

**No. 21-50078**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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TERRY BLACK'S BARBECUE, L.L.C.;  
TERRY BLACK'S BARBECUE DALLAS, L.L.C.,

*Plaintiffs–Appellants,*

v.

STATE AUTOMOBILE MUTUAL INSURANCE COMPANY,

*Defendant–Appellee.*

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On Appeal from the United States District Court for the Western  
District of Texas, Austin Division, No. 1:20-CV-00665-RP

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

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## SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record provides this statement of those with an interest in this brief.

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- Texas Restaurant Association, *Amicus Curiae*
- Angelo I. Amador, Of Counsel
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## STATEMENT OF INTEREST<sup>1</sup>

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

*Amicus* Texas Restaurant Association, a non-profit organization with over 5,000 members operating more than 14,000 locations, advocates on behalf of the food service industry in Texas. It regularly advises member restaurants about legal issues impacting the industry.

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

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<sup>1</sup> 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*, its members, or its counsel. *See* Fed. R. App. P. 29.

sought business interruption coverage under “all risk” commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented state and local 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 (“TBB”) have stated a claim depends on the specific 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. Accordingly, *amici* also have a strong interest in emphasizing that, depending on a complaint’s specific allegations, restaurants may be entitled to coverage for shutdown orders that caused direct physical loss or damage to property.<sup>2</sup>

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<sup>2</sup> *Amici* also have a strong interest in other pending appeals in this Circuit where the district court erred in dismissing business interruption claims. *See, e.g., Aggie Invs., LLC v. Continental Cas. Co.*, No. 21-40382 (5th Cir.).

## 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 state and local shutdown orders.

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

For years, restaurants in Texas and elsewhere have paid substantial premiums for business interruption coverage under “all risk” commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought this insurance believing 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 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 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 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 entitled to summary judgment. That strongly supports concluding the district court misapplied state law and wrongly granted judgment.

Recent decisions also reinforce that a complaint’s allegations and applicable substantive state law—not the current scorecard of non-binding district court decisions—are what really matter in determining whether a plaintiff has stated a claim. Consistent with those important principles, 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 district court’s decision. “Unless the policy dictates otherwise,” the Texas Supreme Court has

explained, bedrock canons of insurance policy interpretation require that “words and phrases” are given “their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage.” *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed in accordance with a policyholder’s reasonable expectations of coverage. Any uncertainty must be resolved “by adopting the construction that most favors the insured ... even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.” *Id.* The policy’s terms require no judicial redefinition: they should be construed according to what a reasonable consumer would expect.

TBB’s policy requires Defendant-Appellee State Auto Mutual Insurance Co. to “pay for the actual loss of ‘Business Income’” resulting from “direct physical loss of or physical damage to property.” Dkt. 1-1 at 207.<sup>3</sup> TBB has alleged that it suffered such “physical loss of and damage to” its property from the shutdown orders, which “physically prevented

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<sup>3</sup> Citations to “Dkt. \_\_\_” refer to the district court record.

access and use of physical areas” of its premises. *E.g. id.* at 14 ¶23, 17 ¶30. TBB further explained that it suffered “a direct physical loss” because the property’s function for its “intended purposes was suspended, and had to be physically altered, limited or prohibited.” Dkt. 24 at 13.

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—including in cases against State Auto—holding that property may suffer physical loss or damage when rendered nonfunctional for its intended purpose or when its appearance or form is altered.

The district court reached a different conclusion in this case, reasoning that although the policy does not define “loss,” “‘physical loss’ requires there to be some ‘distinct, demonstrable, physical alteration of the property’” (Dkt. 26 at 9), and “Plaintiffs do not allege that the restaurants underwent any physical change as a result of the civil authority orders” (*id.* at 12). But the policy does not include that specific requirement. Moreover, reasonable consumers reasonably expect a policy

that covers “loss” or “damage” would include protection if the property’s function 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 in granting judgment against TBB and denying TBB leave to amend the complaint.

