No. 21-1307

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN FOOD SYSTEMS, INC.; OLD ANDOVER RESTAURANT, INC., d/b/a Grassfield's Food & Spirit; OLD WALTHAM RESTAURANT, INC d/b/a Grassfield's Food & Spirit; OLD ARLINGTON RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SAUGUS RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SHREWSBURY RESTAURANT, INC., d/b/a Jimmy's Tavern & Grill; OLD LEXINGTON RESTAURANT, INC., d/b/a Mario's Italian Restaurant,

Plaintiffs-Appellants,

v.

FIREMANS FUND INSURANCE COMPANY; ALLIANZ GLOBAL RISKS UNITED STATES INSURANCE COMPANY,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Mass., Civil Action No. 20-11497-RGS, Hon. Richard G. Stearns, Judge

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BRIEF OF THE RESTAURANT LAW CENTER AND MASSACHUSETTS RESTAURANT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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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 public held company has a 10% or greater ownership interest in *amici curiae*.

/s/ Gabriel K. Gillett
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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 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 Massachusetts Restaurant Association is a nonprofit trade association representing 1800 members encompassing 5500 restaurants, caterers and foodservice companies that do business in Massachusetts. Its purpose, in part, is to represent and advocate on behalf of the restaurant/foodservice industry in the state.

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[1] All parties consent to the filing of this 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*, their members, or their counsel. *See* Fed. R. App. P. 29.

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 because 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 Plaintiffs-Appellants ("AFS") have stated a claim depends on the allegations in their pleadings. Still, *amici* and their members have a strong interest in highlighting why issues in this appeal are important to the restaurant industry. Roughly half of the state courts to decide these issues—which arise under state law, not federal common law—have found policyholders stated a claim or were entitled to summary judgment. *Amici* thus also have a strong interest in emphasizing that, depending on a complaint's allegations, restaurants may be entitled to

coverage for state and local executive shutdown orders that caused direct physical loss or damage to their property.[2]

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 Massachusetts economy and drives 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 Massachusetts and beyond.

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[2] *Amici* also have a strong interest in other appeals pending in this Circuit where the district court erred in dismissing business interruption claims. *E.g.*, *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 21-1202; *Atlantico, LLC v. Greater N.Y. Mut. Ins. Co.*, No. 21-1259; *SAS Int'l, Ltd. v Gen. Star Indem. Co.*, No. 21-1219; *Select Hospitality, LLC v. Strathmore Ins. Co.*, No. 21-1380.

For years, restaurants 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 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 officials issued shutdown orders that caused precisely what these restaurant owners believed to be physical "loss or damage" to their 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, thousands of restaurants have already closed—*permanently*. Restaurants have turned to the courts for 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 state-law 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 shutdown orders. Indeed, roughly half of state courts to decide these state-law questions have found policyholders stated a claim or were entitled to summary judgment. That strongly supports the conclusion that the district court erred.

Recent decisions reinforce that a complaint's allegations and applicable substantive state law—not the current scorecard of non-binding district court rulings—are what really matter in determining whether a plaintiff has stated a claim. Accordingly, this Court should make clear that a restaurant may state a claim by alleging that it suffered physical loss or damage when shutdown orders dispossessed the restaurant of its tangible physical 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 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 decision below. Bedrock canons of insurance policy interpretation require that when "the language of an insurance policy is not ambiguous, [the Court] interpret[s] the words of the policy in their usual and ordinary sense." *Fuller v. First Fin. Ins. Co.*, 448 Mass. 1, 5 (2006). 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 consistent with the policyholder's reasonable expectations of coverage. "When in doubt as to the proper meaning of a term in an insurance policy, [the Court] 'consider[s] what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" *Dorchester Mut. Ins. Co. v. Krussell*, 485 Mass. 431, 437 (2020). The policy's terms require no judicial redefinition: they should be construed based on a reasonable business's expectations.

