Supreme Court of Ohio Clerk of Court - Filed August 03, 2021 - Case No. 2021-0130

IN THE SUPREME COURT OF OHIO

NEURO-COMMUNICATION SERVICES, INC., d/b/a HEARING INNOVATIONS, individually and on behalf of others similarly situated, Plaintiff/Respondent, v. **THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; AND THE CINCINNATI INDEMNITY COMPANY**, Defendants/Petitioners.	)	Supreme Court Case No. 2021-0130 On Review of Certified Questions From the United States District Court Northern District of Ohio, Eastern Division Case No. 4:20-cv-1275

BRIEF OF THE RESTAURANT LAW CENTER AND OHIO RESTAURANT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE

Gabriel K. Gillett
(admitted *pro hac vice*)
Rebecca R. Fate
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTIFICATION OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Circumstances And Continue Their Critical Contributions To Ohio's Economy And Culture. 6

  A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat. 6

  B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies. 8

II. This Is An Important Case Of First Impression Arising Against The Backdrop Of Many Decisions, On Both Sides, Coming From Lower Courts. 10

III. Policy Language, Interpretation Principles, And Precedent Support Finding Executive Orders Caused Physical Loss Or Damage. 13

  A. Policy Language And Policy-Interpretation Principles Support Answering The Certified Question In The Affirmative. 13

  B. Recent And Longstanding Precedent Support Answering The Certified Question In The Affirmative. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

10E, LLC v. Travelers Indem. Co.,
2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) 12

Andersen v. Highland House Co.,
93 Ohio St. 3d 547 (2001).....14

Cherokee Nation v. Lexington Ins. Co.,
2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021) 11, 15

Colectivo Coffee Roasters, Inc. v. Society Ins. Co.,
No. 2020-CV-2597 (Wis. Cir. Ct. Feb. 25, 2021) 11

Derek Scott Williams PLLC v. Cincinnati Ins. Co.,
2021 WL 767617 (N.D. Ill. Feb. 28, 2021) 11, 18

Dundee Mut. Ins. Co. v. Marifjeren,
587 N.W.2d 191 (N.D. 1998) 20

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,
2020 WL 7249624 (E.D. Va. Dec. 9, 2020) 11, 19

Goodwill Indus. of Orange Cnty. v. Phila. Indem. Ins. Co.,
2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021).....11

Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,
2014 WL 6675934 (D.N.J. Nov. 25, 2014) 20

Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.,
2021 WL 168422 (N.D. Ohio Jan, 19, 2021).....11, 15, 17

Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.,
2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020).....11

Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.,
No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020) 19

Hughes v. Potomac Ins. Co. of District of Columbia,
199 Cal. App. 2d 239 (Cal. Ct. App. 1962) 19, 20

JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.,
2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).....11

Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins.,
2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021)....11

Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co.,
2020 WL 6556842 (Fla. Cir. Ct. Sept. 22, 2020)....11

Lager v. Miller-Gonzalez,
2008-Ohio-4838....14

Lane v. Grange Mut. Cos.,
45 Ohio St. 3d 63 (1989)....14, 15

Legacy Sports Barbershop LLC v. Cont'l Cas. Co.,
2021 WL 2206161 (N.D. Ill. June 1, 2021)....11, 12, 18

Macmiles, LLC v. Erie Ins. Exch.,
No. GD-20-7753 (Pa. Ct. C.P. May 25, 2021)....11

McKinley Dev. Leasing Co. v. Westfield Ins. Co.,
2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021)....11

Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.,
2009-Ohio-2270....13

Murray v. State Farm Fire & Casualty Co.,
203 W.Va. 477 (1998)....20

N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.,
942 F.2d 189 (3d Cir. 1991)....13

New Castle Cnty. v. Hartford Accident & Indem. Co.,
933 F.2d 1162 (3d Cir. 1991)....13

North State Deli, LLC v. The Cincinnati Ins. Co.,
2020 WL 6281507 (N.C. Sup. Ct. Oct. 9, 2020)....11, 15, 17

Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.,
2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020)....11

Oral Surgeons, P.C. v. The Cincinnati Ins. Co.,
2021 WL 2753874 (8th Cir. July 2, 2021)....12

Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.,
2016 WL 3267247 (D. Ore. June 7, 2016)....20

Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.,
2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020)....11

Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.,
2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 2021)....11

Santino, LLC v. Society Ins. Co.,
No. 20-CV-358 (Wis. Cir. Ct. Mar. 1, 2021)....11

