# No. 21-1323

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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RYE RIDGE CORP., a New York corporation, dba Rye Ridge Deli, HAROMAR, INC., a Connecticut corporation, dba Rye Ridge Deli, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants*,

v.

THE CINCINNATI INSURANCE COMPANY, an Ohio corporation,

*Defendant-Appellee*.

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Appeal from the United States District Court Southern District of New York
Case No. 1:20-cv-7132 – Judge Lorna G. Schofield

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**BRIEF OF THE RESTAURANT LAW CENTER, NEW YORK STATE RESTAURANT ASSOCIATION, AND NEW YORK CITY HOSPITALITY ALLIANCE, 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 publicly 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* New York State Restaurant Association is the leading business association for the restaurant and hospitality industry in New York State. It advocates for businesses and employees in the industry, which serves as the cornerstone of the state economy, and offers opportunities for career advancement and community involvement.

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

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

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

*Amici* and their members have a significant interest in the important issues in this case. Many in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented state and local 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 suffered real and tangible losses, been physically altered and impaired, and rendered non-functional as a result of the orders.

Whether Plaintiff-Appellants ("Rye Ridge") have stated a claim depends upon the specific factual allegations in their pleadings. In this respect, *amici* and their members have a strong interest in highlighting why issues in this appeal are important to the restaurant industry and in emphasizing that—depending upon the factual specificity of allegations in their complaints regarding direct physical loss or damage to their insured property—restaurants may sufficiently plead viable claims against their insurers based upon executive shutdown orders. Indeed, roughly half of the state courts to consider this issue have ruled that policyholders stated a claim or were entitled to summary judgment.

## SUMMARY OF ARGUMENT

*Amici* write to provide this Court 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 that physically altered, materially harmed, and otherwise directly damaged their properties, rendering them physically non-functional and effectively lost for their intended purposes.

**I.** The restaurant industry is a significant sector of the New York 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 New York and beyond.

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 that it would cover income lost as a result of physical "loss or damage" to their property, as they understood those plain, ordinary, everyday words.

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 their physical premises, directly imposing harmful physical changes, materially impairing physical spaces, and rendering insured property nonfunctional and effectively lost for its intended purposes—insurers denied coverage without legitimate justification. Facing catastrophic losses, thousands of restaurants have closed—*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 affording 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 cited 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-level courts across the country have found in well-reasoned decisions that a plaintiff stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of executive shutdown orders. Indeed, roughly half of state courts to decide these state-law questions have found policyholders stated a claim or were entitled to summary judgment.

These decisions 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. This Court should make clear that a restaurant may state a claim by alleging that it suffered physical loss or damage from shutdown orders which mandated real, material, detrimental physical alterations to their premises, thereby effectively dispossessing the restaurant of tangible physical space in the form it was initially insured.

**III.** Bedrock canons of insurance policy interpretation require that "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267 (2007). A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed consistently with the policyholder's reasonable expectations of coverage. "In construing an insurance contract, the tests to be applied are 'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW Enters., Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 340 (2d Dep't 2004). The policy's terms should not be subject to judicial redefinition or elaboration, nor should they be construed according to a misplaced belief in the existence of controlling special meanings found only in arcane case law not readily accessible to ordinary lay persons. They should be construed precisely as written and in

accordance with what a reasonable business person would expect them to mean without having to retain legal counsel.

Rye Ridge's policy requires Cincinnati to "pay for the actual loss of 'Business Income' … caused by direct 'loss' to property." Dkt. 1, ¶57.[2] Rye Ridge has alleged that it incurred "substantial lost business income and other financial losses" because, among other reasons, its properties were "no longer usable for their intended purpose(s), and in many cases impossible to operate safely" Dkt. 1, ¶¶ 48, 50. Rye Ridge further alleged that "government orders caused" the "loss of the ability to welcome customers onto the Delis' physical premises, offer the physical dining experience of eating on site, [and] access or utilize any of the physical property associated with these activities." *Id.* ¶ 62.