## **ARGUMENT**

### **I. Restaurants Are Critical To Texas’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 the Texas economy. In 2019, the industry accounted for an estimated \$70.6 billion in sales across 49,666 locations throughout the state. The industry employed 1,349,500 people in 2020 and is expected to employ 16.9% more over the next decade.<sup>4</sup>

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<sup>4</sup> Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant Industry* (2020).



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 more than two dollars to the state’s economy, not to mention the positive impact on the state’s tax revenue.<sup>5</sup> A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.<sup>6</sup> That is certainly the case in Texas, where ample and diverse dining opportunities drives tourism across the state.

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

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<sup>5</sup> Nat’l Restaurant Ass’n, *Texas Restaurant Industry at a Glance* (2019).

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

an entry-level position. Even more restaurant managers say the same.<sup>7</sup> Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and own their own businesses.<sup>8</sup>

The past successes of the industry are neither self-sustaining nor guaranteed. In the past year, nationwide restaurant and foodservice sales were “down \$270 billion from expected levels” and industry employment has decreased in every state and the District of Columbia.<sup>9</sup> As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were closed permanently or long-term.<sup>10</sup>

Texas restaurants have not been spared. As of January, restaurant employment in Texas was down significantly, and the numbers for independent restaurants are even starker.<sup>11</sup> These closures can

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<sup>7</sup> *Factbook*, *supra* note 4.

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

<sup>9</sup> Nat’l Restaurant Ass’n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat’l Restaurant Ass’n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021).

<sup>10</sup> Nat’l Restaurant Ass’n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).

<sup>11</sup> *See supra* note 9; Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

devastate neighborhoods as the harm from closures reverberates, impacting other local businesses and industries. “Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains.”<sup>12</sup>

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

Faced with unprecedented losses caused by orders forcing restaurants to severely alter and restrict their physical premises, restaurants in Texas 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 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

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

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, in the eyes of 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 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 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 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. 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,<sup>13</sup> and were frequently issued without meaningful (if any) investigation.

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<sup>13</sup> For example, Society Insurance all but denied coverage “preemptively and *en masse*” through a memo to “agency partners” on March 16, 2020—before most businesses had even submitted claims but after many states limited operations of certain businesses—“observing that ‘a quarantine of any size,’” or “a widespread governmental imposed shutdown” would “likely not trigger the additional coverage.” *In re Society Insurance Co.*, MDL 2964, 2021 WL 679109, at \*4 (N.D. Ill. Feb. 22, 2021). In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that “[p]andemic outbreaks are uninsured because they are uninsurable.” Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 7, 2020).

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

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

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants, for three reasons.

*First*, the district court's interpretation of an insurance contract governed by state law is a question of law which is reviewed de novo. *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 99 F.3d 695, 700 (5th Cir. 1996). This Court thus accords "no deference to [the district court's] determinations of state law issues." *Bradley v. Allstate Ins. Co.*, 620 F.3d 509, 516 (5th Cir. 2010); accord *S. Ins. Co. v. Affiliated FM Ins. Co.*, 830 F.3d 337, 351 (5th Cir. 2016). In reviewing the complaint, the "ultimate question ... is whether [it] states a valid claim

when all well-pleaded facts are assumed true and viewed in the light most favorable to the plaintiff.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). “The Court’s task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff’s likelihood of success.” *Id.*

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

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

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<sup>14</sup> See *id.*; see, e.g., Order, *Lombardi’s, Inc. v. Indem. Ins. Co. of N. Am.*, No. DC-20-05751-A (Tex. Dist. Ct. Oct. 15, 2020); Order and opinion, *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. Sup. Ct. Oct. 9, 2020); *McKinley Dev. Leasing v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. Com. Pl. Feb. 9, 2021); *Timothy A. Ungarean, Dmd D/B/A Smile Savers Dentistry, PC v. CNA*, No. GD-20-00654 (Pa. Com. Pl. Mar. 22, 2021); Order, *Macmiles, LLC v. Erie Ins. Exchange*, No. GD-20-7753 (Pa. Ct. C. P. May 25, 2021); *Scott Craven DDS v.*



as required and predicting how state courts would apply state law, have reached the same conclusion.<sup>15</sup>