AFS's policy requires Defendant-Appellee Fireman's Fund Insurance Company to "pay for the actual loss of business income" resulting from "direct physical loss or damage" to insured property. Dkt. 22-1 at 45.[3] AFS has alleged that it suffered such "physical loss or damage" when, as a result of shutdown orders, AFS's restaurants were "require to slow down and eventually cease their business activities, most importantly the provision of on-premises dining and alcohol service." Dkt. 22 ¶ 69. Even once on-premises dining resumed, AFS's restaurants could only be operated "with limited capacity" and subject to physical restrictions that required AFS to reconfigure its dining rooms. *Id.* ¶¶ 71-73.

Many other courts have found allegations that shutdown-order-mandated physical alterations and impairments to property qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that property may suffer physical loss or damage when made rendered nonfunctional for its intended purpose or when its appearance or form is altered.

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

The district court reached a different conclusion in this case. Though it recognized that ambiguous policy terms must be strictly construed against the drafter, the Court reasoned that a "direct physical loss or damage" requires pleading "some enduring impact to the actual integrity of the property at issue." Dkt. 38 at 7. On that basis, the Court dismissed AFS's complaint. *Id.* at 13. But those added words appear nowhere in the policy and reasonable consumers would not expect a policy that covers "loss or damage" to property to include such a requirement. Moreover, reasonable consumers reasonably expect a policy that covers "loss or damage" to property would include protection if the property's function and physical space was forcibly altered by a state or local shutdown order. And many courts have found that restaurants and others adequately alleged that shutdown orders caused physical loss or damage by requiring physical alteration of a policyholder's property. The district court thus erred by reading the policy to preclude coverage and by dismissing AFS's claims.

ARGUMENT

I. Restaurants Are Critical To Massachusetts' 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 the Massachusetts economy. In 2019, the industry accounted for an estimated $19.5 billion in sales across 15,727 locations throughout the state. The industry employed 348,700 people in 2020 and is expected to employ 7.9% more 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 state and local shutdown orders—returns approximately two dollars to the state's economy and boosts state tax revenue.[5] A restaurant contributes to the livelihood of dozens of employees, suppliers,

[4] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* (2020).
[5] Nat'l Restaurant Ass'n, *Massachusetts Restaurant Industry at a Glance* (2019).

purveyors, and related businesses.[6] That is the case in Massachusetts, where ample and diverse dining opportunities drive tourism.

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and 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 owners say their first industry job was an entry-level position. Even more 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]

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[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).

[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).

The past successes of the industry are not guaranteed in the future. Since March 2020, 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.[9] As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were "closed permanently or long-term." [10]

Massachusetts restaurants have not been spared. Compared to February 2020, employment in Massachusetts restaurants is down more than 30%, representing over 83,000 jobs. [11] 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."[12]

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[9] 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). ("*Forty states*").
[10] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).
[11] *Id.*; Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).
[12] 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 orders forcing restaurants to severely alter and restrict their physical premises, restaurants 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 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 restaurants, business interruption coverage is triggered when a policyholder suffers direct "loss or damage" to its premises. These policies provide businesses with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

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, to a reasonable policyholder, include 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 warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. 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 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 shutdown orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining, those orders caused the loss of millions of square feet of vital 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. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations gone. 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 followed telegraphed statements by insurers and trade groups,[13] and were frequently issued without meaningful (if any) investigation.

Many restaurants have challenged these wrongful denials. Without judicial relief, many restaurants will be out of business entirely, many industry employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

[13] 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 Ins. 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. 6, 2020).

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, the "interpretation of an insurance policy is a question of law" controlled by state substantive law and subject to "review de novo." *Jalbert as Tr. of the F2 Liquidating Tr. v. Zurich Servs. Corp.*, 953 F.3d 143, 150 (1st Cir. 2020). "When de novo review is compelled, no form of appellate deference is acceptable." *Bos. & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 858 (1st Cir. 1993). In reviewing a motion to dismiss, the Court "must assume the truth of all well-plead facts and give the plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007). The Court must also "construe all factual allegations in the light most favorable to the non-moving party to determine if there exists a plausible claim upon which relief may be granted." *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 353 (1st Cir. 2013).