The district court found these allegations insufficient, reasoning that "physical loss or accidental physical damage" requires an insured to plead more than a "loss of use." Dkt. 45 at 4, 12. But those added words appear nowhere in the policy, and reasonable consumers would not expect a policy that covers direct loss to property to include such a requirement. Moreover, ordinary consumers would reasonably expect that a policy which covers direct loss to property would respond if the property's function were directly and forcibly altered by a state or local shutdown order. The district court erred insofar as it held otherwise.

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

If this Court disagrees and affirms, however, it should make clear that any ruling is limited to the specific factual allegations at issue. Even under the district court's approach, a plaintiff can state a claim by adequately alleging that shutdown orders caused physical loss or damage by detrimentally altering property, causing a physical change for the worse in the premises, or mandating material physical changes that render property nonfunctional and effectively lost for its intended purpose. Courts across the country have recognized that such allegations—describing how the orders caused physical alterations and impairments to property, among other things—qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent, and this Court should clarify that those rulings remain good law even if the decision below is affirmed.

## ARGUMENT

### I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Hardship And Continue Their Critical Contributions To New York's Economy And Culture.

#### A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant and foodservice industry is the lifeblood of New York's economy. In 2019, the industry accounted for an estimated $54.5 billion in sales

across 49,032 locations throughout the state. The industry employed 881,400 people in 2020 and is expected to employ 5.3% more over the next decade.[3]

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 roughly two dollars to the state's economy and boosts the state's tax revenue.[4] A restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[5] That is the case in New York, 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.[6] Restaurants also provide opportunities for historically

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[3] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* (2020).
[4] Nat'l Restaurant Ass'n, *New York Restaurant Industry at a Glance* (2019).
[5] 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).
[6] *Factbook*, *supra* note 3.

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.[7]

The past successes of the industry are not guaranteed in the future. Comparing March 2020 to March 2021, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment decreased in every state and the District of Columbia.[8] As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were "closed permanently or long-term."[9]

New York restaurants have not been spared. 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."[10]

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[7] *Id.*; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[8] 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).
[9] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).
[10] 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 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 physical "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.

Given 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, would include executive shutdown orders causing direct physical "loss or damage" to their insured premises, as policyholders understood those words to

mean. There can be no reasonable dispute that if governmental shutdown orders are proven to have caused direct physical loss (of) or damage to insured property, "all risk" property policies would respond.

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 an atmosphere that draws guests. Restaurant dining is an experience in which physical space and layout play a crucial role.

Insurers know this. They price and charge premiums based on assumed revenues generated when the policyholder's properties are operating in a fully functional manner utilizing 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 and in accordance with corresponding premium charges.

That kind of interruption is precisely what happened when executive shutdown orders required restaurants to make detrimental physical alterations that materially impaired the functionality of their premises. In barring or limiting restaurants from featuring on-premises dining within their physical spaces, 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—the detrimental physical alterations—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,[11] and were frequently issued without meaningful (if any) investigation.

[11] 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

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.

## 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*, "interpretation of an insurance agreement is a question of law," so "the district court's construction of the Policy [is reviewed] de novo." *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.,* 720 F.3d 71, 76 (2d Cir. 2013). "*De novo* review is review without deference," meaning the "review is independent and plenary … as though it had come to the courts for the first time." *Zervos v. Verizon N.Y., Inc.*, 252

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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. 6, 2020).

F.3d 163, 168 (2d Cir. 2001). In reviewing the complaint, the "Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

*Second*, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages. 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 of these decisions have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[12] Many federal district courts, applying state substantive

[12] *See e.g.*, *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); Tr., *Santino, LLC v. Society Ins. Co.*, No. 20-CV-358 (Wis. Cir. Ct. Mar. 1, 2021); Tr., *Colectivo Coffee Roasters, Inc. v. Society Ins. Co.*, No. 2020-CV-2597 (Wis. Cir. Ct. Feb. 25, 2021); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); *Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins.*, 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); 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); *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.

law as required and predicting how state courts would apply state law, have reached the same conclusion.[13]

While other decisions have favored insurers, many turn on the specific facts, circumstances, or legal theories 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 publications that ordinary people would never consult.