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

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*Cameron Mut. Ins. Co.*, 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins. Co.*, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021); *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. Indemnity Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *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. 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); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114 (Ohio Ct. C.P. Nov. 17, 2020); *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co., S.I.*, 2020 WL 6556842 (Fla. Cir. Ct. Sept. 22, 2020); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2020 WL 6993790 (La. Civ. Dist. Ct. Nov. 4, 2020).

<sup>15</sup> See, e.g., *Kenneth Seifert d/b/a The Hair Place v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Legacy Sports Barbershop LLC v. Continental Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 2021); *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); *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); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020).

Most troubling, many decisions may 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 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.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending* No. 20-56206 (9th Cir.); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. 2020); *accord* TBB Brief at 17-19 & n.13. In this diversity case where state substantive law controls, the federal courts must apply the law as it would be interpreted by the state's highest court.

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 (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 those in other cases where the same judge had granted motions to dismiss).

*Third*, history shows that early decisions on issues of first impression are often viewed differently after appellate courts have the opportunity to weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, “the meaning of the standard pollution exclusion clause’s exception for discharges that are ‘sudden and accidental’ ... precipitated ‘a legal war ... in state and federal courts from Maine to California.’” *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as “at least suggesting that the term ‘sudden’ is susceptible of more than one reasonable definition.” *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991). Many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

This Court faces a similar task in interpreting the meaning of the industry-standard physical loss or damage requirement. The current disagreement among trial courts about whether plaintiffs have stated a claim—and the fact that roughly half of state courts have concluded that plaintiffs have—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.**

TBB alleges that its property was physically impaired due to a series of state and local orders issued by state and local officials starting in March 2020. *See* Dkt. 1-1, 11 ¶ 14.

State Auto, like other insurers, has insisted that the orders that impaired policyholders’ property have not caused physical loss or damage. State Auto, like other insurers, further contends that only events like hurricanes and fires can trigger business interruption

coverage. But that position is inconsistent with the policy’s language, foundational policy-interpretation principles, and both recent and historical precedent. The district court thus erred in granting judgment on the pleadings.

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

Under Texas law, “insurance policies are strictly construed in favor of the insured in order to avoid exclusion of coverage.” *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). 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. Any uncertainty must be resolved “by adopting the construction that most favors the insured ... even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.” *Id.* “An intent to exclude coverage must be expressed in clear and unambiguous language.” *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993).

“Unless the policy dictates otherwise,” the Texas Supreme Court has explained, “words and phrases” are given “their ordinary and generally accepted meaning, reading them in context and in light of the

rules of grammar and common usage.” *RSUI Indem. Co.*, 466 S.W.3d at 118. “To determine a term’s common, ordinary meaning, [the Court] typically look[s] first to dictionary definitions then consider[s] the term’s usage in other authorities.” *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 573 S.W.3d 187, 192 (Tex. 2019).

Here, the plain language of the policy supports finding coverage for loss or damage caused by shutdown orders that physically impaired property. State Auto agreed to pay for “direct physical loss of 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.”<sup>16</sup>

Had State Auto wanted “loss” and “damage” to mean the same thing, or to narrow their meaning, it was obligated to do so “in clear and unambiguous language.” *Reed*, 873 S.W.2d at 699. But State Auto chose not to do either despite knowing these terms can reasonably be construed

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<sup>16</sup> 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 1302-03; *Studio 417*, 478 F. Supp. 3d at 800-03.

(and indeed have been construed by courts) more broadly than the narrow reading State Auto favors. Each of those terms must therefore be given its plain and ordinary meaning consistent with the expectations of a reasonable consumer and construed in favor of coverage.