Second, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages and no appellate court has yet weighed in.

Among trial-level decisions to date in state courts—where the judiciary is well-versed at applying the state law that governs insurance policies—roughly half of these decisions have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[14] Many federal district courts, applying

[14] *See, e.g.*, *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); Order, *Ungarean v. CNA*, No. GD-20-00654 (Pa. Ct. C.P. Mar. 22, 2021); Order, *Macmiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.*, 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021); *Goodwill Indus. of Orange Cnty. v. Phila. Indem. Ins. 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); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry St. Brewing Co., v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 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.*, 2020 WL 6556842 (Fla. Cir. Ct. Sept. 22, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 8484870 (La. Civ. Dist. Ct. Nov. 4, 2020).

state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[15]

While other decisions have favored insurers, many turn on the specific facts or 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.

Most troubling, many decisions—including the decision below—appear to be the result of a reflexive self-fulfilling feedback loop in which federal district courts appear to effectively treat other federal district courts as establishing a sort of federal common law on business interruption insurance. For example, early yet unremarkable decisions have been cited dozens of times by other courts, even though the decisions

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[15] *See, e.g.*, *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Legacy Sports Barbershop LLC v. Cont'l Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 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.,* 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *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); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

are not particularly detailed or persuasive, did not arise after an amended complaint, and have not been subject to appellate review. *See, e.g.*, *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020), *appeal pending* No. 20-56206 (9th Cir.); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. 2020).

Rather than tally decisions by other courts in other cases, each court must focus on a complaint's allegations, liberally construed in plaintiff's favor, and determine whether those specific allegations satisfy the applicable standard. *See Seifert*, 2021 WL 2228158, at *3-4 (denying motion to dismiss amended complaint that adequately alleged shutdown orders caused physical loss, after granting motion to dismiss initial complaint); *Legacy Sports*, 2021 WL 2206161, at *2-3 (denying motion to dismiss and distinguishing allegations from cases where the same judge had granted dismissal).

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).

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—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 shutdown orders that imposed material physical alterations on restaurants.

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

AFS alleges that its property was physically impaired due to a series of orders issued by state and local officials starting in March 2020. *See* Dkt. 22 at ¶¶ 28-30, 68. Fireman's Fund, like other insurers, has insisted that the orders that impaired policyholders' property have not caused physical loss or damage. Fireman's Fund, 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.

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

Under Massachusetts law, an insurance policy "term is ambiguous where 'it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.'" *Dorchester Mut.*, 485 Mass. at 437. "When in doubt as to the proper meaning of a term in an insurance policy, [the Court] 'consider[s] what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" *Id.* "'Any ambiguities in the language of an

insurance contract,' … 'are interpreted against the insurer who used them and in favor of the insured.'" *Id.* "This rule 'applies with particular force to exclusionary provisions,' and an insurer bears the burden of proving that a particular exclusion is applicable." *Id.*

"If the language of an insurance policy is not ambiguous, [the Court] interpret[s] the words of the policy in their usual and ordinary sense." *Fuller*, 448 Mass. at 5. Courts may utilize a dictionary to assist with the determination of a term's meaning. *Dorchester Mut.*, 485 Mass. at 438.

Here, the plain language of the policy supports finding coverage for loss or damage caused by shutdown orders that physically impaired property. Fireman's Fund agreed to pay for "direct physical loss or damage to property." The disjunctive "or" in that phrase means that "loss" must cover something different from "damage." 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."[16]

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[16] *See, e.g.*, *Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3; *In re Society*, 2021 WL 679109, at *8-10; *Henderson Rd.*, 2021 WL 168422, at *11-12; *Urogynecology Specialist,* 489 F. Supp. 3d at 1301-03; *Studio 417*, 478 F. Supp. 3d at 800-03.

