No. 21-3068

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANTO'S ITALIAN CAFÉ LLC dba SANTOSSUSSOS PIZZA PASTA VINO, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

ACUITY INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 1:20-cv-01192
Hon. Pamela A. Barker, District Judge

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-3068 Case Name: Santo's Italian Cafe LLC v. Acuity Ins. Cc

Name of counsel: Gabriel K. Gillett

Pursuant to 6th Cir. R. 26.1, Restaurant Law Center
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 9, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Gabriel K. Gillett

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-3068 Case Name: Santo's Italian Cafe LLC v. Acuity Ins. Cc

Name of counsel: Gabriel K. Gillett

Pursuant to 6th Cir. R. 26.1, Ohio Restaurant Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

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STATEMENT OF INTEREST[1]

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 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 Restaurant Law Center provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

Amicus Ohio Restaurant Association is the chief promoter, educator and advocate for Ohio's foodservice industry. The Association is comprised of more than 2,000 members, including independent and multi-unit restaurant companies and industry purveyors. The Association is committed to enhancing Ohio's restaurant

[1] All parties consent to the filing of this *amici* brief. Pursuant to Appellate Rule 29, 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.

industry, an integral part of Ohio's economy and its second-largest private sector employer.

Amici and their members have a significant interest in the important issues raised by 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 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 broader restaurant industry.[2] *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.

[2] *Amici* also have a strong interest in other pending appeals in this Court that raise similar issues under Ohio law, and where the district court similarly erred in dismissing business interruption claims. *See, e.g.*, *Ceres Enters., LLC v. Travelers Ins. Co.*, No. 21-3232; *Equity Plan. Corp. v. Westfield Ins. Co.*, No. 21-3229; *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 21-3222; *MIKMAR Inc. v. Westfield Ins. Co.*, No. 21-3230; *Family Tacos, LLC v. Auto Owners Ins. Co.*, No. 21-3224; *Dakota Girls, LLC v. Phila. Indemnity Ins. Co.*, No. 21-3245.

SUMMARY OF ARGUMENT

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

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

For years, restaurants in Ohio 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 Ohio and other officials issued executive orders that caused precisely what these restaurant owners believed to be "physical loss of 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*. 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—in this Circuit, Ohio, and elsewhere—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 Santo'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 millions of square feet of vibrant physical space and dispossessed the restaurant of its tangible space by mandating real, material, detrimental physical alterations to the premises. 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 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 undefined terms be given their "plain and ordinary" meaning. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 11. A court should not inject extrinsic terms or conditions into the policy: the policy's plain terms require no judicial redefinition.

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. "The test to be applied by the court in determining whether there is an ambiguity is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood." *Snedegar v. Midwestern Indemn. Co.*, 64 Ohio App. 3d 600, 604 (Ct. App. 1989). "Thus, the criterion is ambiguity from the standpoint of a layman, not a lawyer." *Id.*

Santo's has alleged as a matter of fact that it has suffered "direct physical property damage or physical loss" because it "has been forced" by executive orders "to cease its dine-in operations." Dkt. 1-1 ¶¶ 1, 9, 31; Page ID ##7, 9, 12.[3] The Santo's policy provides that Acuity will "pay for the actual loss of Business Income" resulting from "direct physical loss of or damage to property." *Id.* ¶ 25; Page ID #11. 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 across the country holding that 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 redefining the policy to require "distinct, demonstrable, physical alteration" to property. But those added words appear nowhere in the policy, reasonable consumers would not expect the policy to include such requirements, 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 person, and improperly relies on

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

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

ARGUMENT

I. Restaurants Are Critical To Ohio'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 Ohio's economy. In 2019, the industry accounted for an estimated $25.6 billion in sales across more than 23,000 locations in Ohio. It employed 585,000 people in 2020, a figure that is expected to grow 7.4% over the next decade.[4]

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

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

[5] Nat'l Restaurant Ass'n, *Ohio Restaurant Industry at a Glance* (2019).

