7229856 (Cal. Super. Ct. Sept. 30, 2020); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); Order, *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).

<sup>15</sup> See, e.g., *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 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 Rd. 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).

feedback loop. For example, an early yet unremarkable decision has 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.). It is therefore especially important for this Court to carefully consider the issues, liberally construe the complaint's allegations in Holdings's favor, and apply core interpretive principles in determining whether Holdings has 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). 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 current disagreement among trial courts about whether plaintiffs have stated a claim—and the fact that roughly half of state courts have concluded that plaintiffs have—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 caused by executive 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.**

Holdings alleges that its property was physically altered, materially impaired, and no longer functional as intended due to a series of executive orders issued by Governor Cuomo starting in March 2020. *See* Dkt. 15, ¶¶ 10-12, 63-104.

Sentinel, like other insurers, has insisted that the orders that impaired policyholders’ property have not caused physical “loss or damage.” Sentinel, like other insurers, further contends that only events like hurricanes and fires can trigger business interruption coverage. But that position is inconsistent with the policy’s language, foundational policy-interpretation principles, and both recent and historical precedent. The district court thus erred in dismissing the complaint.



**A. Policy Language And Policy-Interpretation Principles Support Reversal.**

Under New York law, insurance policies are “construed liberally in favor of the insured and strictly against the insurer.” *In re Liberty Mut. Fire Ins. Co.*, 75 A.D.3d 967, 968 (3d Dep’t 2010). “New York follows the maxim of *contra proferentem* in insurance cases: where the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding coverage.” *CGS*, 720 F.3d at 77. “[W]hen an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language.” *MDW*, 4 A.D.3d at 340. “Such exclusions or exceptions ... must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” *Id.*

“As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning.” *White*, 9 N.Y. 3d at 267. A phrase’s “plain and ordinary meaning” is determined by “‘common speech’ and ‘the reasonable expectation and purpose of the ordinary businessman.’” *MDW*, 4 A.D.3d at 340. It is “common practice” for New York courts “to refer to the dictionary to determine the plain and ordinary meaning of words to a contract.” *Mazzola v. Cnty. of Suffolk*, 143 A.D.2d 734, 735 (2d Dep’t 1988).

Here, the plain language of the policy supports finding coverage for loss or damage caused by executive orders that physically impaired property. Sentinel

agreed to pay for “direct physical loss” and “loss or damage” to property. The disjunctive “or” in that phrase means that “loss” must cover something different from “damage.” *See Certain Underwriters at Lloyd’s London v. Advance Transit Co.*, 188 A.D.3d 523, 523-24 (1st Dep’t 2020) (describing interpretive principles). 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.”<sup>16</sup>

Had Sentinel wanted “loss” and “damage” to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly, “in clear and unmistakable language.” *MDW*, 4 A.D.3d at 340. But Sentinel chose not to do either despite knowing these terms can reasonably be construed (and indeed have been construed by courts) more broadly than the narrow reading Sentinel favors. Each of those terms must therefore be given its plain and ordinary meaning consistent with the expectations of a reasonable consumer, and construed in favor of coverage.

With that in mind, Holdings has met its burden to plead that it has suffered direct physical loss or damage to property. Merriam-Webster defines physical as “of

---

<sup>16</sup> *See, e.g., In re Society*, 2021 WL 679109, at \*8-10; *Henderson Rd.*, 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 800-03; *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.

or relating to material things” that are “perceptible especially through the senses.”<sup>17</sup>

Loss is defined as “the act of losing possession,” “deprivation,” and the “failure to gain, win, obtain, or utilize.”<sup>18</sup>

Put together, the ordinary meaning of “physical loss” includes when a property can no longer function as intended in the real, material world. For many restaurants, that was exactly what happened when executive orders imposed real, detrimental, physical alterations to their spaces—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The executive orders “deprived” restaurants and Holdings of property in a way that is perceptible through the senses because businesses no longer possessed the same rights to their property and large swaths of their property was rendered non-functional.

The district court erred in finding otherwise. It read caselaw to require Holdings to plead the “Civil Order physically damaged Plaintiff’s property.” Dkt. 34 at 5. But the Complaint does so plead—alleging that Holdings “has suffered a direct physical loss of and damage to its property” from the shutdown orders, which rendered Holdings’s property non-functional “for its intended purpose” because “the

---

<sup>17</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/physical> (last accessed Apr. 5, 2021).

<sup>18</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/loss> (last accessed Apr. 5, 2021).

function of Plaintiff’s property has been eliminated or destroyed.” *E.g.* Dkt. 1, ¶¶ 29, 45, 67. And the district court held that “loss” under the policy does not encompass “loss of use.” Dkt. 34 at 5. But that requirement does not appear in any relevant portion of the policy; Sentinel left “loss” undefined. And no reasonable policyholder would have understood “loss” 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.

Reasonable policyholders would, however, understand that interposing barriers, blocking off physical space, and detrimentally 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, policyholders like 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’s meaning is determined by common speech and reasonable expectations of ordinary business owners. Plain policy terms require no judicial redefinition or clarification.

The plain language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder’s expectations—

dictates that Holdings 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. Holdings should be able to test whether it can offer sufficient evidentiary support to obtain a jury verdict in its favor.