Had Fireman's Fund wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do explicitly in clear and unambiguous language. *See Dorchester Mut.*, 485 Mass. at 437. But Fireman's Fund chose not to do either despite knowing these terms can reasonably be construed (and indeed have been construed by many courts) more broadly than the narrow reading Fireman's Fund favors. Each of those terms must therefore be given its usual and ordinary meaning consistent with the expectations of a reasonable consumer and construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[17] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[18] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

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[17] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed June 28, 2021).
[18] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed June 28, 2021).

For many restaurants, that was exactly what happened when shutdown 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 shutdown orders "deprived" restaurants like AFS of property in a way that is perceptible through the senses because they 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 AFS to plead "some enduring impact to the actual integrity of the property at issue." Dkt. 38 at 7. But that requirement does not appear in any relevant portion of the policy; Fireman's Fund left "loss" undefined and no reasonable policyholder would have understood "loss" to require physical alteration to the structure of the premises, much less an alteration that requires "enduring impact to the actual integrity" of the property. Nor would a reasonable policyholder have 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 that render the property non-function and thus undermine the integrity of the property as a restaurant. Therefore, even under the district court's interpretation of the meaning of the policy language, policyholders like restaurants have suffered physical loss or damage as a result of 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 AFS has sufficiently alleged as a matter of fact that the relevant shutdown orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional.

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 state and local shutdown orders.

Several powerful examples come from the Northern District of Illinois, where 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 broad agreement on 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* 2021 WL 679109, at *8-9; *see Williams* 2021 WL 767617, at *3-4 (finding a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of … business premises").

A third district court concluded that, although "loss of or damage to" property required "physical damage or alteration," policyholders had satisfied that standard by alleging they were required to "build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." *Legacy Sports*, 2021 WL 2206161, at *2-3. In so finding, and distinguishing its own prior decisions dismissing business interruption claims in other cases, the court made clear that whether a plaintiff has stated a claim turns on the individual allegations in each case.

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). The district court granted summary judgment for the policyholder and found that shutdown 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.

Courts around the country have come to similar conclusions. In *Seifert v. IMT Insurance Co.*, the Chief Judge of the District of Minnesota denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that

executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it." 2021 WL 2228158, at *4-5.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, a district court in Virginia denied an insurer's motion to dismiss, explaining that if the insurer "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.

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the state court in North Carolina 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. 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" state and local shutdown 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"); *Perry St. Brewing*, 2020 WL 7258116, at *2-3 (finding "direct physical loss" as "an average lay person would understand by th[at] 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 & Casualty Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further rockfalls. 203 W.Va. 477, 481, 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." *Id.* The West Virginia Supreme Court disagreed, reasoning that "'[d]irect

physical loss' provisions require only that a covered property be injured, not destroyed." *Id.*

The court continued: 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." *Id*. 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."[19]

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

[19] *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 Mgmt. 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").

loss when it is uninhabitable, a restaurant suffers physical loss when it becomes non-functional and cannot serve customers as intended.

This Court should conclude that AFS has stated a claim by alleging the shutdown orders caused "physical loss" of property and rendered the properties non-functional for their intended purpose. This Court should also remind district courts to properly apply substantive state law and policy-interpretation principles, and to liberally construe a plaintiff's allegations, to find a claim stated when a plaintiff alleges physical loss or damage caused by shutdown orders that imposed material, detrimental, physical alterations to their property.

CONCLUSION

The judgment below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 because the brief contains 6,232 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

Dated: June 28, 2021

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

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on June 28, 2021, I electronically filed the foregoing **Brief of the Restaurant Law Center and Massachusetts Restaurant Association as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** with the United States Court of Appeals for the First Circuit by using the CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

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