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

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.[7] 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.[8]

The past successes of the restaurant industry are neither self-sustaining nor guaranteed. In the last twelve months, nationwide restaurant and foodservice sales were down $270 billion from expected levels.[9] Compared to February 2020, the industry has lost millions of employees—reflected in decreased employment in

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

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

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

every state.[10] As of late 2020, 17% of restaurants—more than 110,000 establishments—were closed permanently or long-term.[11] Those restaurants had, on average, been in business for more than sixteen years. The restaurant industry's recovery, in other words, is likely to be "measured in years and not months."[12]

Ohio restaurants have not been spared. Compared to February 2020, employment in Ohio restaurants is down 10% to 20%, representing tens of thousands of jobs.[13] The numbers for independent restaurants are even starker.[14] These closures can be devastating to neighborhoods. Nearly 90% of adults say "restaurants are an important part of their community."[15] The harm from closures reverberates through communities, impacting other local businesses and industries as well. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[16]

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

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

[12] Nat'l Restaurant Ass'n, *Restaurant employment fell for the third consecutive month* (Feb. 5, 2021).

[13] *Id.*

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

[15] Bruce Grindy, *Consumers are Worried their Restaurants will not Survive the Pandemic*, Nat'l Restaurant Ass'n (Aug, 18, 2020).

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

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 Ohio 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 many in the restaurant industry, business interruption coverage is triggered when a restaurant suffers direct "physical loss of 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 of or damage to" property, 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 "physical loss of or damage to" property requirement. Those denials follow the telegraphed statements by insurers and trade groups,[17] and frequently issued without meaningful (if any) investigation.

[17] 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).

Many restaurants in Ohio and thousands 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.

First, insurance policy interpretations are "questions of law subject to de novo review." *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 990 (6th Cir. 2007). Thus, "[n]o deference is afforded to the district court." *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012). The Court must "construe the complaint in the light most favorable to the non-moving party and accept all factual allegations as true." *Id.* at 731. The "complaint need contain only 'enough facts to state a claim to relief that is plausible on its face.'" *Paige v. Coyner*, 614 F.3d 273, 277 (6th Cir. 2010).

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.[18] Many federal district courts, applying state law, have reached the same conclusion.[19]

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[18] *See id.*; *see, e.g.*, *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378, at *1 (Ohio Ct. C.P. Jan. 7, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021); *Chapparells Inc. v. Cincinnati Ins. Co.*, 2020 WL 7258117, at *2 (Ohio Ct. C.P. Oct. 21, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114 (Ohio Ct. C.P. Nov. 17, 2020); *Scott Craven DDS v. Cameron Mut. Ins. Co.*, 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); Order, *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681 (Cal. Super. Ct. Feb. 1, 2021); Order, *Cherokee Nation v. Lexington Ins. Co.*, No. CV-2020-00150 (Okla., Cherokee Cnty., Jan. 29, 2021); Minute order, *Goodwill Indus. of Orange Cnty. v. Phila. Indem. Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, 2020 WL 7229856 (Cal. Super. Ct. Sept. 30, 2020); Order, *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); *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).

[19] *See, e.g.*, *Henderson Rd. Rest. Sys. Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021); *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 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.*, 478 F.

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 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 Santo's' favor, and apply core interpretive principles in determining whether Santo's 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' …

Supp. 3d 794 (W.D. Mo. 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020).

precipitated 'a legal war ... in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991). And many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

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

As a result of a series of executive orders issued by Governor DeWine starting in March 2020, the Santo's property was physically altered, materially impaired, and no longer functional as a restaurant. *See* Dkt. 1-1, ¶¶ 5-9; Page ID ##8-9.

Acuity, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused physical "loss of or damage to" property.

Acuity, like other insurers, further contends that only events like hurricanes and fires can cause the type of loss required to trigger business interruption coverage. But Acuity's position is inconsistent with the policy's language and foundational principles for interpreting it. Acuity's position is also contrary to both recent and historical precedent. The district court was therefore wrong to dismiss the complaint.

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

Under Ohio law, courts "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 2009-Ohio-2270, ¶ 9. When construing an insurance policy, Ohio courts "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Westfield*, 2003-Ohio-5849, ¶ 11. When words are undefined in a policy, they "must be given [their] common, ordinary, [and] usual meaning." *Shear v. W. Am. Ins. Co.*, 11 Ohio St. 3d 162, 166 (1984). A dictionary may show a word's "common, ordinary [and] usual meaning." *See id.*

An insurance policy is ambiguous when it "is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 2008-Ohio-4838, ¶ 16. If an ambiguity exists, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question." *Andersen v. Highland House Co.*,

93 Ohio St. 3d 547, 549 (2001). If coverage provisions or exclusions "are susceptible of more than one interpretation, they 'will be construed strictly against the insurer and liberally in favor of the insured.'" *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St. 3d 186, 187 (2006); *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 65 (1989) ("The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect."). In determining ambiguity, the Court does not look to "what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood." *Snedegar*, 64 Ohio App. 3d at 604. "Thus, the criterion is ambiguity from the standpoint of a layman, not a lawyer." *Id.* A "reasonable construction which results in coverage of the insured must be adopted." *Sterling Merch. Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131, 137 (Ct. App. 1986).