The district court erred by subordinating these foundational principles to distinguishable and non-binding decisions in *Roundabout Theater Co. v. Continental Casualty Co.*, 302 A.D. 2d 1 (1st Dep’t 2002) and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014).

*Roundabout*, which involved different policy language and circumstances than those here,<sup>19</sup> addressed exclusively off-site injury. Indeed, there was no meaningful loss or damage to the theater itself. *Id.* at 2-5. But Holdings has alleged the executive shutdown orders applied directly to its property and caused direct physical loss or damage to that property. And the *Roundabout* court impermissibly found coverage for “loss or damage” was only triggered if the property “suffers direct physical damage,” although the policy *also* covered physical loss. *Id.* at 6-7.

*Newman Myers*, which largely relied on *Roundabout*, is similarly inapposite. It concerned preemptive power shutdown orders that, unlike the executive orders at

---

<sup>19</sup> For example, *Roundabout*’s policy contained an explicit exclusion for losses covered by “civil commotion[s]” (not an endorsement for civil authority coverage, as here), and *Roundabout* had taken the exact opposite position about the policy’s meaning in other litigation. 302 A.D. 2d at 8-10.

issue here, did not actually cause physical loss or damage. *See* 17 F. Supp. 3d at 324-25. This Court, consistent with the principles discussed above and the precedent discussed below, should therefore find Holdings stated a claim notwithstanding these distinguishable decisions.

Bolstering that conclusion, the district court entirely ignored *Pepsico, Inc. v. Winterthur International America Insurance Co.*, which involved products that were “off-tasting” due to “faulty raw ingredients.” 24 A.D. 3d 743, 743 (2d Dep’t 2005). The court there rejected the insurer’s argument that the products were not physically damaged and instead concluded that the policyholder need not prove a distinct demonstrable alteration of the physical structure of the products. It was “sufficient under the circumstances,” the court explained, “that the product’s function and value have been seriously impaired, such that the product cannot be sold.” *Id.* at 744. The same can be said of the situation facing restaurants and hospitality companies who had the function of their property impaired as a result of executive shutdown orders.

**B. Recent and Longstanding Precedent Supports Reversal.**

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

Two recent examples come from the Northern District of Illinois, where two district courts denied motions to dismiss and found that plaintiffs “need not plead or show a change to the property’s physical characteristics” where policies cover “loss” in addition to “damage.” *In re Society*, 2021 WL 679109, at \*8; *Derek Scott Williams PLLC*, 2021 WL 767617, at \*1, 3-4 (noting no “appreciable difference” among the law of the various states endorsing the basic principle that “each word [in a contract] has some significance and meaning.”). Both courts 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.” *Society* at \*8-9; *see Williams* at \*3-4 (finding a reasonable factfinder could determine that “physical loss” includes “a deprivation of the use of ... business premises”).

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 New York’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 the cases on which the district court relied heavily in erroneously dismissing Holdings’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 New York'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 insurers for the same reasons. *See, e.g., Studio 417*, 478 F. Supp. 3d at 801 (holding “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 “property could not physically be used for its intended purpose” because owner “was deprived from using it”); *see also, e.g., supra* notes 14-15.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left “standing on the edge of and partially overhanging a newly formed 30-foot cliff” resulting from 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, which had not been damaged. *Id.* at 245-46.

The court rejected that argument, reasoning that it would “render the policy illusory” because the insurer’s position “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.* at 248-49.

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs’ homes at risk of further rockfalls. 203 W.Va. 477, 492-93 (1998). The insurer argued that the policies “do not cover any losses occasioned by the potential damage that could be caused by future rockfalls.” The West Virginia Supreme Court disagreed, reasoning that “[d]irect physical loss’ provisions require only that a covered property 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” but until the risk of rockfalls abates “plaintiffs’ houses could scarcely be considered ‘homes’ in the sense that rational persons would be content to reside there.” The court thus held that “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.”<sup>20</sup>

---

<sup>20</sup> 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.*

Holdings has alleged its property suffered “direct physical loss” and has been rendered materially non-functional. Focusing exclusively on structural damage ignores the well-reasoned analysis suggesting that a business suffers cognizable physical loss even if it is not physically damaged. Just like a home suffers physical loss when it is uninhabitable, an art gallery—or a restaurant—suffers physical loss when it becomes non-functional and cannot serve customers as intended.

This Court should conclude that Holdings has stated a claim by alleging the executive orders caused “physical loss” of property and rendered the property non-functional for its intended purpose. This Court should also remind district courts to properly apply policy-interpretation principles and to liberally construe a plaintiff’s allegations, especially when the plaintiff alleges physical loss or damage caused by executive shutdown orders that imposed material, detrimental, physical alterations to property.

## CONCLUSION

The judgment below should be reversed.

---

*Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where 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” when “a building’s function may be seriously impaired or destroyed”).

April 9, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

Jeremy M. Creelan  
Michael W. Ross  
Jenner & Block LLP  
919 Third Avenue  
New York, NY 10022  
(212) 891-1678  
jcreelan@jenner.com

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

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 32(a)(7)(C), and Local Rule 29.1(c), I certify that this brief complies with the length limitation because this brief contains 6,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Pursuant to Fed. R. App. P. 32(a)(5) and (6), and Local Rule 32.1, this brief complies with the typeface and type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: April 9, 2021

/s/Gabriel K. Gillett  
Gabriel K. Gillett

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of April, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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