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

For many restaurants, that was exactly what happened when 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 TBB of property in a way that is perceptible through the senses because they no longer possessed

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<sup>17</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/physical> (last accessed June 2, 2021).

<sup>18</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/loss> (last accessed June 2, 2021).

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 TBB to plead “some ‘distinct, demonstrable, physical alteration of the property.’” Dkt. 26 at 9. But that requirement does not appear in any relevant portion of the policy; State Auto left “loss” undefined and no reasonable policyholder would have understood “loss” to require physical alteration to the structure of the premises, much less closely read judicial decisions to discern the supposed true meaning of the policy’s language.

Reasonable policyholders would, however, understand that interposing barriers, blocking off physical space, and detrimentally changing property in other material physical ways constitute physical alterations. Therefore, even under the district court’s 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 TBB 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. TBB should be able to test whether it can offer sufficient allegations or evidentiary support to obtain a jury verdict in its favor.

**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* 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”).

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). Applying policy-interpretation principles like Texas’s, 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. Notably, the court in *Henderson Road* explicitly rejected the contrary conclusions in the cases on which the district court relied heavily in erroneously granting judgment against TBB.

Courts around the country have come to similar conclusions. In *Kenneth Seifert d/b/a The Hair Place v. IMT Ins. 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 shutdown 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 Ins. 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 Street Brewing*, 2020 WL 7258116, at \*2-3 (finding “direct physical loss” as “an average lay person would understand by [that] phrase” when “property could not physically be used for its intended purpose” because owner “was deprived from using it”); *see also, e.g., supra* notes 14-15.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left “standing on the edge of and partially overhanging a newly formed 30-foot cliff” resulting from a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962). The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-46.

The court rejected that argument, reasoning that it would “render the policy illusory” because the insurer’s position “would be to conclude that a building which has been overturned or which has been placed in

such a position as to overhang a steep cliff has not been ‘damaged’ so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a ‘dwelling building’ might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.” *Id.* at 248-49.

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs’ homes at risk of further rockfalls. 203 W.Va. 477, 492-93 (1998). The insurer argued that the policies “do not cover any losses occasioned by the potential damage that could be caused by future rockfalls.” The West Virginia Supreme Court disagreed, reasoning that “[d]irect physical loss’ provisions require only that a covered property be injured, not destroyed.”

The court continued: the insured properties “were homes, buildings normally thought of as a safe place in which to dwell or live” but until the risk of rockfalls abates “plaintiffs’ houses could scarcely be considered ‘homes’ in the sense that rational persons would be content to reside

there.” The court thus held that “direct physical loss[es]” covered by the policy, “including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.”<sup>19</sup>

Focusing exclusively on structural damage ignores the well-reasoned analysis suggesting that a business suffers cognizable physical loss even if it is not physically damaged. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it becomes non-functional and cannot serve customers as intended.

This Court should conclude that TBB has stated a claim by alleging the shutdown orders caused “physical loss” of property and rendered the property non-functional for its intended purpose. This Court should also remind district courts to properly apply policy-interpretation principles and to liberally construe a plaintiff’s allegations to find a

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<sup>19</sup> See also, e.g., *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at \*5 (D.N.J. Nov. 25, 2014) (“property can sustain physical loss or damage without experiencing structural alteration”); *Dundee Mut. Ins. Co. v. 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”).

claim stated when a plaintiff alleges physical loss or damage caused by shutdown orders that imposed material, detrimental, physical alterations to property.

### CONCLUSION

The judgment below should be reversed.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2, the brief contains 6,486 words.

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) and Circuit Rule 32.1, respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2016, with Century Schoolbook 14-point font for the main text and Century Schoolbook 12-point font for the footnotes.

Dated: June 4, 2021

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

I hereby certify that on this 4th day of June, 2021, I caused the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties will be served via the Court's CM/ECF system at the email addresses on file.

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