Scott Craven DDS v. Cameron Mut. Ins. Co.,
2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021)....11

Seifert v. IMT Ins. Co.,
2021 WL 2228158 (D. Minn. June 2, 2021)....11, 12, 15, 18

Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,
563 N.W.2d 296 (Minn. Ct. App. 1997)....20

Serendipitous, LLC v. The Cincinnati Ins. Co.,
2021 WL 1816960 (N.D. Ala. May 6, 2021)....11, 15

Sharonville v. Am. Emps. Ins. Co.,
109 Ohio St. 3d 186 (2006)....14, 15

Shear v. W. Am. Ins. Co.,
11 Ohio St. 3d 162 (1984)....14

Snedegar v. Midwestern Indemn. Co.,
64 Ohio App. 3d 600 (Ct. App. 1989)....6, 14

In re Society Insurance Co.,
MDL 2964, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021)....10, 11, 15, 17, 18

Sterling Merch. Co. v. Hartford Ins. Co.,
30 Ohio App. 3d 131 (Ct. App. 1986)....14

Studio 417, Inc. v. Cincinnati Ins. Co.,
478 F. Supp. 3d 794 (W.D. Mo. 2020)....11, 19

Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.,
2021 WL 1837479 (E.D. Pa. May 7, 2021)....11, 15

Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London,
2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020)....11

Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,
489 F. Supp. 3d 1297 (M.D. Fla. 2020)....11, 15

Westfield Ins. Co. v. Galatis,
2003-Ohio-5849....5, 14

Other Authorities

9 Couch on Ins. § 127:11 (2020) 13

Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020) 7

Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015)....................7

Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss 15

Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/damage 16

Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical 15

Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* (2020) 6, 7

Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021) 7

Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020)....................8

Nat'l Restaurant Ass'n, *Ohio Restaurant Industry at a Glance* (2019)....................6

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

Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021) 7

Press Release, Am. Prop. Cas. Ins. Ass'n, *APCIA Releases New Business Interruption Analysis* (Apr. 6, 2020)....................10

IDENTIFICATION OF AMICUS CURIAE

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

Amicus Ohio Restaurant Association is the chief promoter, educator and advocate for Ohio's foodservice industry. The Association is comprised of more than 2,000 members, including independent and multi-unit restaurant companies and industry purveyors. The Association is committed to enhancing Ohio's restaurant industry, an integral part of Ohio's economy and its second-largest private sector employer. The restaurant industry is a significant sector of the Ohio economy and a major driver of economic activity across the country. The industry creates employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in Ohio and beyond.

Plaintiff/Respondent is not a restaurant or hospitality company, and whether it has stated a claim for coverage depends on the specific factual allegations in its pleadings. Nevertheless, *amici* and their members have a significant interest in the issue of what constitutes "direct physical loss or damage to property" sufficient to trigger coverage under their respective "all risk" commercial property insurance policies. Many in the restaurant industry have paid substantial premiums over

the years to procure business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones like viruses and executive orders, unless specifically excluded. They believe these "all risk" policies should cover the physical loss or damage their properties incurred as the direct result of unprecedented state and local executive orders requiring detrimental alterations, erection of physical barriers, reduction of usable square footage, less productive rearrangement of furniture, and other highly visible changes "for the worse" to their premises—rendering them non-functional for their insured purposes and in many instances physically shutting them down entirely.

As if acting in concert, all their insurers have simultaneously denied them business interruption coverage upon the similar dubious contention that they have not incurred "direct physical loss or damage" to their property sufficient to trigger coverage under their "all risk" commercial property insurance policies. Accordingly, thousands of restaurants are pursuing coverage litigation in courts across the country in which they have pleaded with specificity the kinds of direct physical loss and damage caused to their premises by executive orders and similar mandates.

SUMMARY OF ARGUMENT

The issue certified in this action is narrowly limited to:

> *Does the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute direct physical loss or damage to property; or does the presence on a premises of a person infected with COVID-19 constitute direct physical loss or damage to property at that premises.*

Amici assert that the answers to these questions as stated should in both instances be "possibly yes" and in neither instance "definitely no." As discussed more thoroughly below, the expansive construction which should be given to the ordinary terms "direct physical loss or damage" should allow for Respondent to proceed to offer evidentiary proof, possibly at the molecular or other

biophysical level, of how their premises have been impacted by the coronavirus or persons infected with COVID-19. If plaintiffs can prove direct physical loss or damage to their premises as alleged from these sources, then they should prevail. If not, then they should fail. In short, this should be a fact question subject to evidentiary proof and not a legal one—at least at this stage. At the proper procedural time, the trial court should be allowed to decide this fact issue either summarily if appropriate, or by submission to a jury. If it is presumed for the purpose of the certified questions, however, that the coronavirus was in fact present on surfaces of the insured premises during the relevant time period, then it would stand to reason that these premises incurred direct physical damage, harm, and loss as these terms are defined in the dictionary and commonly understood to mean.