Most troubling, many decisions 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 are not particularly

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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).

[13] *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); *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); *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021).

detailed or persuasive, did not arise after an amended complaint, and have not been subject to appellate review. *See, e.g.*, *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020), *appeal dismissed* No. 21-57 (2d. Cir.).

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). Indeed, in affirming dismissal of a plaintiff's business interruption claim (albeit one arising under Iowa law and involving different policy language than at issue here), the U.S. Court of Appeals for the Eighth Circuit stressed that its decision was based on the plaintiff's failure to plead physical loss or damage—not a categorical rule that such damage cannot be pleaded. *See Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2021 WL 2753874, at *3 & n.2 (8th Cir. July 2, 2021).

*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).

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 either stated a claim or were entitled to summary judgment—reinforces that this Court is on solid ground in finding plaintiffs have stated a claim for business interruption coverage arising from executive shutdown orders. This Court should conclude that the plain meaning of the undefined, disjunctive terms physical "loss of or damage"—as a layperson would understand them—applies to cover losses allegedly caused by executive 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.

Cincinnati, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused physical "loss or damage." Cincinnati, like other insurers, further contends that only events like hurricanes and

fires 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 New York law, insurance policies are "construed liberally in favor of the insured and strictly against the insurer." *In re Liberty Mut. Fire Ins. Co.*, 75 A.D.3d 967, 968 (3d Dep't 2010). "New York follows the maxim of *contra proferentem* in insurance cases: where the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding coverage." *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 732 (2d Cir. 2012). "[W]hen an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. "Such exclusions or exceptions … must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Id.*

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White*, 9 N.Y. 3d at 267. A phrase's "plain and ordinary meaning" is determined by "'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW*, 4 A.D.3d at 340. It is "common practice" for New York courts "to refer to the dictionary to

determine the plain and ordinary meaning of words to a contract." *Mazzola v. Cnty. of Suffolk*, 143 A.D.2d 734, 735 (2d Dep't 1988).

Here, the plain language of the policy supports finding coverage for loss or damage caused by executive shutdown orders that physically impaired property. Cincinnati agreed to pay for "direct physical loss" and "loss of or damage to" property. The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." *See Certain Underwriters at Lloyd's London v. Advance Transit Co.*, 188 A.D.3d 523, 523-24 (1st Dep't 2020). As many courts have recently held, to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage."[14]

Had Cincinnati wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly, "in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. But Cincinnati chose not to limit the definition of loss or damage despite knowing these terms can reasonably be construed (and indeed have been construed by many courts) more broadly than the narrow reading Cincinnati favors. Those terms must therefore be given their plain

[14] *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; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6; *Susan Spath Hegedus, Inc.*, 2021 WL 1837479, at *8-9.

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."[15] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[16] 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 and caused multiple changes for the worse in their premises—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The shutdown orders "deprived" restaurant owners 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 were rendered non-functional. And reasonable policyholders would understand that interposing harmful physical barriers within their property, blocking off physical space, and

[15] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed July 19, 2021).
[16] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed July 19, 2021).

detrimentally changing property in other material physical ways that constitute physical alterations.

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 policyholders like restaurants may adequately allege that they suffered physical loss or damage as a result of shutdown orders by describing the harmful physical alterations caused by those orders. They may also state a claim by explaining how their property was rendered non-functional for its intended purpose.

Rye Ridge has alleged as a matter of fact that the relevant executive shutdown orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. Rye Ridge should be able to test whether it can offer sufficient evidentiary support to obtain a jury verdict in its favor.

### B. New York Cases Do Not Categorically Bar Coverage For Policyholders, Like Restaurants, That Suffered Physical Loss Or Damage From Executive Orders.