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by executive orders that physically impaired restaurants. Acuity agreed to pay for "direct physical loss of or damage to property." The policy provides coverage if the policyholder shows physical loss **or** damage to property. "[P]hysical loss *of* the real property means something different than damage to the real property. … Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?" *Henderson Rd.*, 2021 WL 168422, at *10. As many courts have recently held in the business interruption context—including in

this Circuit and in Ohio—to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage." *Id.*[20]

Had Acuity 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 explicitly defining or limiting those terms. *Lane*, 45 Ohio St. 3d at 65; *Sharonville*, 109 Ohio St. 3d at 187. But Acuity chose not to define those terms even though they can reasonably be construed (and indeed have been construed by courts) more broadly than the narrow self-serving definition that Acuity favors. Each of those terms must therefore 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, Santo's has met its burden to plead that it has suffered direct physical loss of or damage to property consistent with the plain and ordinary meaning of those terms. *See Shear*, 11 Ohio St. 3d at 166. Merriam-Webster defines physical as "of or relating to material things"

[20] *See, e.g., In re Society Ins. Co.*, 2021 WL 679109, at *8-10; *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.

that are "perceptible especially through the senses."[21] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[22]

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, like Santo's, 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. The district court relied on case law to read into "loss of or damage to property" a requirement that the policyholder show "distinct, demonstrable, physical alteration" to the insured property. Dkt. 23 at 24; Page ID #458. But that requirement does not appear in any relevant portion of the policy. Acuity did not define loss as requiring "distinct, demonstrable, physical alteration." No reasonable policyholder would have understood "loss" (as distinct

[21] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed Apr. 5, 2021).

[22] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last accessed Apr. 5, 2021).

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

Policyholders should not have to hire lawyers to understand what the words "loss" and "damage" mean. They should not have to guess whether a judge will require a policyholder to suffer 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 Santo's has sufficiently alleged as a matter of fact that the executive orders have caused loss or damage by dispossessing it of its property and rendering that property nonfunctional. Santo's should be able to test whether it can offer sufficient evidentiary support to obtain a jury verdict in its favor.

B. Precedent Supports Reversal.

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

Top of mind is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). Applying Ohio's law and policy-interpretation principles, the district court granted summary judgment for the policyholder and found that executive orders caused "physical loss" 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 Santo's' claims. Numerous state courts in Ohio have done the same. *See, e.g.*, *supra* note 18.

Courts around the country have come to similar conclusions. For example, two district courts in Illinois recently 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"). Earlier, a federal court in Virginia likewise denied a motion to dismiss, explaining that "direct physical loss" 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." *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 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 Ohio's, 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." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020). The court further found that was "precisely the loss caused by" executive orders that forbade 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 that "loss" and "damage" must be given separate meanings, and that "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose."); Order at 6, ¶¶ 30-31, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020) (finding "direct physical loss" as "an average lay person would understand by [that] phrase" when insured's "property could not physically be used for its intended purpose," *i.e.*, it "was deprived from using it"); *see also, e.g.*, *supra* notes 18-19.

These cases favoring policyholders are consistent with longstanding precedent across the country. For example more than fifty years ago, a California appellate court considered the case of a couple whose home was left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," the result of a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962). The insurer argued the policy only insured the house itself not the land underneath it. *Id.* at 245-46. The court rejected that argument, reasoning that it would "render the policy illusory." *Id.* at 248-49.

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

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, 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."[23]

Santo's 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 cognizable physical loss if it is physically altered and impaired. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional and can no longer serve customers on premises as intended.

This Court should conclude that Santo's has sufficiently stated a claim by alleging the executive orders caused "physical loss of or damage to" its 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 is a

[23] *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 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").

restaurant alleging physical loss or damage as a result of executive shutdown orders that imposed material, detrimental, physical alterations to property.

CONCLUSION

The judgment below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b)(1).

2. This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14 point Times New Roman font for the main text and footnotes.

Dated: April 9, 2021

/s/*Gabriel K. Gillett*
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CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on April 9, 2021, I caused the foregoing **Brief of the Restaurant Law Center and Ohio Restaurant Association, as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/*Gabriel K. Gillett*
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