In its brief to this Court, Cincinnati Insurance Company ("the Moving Party") moves well beyond this straightforward certified question and addresses various idiosyncratic issues related to other provisions in the single insurance policy it issued to the Respondent, all of which remain subject to initial consideration and rulings by the Northern District of Ohio and are not directly before this Court. To the extent that the Moving Party may herein seek implicitly to broaden the scope of the certified questions to apply negatively to the kinds of direct physical loss and damage incurred by other businesses as the result of executive orders as opposed to the coronavirus, *Amici* and their members respectfully request the Court to refrain from doing so, especially in the absence of a complete record upon which to consider this issue, which is critically important to so many businesses in Ohio and elsewhere.

Amici and their members have a strong interest in emphasizing that—depending upon the factual specificity of allegations in their pleadings regarding direct physical loss or damage to their insured property—restaurants may sufficiently plead viable claims against their insurers for direct

physical loss and damage caused by executive orders. Indeed, roughly half of the state courts to consider this issue, including many in Ohio, have ruled that policyholders have sufficiently stated a claim or were entitled to summary judgment on this basis. *Amici* respectfully submit that nothing in this Court's answers to the certified questions regarding the presence of SARS-CoV-2 and COVID-19 should preclude restaurants from continuing to pursue claims under their all-risk commercial property insurance policies for direct physical loss or damage to their property caused by executive orders.

The certified questions present issues of first impression and arise in unprecedented circumstances, i.e., the SARS-CoV-2 coronavirus pandemic. Although the carefully phrased certified questions ask the Court to construe the terms "direct physical loss or damage to property" as applied to the presence of SARS-CoV-2 and persons infected with COVID-19, there is no mention of an insurance policy in the text of the questions themselves. The accompanying two paragraph "Statement of Facts," however, sets forth a barebones summary of the policy provisions deemed relevant by the federal district court. Accordingly, although not specifically stated, the certified questions are calling for use of the rules of construction applicable to terms in insurance policies under Ohio law.

This Court will be examining and construing these terms not only *de novo* but also as reasonable, ordinary lay persons would understand them to mean in the context of a property insurance policy. Terms in an insurance policy should be construed precisely as written and in accordance with what a reasonable business person would understand and expect. Here, there should be no special meaning or arcane legal gloss afforded to the terms "direct physical loss or damage." There should be no need for or reference to any judicial redefinition, elaboration upon, further clarification, or resort to "case law" about what these simple terms mean. If written words

do not appear in an insurance policy, they should not be added through judicial modification. Consumers should not have to retain lawyers to perform legal research to advise them about what these terms "really" mean. A dictionary should suffice.

Nevertheless, many trial courts—including in Ohio—have found in well-reasoned decisions that a plaintiff sufficiently stated a claim for business interruption coverage by alleging it suffered physical loss or damage caused by the detrimental alterations and material changes for the worse to their property mandated by state and local executive orders. Indeed, roughly half of state courts to decide these state-law questions—including many courts in Ohio—have found policyholders stated a claim or were entitled to summary judgment.

These decisions reinforce that a complaint's well-pleaded 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. In answering these certified questions, this Court should do nothing to preclude a restaurant from sufficiently stating a claim that it incurred physical loss or damage from executive orders which mandated real, material, detrimental physical alterations to its premises, thereby effectively dispossessing it of tangible physical space in the form it was initially insured.

Bedrock canons of insurance policy interpretation are well known to this Court. Those principles require that undefined terms be given their "plain and ordinary" meaning. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 11. A court should not inject extrinsic terms or conditions into the policy: the policy's plain terms require no judicial redefinition. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed in accordance with a policyholder's reasonable expectations of coverage. "The test to be applied by the court in determining whether there is an ambiguity is not what the insurer intended its words to mean, but

what a reasonably prudent person applying for insurance would have understood." *Snedegar v. Midwestern Indemn. Co.*, 64 Ohio App. 3d 600, 604 (Ct. App. 1989). "Thus, the criterion is ambiguity from the standpoint of a layman, not a lawyer." *Id.*

In answering the certified questions, this Court should make clear a plaintiff can state a claim for business interruption coverage by adequately alleging physical loss or damage by any means or from any risk which detrimentally alters property; causes a harmful physical change in the premises; causes material physical changes for the worse to the premises; or that render property nonfunctional and effectively lost for its insured purpose. Courts across the country have recognized that such allegations qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent under Ohio law as well.