Relying on *Roundabout Theater Co. v. Continental Casualty Co.*, 302 A.D.2d 1 (1st Dep't 2002) and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), this district court dismissed Rye Ridge's claim because "the Complaint alleges no facts to suggest that Plaintiffs' properties suffered any physical loss or damage." The district court failed to recognize, however, that both *Roundabout* and *Newman Myers* are inapplicable to many business interruption claims arising from executive shutdown orders.

*Roundabout*, which involved different policy language and circumstances than those here,[17] addressed exclusively off-site injury. Indeed, there was no meaningful loss or damage to the theater itself. 302 A.D. 2d at 2-5 (noting "the incident damaged the neighboring property, not the insured property"). And, the *Roundabout* court impermissibly found coverage for "loss or damage" was only triggered if the property "suffers direct physical damage," although the policy *also* covered physical loss. 302 A.D.2d at 6-7. The district court made the same error here, citing *Roundabout* for the proposition that "direct physical loss of or damage

[17] For example, Roundabout's policy explicitly excluded losses covered by "civil commotion[s]" (not an endorsement for civil authority coverage, as here), and Roundabout had taken the exact opposite position about the policy's meaning in other litigation. 302 A.D.2d at 5, 8-10.

to" property provided coverage only for "direct damage to plaintiffs' property"—functionally deleting the word "loss" from the policy. *See* Dkt. 45 at 5.

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

This Court should not make the same mistake, as a handful of federal district courts have recently done. Consistent with the principles discussed above and the precedent discussed below, this Court should find Rye Ridge has stated a claim because it has alleged that the shutdown orders rendered its property nonfunctional for its intended purpose. This Court should also make clear that New York law—including as construed by *Roundabout* and *Newman Myers*—does not categorically foreclose a policyholder from adequately alleging physical loss or damage arising

from an executive order that caused the policyholder's property to be detrimentally altered, physically impaired, and rendered non-functional as a restaurant.

### C. Recent And Longstanding Precedent Outside New York 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 of or damage" to property as a result of state and local shutdown orders.

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court 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." *Id.*

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"); Tr., *Colectivo*, No. 2020-CV-2597, at 43-44 (noting that losing a dining room via shutdown order constitutes a physical loss).

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 New York'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.

*Seifert v. IMT Insurance Co.*, 2021 WL 2228158, at *4-5, is also instructive. There, 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."

Another example is *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, where the court 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. The court reasoned that, although the plaintiff's property was not "structurally damaged"—an extra-contractual requirement that the district court below imposed—it plausibly alleged

a "direct physical loss" by pleading that executive orders rendered the property "uninhabitable [and] inaccessible." *Id.* at *10.

These cases are just a few examples of the many courts have ruled against insurers for the same reasons. *See, e.g.*, *supra* notes 14-15. And these 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 (Cal. Ct. App. 1962).

The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-49. 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.*

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, while the policies might cover the damage to those homes actually hit by rocks, 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: 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."[18]

[18] *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").

*Murray*'s insight is particularly applicable in the business interruption cases arising out of recent executive shutdown orders. 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 its property is physically altered for the worse or it becomes non-functional and cannot serve customers as intended.

This Court should conclude that Rye Ridge has stated a claim by alleging the shutdown orders caused "physical loss" of property and rendered the property non-functional for its insured and intended purpose. This Court should also remind district courts that, consistent with New York law and properly applied policy-interpretation principles—a plaintiff may adequately state a claim under an "all risk" property insurance policy by alleging that it suffered physical loss or damage as a result of shutdown orders that imposed material, detrimental, physical alterations to their property, effectively rendering them useless and lost for their insured and intended purposes.

## CONCLUSION

The judgment below should be reversed.

July 23, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), Fed. R. App. P. 32(a)(7)(g), and Local Rule 29.1(c), I certify that this brief complies with the length limitation because this brief contains 6,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: July 23, 2021

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of July, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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