ARGUMENT

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Circumstances And Continue Their Critical Contributions To Ohio'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 Ohio's economy. In 2019, the industry accounted for an estimated $25.6 billion in sales across more than 23,000 locations in Ohio. It employed 585,000 people in 2020, a figure that is expected to grow 7.4% over the next decade.[1]

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by the state and local executive orders—returns roughly two dollars to the state's economy, and boosts the state's tax revenue.[2] A single

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

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

restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[3] That is the case in Ohio, 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 have an 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.[4] 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.[5]

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.[6] As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were "closed permanently or long-term."[7]

---

[3] 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).

[4] *Factbook*, *supra* note 1.

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

[6] 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).

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

Ohio 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."[8]

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses caused by executive orders imposing severe physical alterations on physical premises, restaurants across the country turned to their insurers for coverage under "all risk" property insurance policies that included protection for business interruption.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for "all risks" of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many in the restaurant industry, business interruption coverage is triggered when a restaurant suffers direct "physical loss of or damage to" its premises. These policies provide consumers with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair their businesses.

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks. Those risks, in the eyes of a reasonable policyholder, include executive orders causing direct physical "loss of or damage to" property, as policyholders understood those words to mean.

---

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

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 orders required restaurants to make detrimental physical alterations that materially impaired the functionality of their property. 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, visible, material harmful physical changes to their property. 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,[9] and were frequently issued without meaningful (if any) investigation.

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

II. This Is An Important Case Of First Impression Arising Against The Backdrop Of Many Decisions, On Both Sides, Coming From Lower Courts.

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.

Importantly, this Court's review comes at a time when executive order related business interruption litigation is in its early stages. Roughly half of the trial-level decisions to date in state courts—where the judiciary is well-versed at applying the state law that governs insurance policies—have found a plaintiff stated a claim for business interruption coverage or granted

---

[9] 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. 6, 2020).

summary judgment to the plaintiff on that claim.[10] Many federal district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[11]

While many decisions have favored insurers, they always 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.

---

[10] *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. 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).

[11] *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).

Most troubling, many pro-insurer 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 detailed or persuasive, did not arise after an amended complaint, and have not been subject to appellate review. *See 10E, LLC v. Travelers Indem. Co.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending* No. 20-56206 (9th Cir.).

Given this context, this Court should emphasize that lower courts must not decide the sufficiency of a policyholder's pleadings merely by tallying decisions by other courts in other cases. Instead, 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).

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). And many courts eventually coalesced around a meaning that permitted policyholders to recover in many situations. *See* 9 Couch on Ins. § 127:11 (2020).

The current disagreement among trial courts about whether plaintiffs have stated a claim—and the fact that roughly half of state courts have concluded that plaintiffs either stated a claim or were entitled to summary judgment—reinforces two key points. First, this Court is on solid ground in answering the certified question in the affirmative. And second, even if this Court answers the question in the negative, it should make clear that—depending on a pleading's specific allegations—a policyholder may state a claim for business interruption coverage arising from any means or risk which causes detrimental physical alterations or harmful changes to its insured property.

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

Cincinnati, like other insurers, 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 Answering The Certified Question In The Affirmative.

Under Ohio law, courts "presume that the intent of the parties is reflected in the language used in the policy." *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.,* 2009-Ohio-2270, ¶ 9. When construing an insurance policy, Ohio courts "look to the plain and ordinary meaning of the

language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Westfield*, 2003-Ohio-5849, ¶ 11. When words are undefined in a policy, they "must be given [their] common, ordinary, [and] usual meaning." *Shear v. W. Am. Ins. Co.*, 11 Ohio St. 3d 162, 166 (1984). A dictionary may show a word's "common, ordinary [and] usual meaning." *See id.*

An insurance policy is ambiguous when it "is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 2008-Ohio-4838, ¶ 16. If an ambiguity exists, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question." *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 549 (2001). If coverage provisions or exclusions "are susceptible of more than one interpretation, they 'will be construed strictly against the insurer and liberally in favor of the insured.'" *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St. 3d 186, 187 (2006); *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 65 (1989) ("The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect."). In determining ambiguity, the Court does not look to "what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood." *Snedegar*, 64 Ohio App. 3d at 604. "Thus, the criterion is ambiguity from the standpoint of a layman, not a lawyer." *Id.* A "reasonable construction which results in coverage of the insured must be adopted." *Sterling Merch. Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131, 137 (Ct. App. 1986).

Here, the plain language of the policy would support finding coverage for loss or damage caused by any non-excluded risk or means that physically impaired property. Cincinnati agreed to pay for "direct physical loss" as well as for "damage." As many courts have recently held in the

business interruption context—including in this Circuit and in Ohio—to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage."[12] The term "loss" must refer to something different from "damage." In other words, coverage for "loss" is in addition to coverage for "damage."

Had Cincinnati wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do so by explicitly defining or limiting those terms. *Lane*, 45 Ohio St. 3d at 65; *Sharonville*, 109 Ohio St. 3d at 187. But Cincinnati chose not to define those terms even though they 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 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."[13] Accordingly, although not essentially so, if something is visible, it is also physical. Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[14] Put together, the ordinary meaning of "physical loss" includes when a property obviously can no longer function as intended in the real, material world. Merriam-Webster defines "damage" as "loss or harm resulting from injury to

[12] *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.

[13] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed August 2, 2021).

[14] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed August 2, 2021).

person, property, or reputation."[15] The ordinary meaning of direct physical damage would certainly include loss or harm to property caused by any means or risk. Accordingly, at a minimum the physical presence of the coronavirus on surfaces at a premises would almost certainly be understood to "harm" (i.e., damage) that property according to the commonly understood meaning of the term "damage." In this respect, the certified question should be answered in the affirmative.

For many restaurants, this is exactly what happened when executive orders imposed real, detrimental, visible 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 large swaths of their property were rendered non-functional and effectively lost for their insured purposes. Photos of their properties before and after executive orders make this fact visibly undeniable.

Notably, Cincinnati did not specify in writing that physical loss or damage requires distinct, demonstrable, physical alteration. No reasonable policyholder would have understood such a requirement to be inherent in the language of Cincinnati's policy, much less closely read judicial decisions to discern the supposed true meaning of that language. In any event, reasonable policyholders would understand that being required to erect harmful physical barriers within their property, block off physical space, and detrimentally change property in other material physical ways would constitute physical alterations.

---

[15] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/damage (last accessed August 2, 2021).

B. Recent And Longstanding Precedent Support Answering The Certified Question In The Affirmative.

In answering the certified questions as *Amici* suggest, this Court will provide useful guidance to innumerable courts across the country, while remaining 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 executive orders..

In *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), applying Ohio law and policy-interpretation principles, the district court granted summary judgment for the policyholder and found that executive orders caused "physical loss" because "the properties could no longer be used for their intended purposes—as dine-in restaurants." *Id.* at *10.

Likewise, in *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court, applying policy interpretation principles like Ohio's, concluded that "'direct physical loss' describes the scenario" where policyholders "lose the full range of rights and advantages of using or accessing their business property." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020). The court further found that was "precisely the loss caused by" executive orders that forbade policyholders from "putting their property to use for the income-generating purposes for which the property was insured." Granting summary judgment to the plaintiff, the court then concluded that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered."

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 executive 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.

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 of the many courts have appropriately recognized that policyholders have stated claims and ruled against insurers seeking early dismissal or summary judgment. Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *Studio 417*, 478 F. Supp. 3d at 801 (holding that "loss" and "damage" must be given separate meanings, and that "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose."); Order at 6, ¶¶ 30-31, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 (Wash., King Cnty. Nov. 13, 2020) (finding "direct physical loss" as "an average lay person would understand by [that] phrase" when insured's "property could not physically be used for its intended purpose," *i.e.*, it "was deprived from using it"); *see also, e.g.*, *supra* notes 10-11.

Importantly, these cases favoring policyholders are also 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."[16]

---

[16] *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.

CONCLUSION

The Certified Question should be answered affirmatively as suggested by *Amici*. But regardless of the outcome here, the Court should do nothing to preclude policyholders from stating a claim by alleging that any means or risk—including executive orders or the presence of the coronavirus—caused "direct physical loss or damage" to property, including by rendering the property non-functional for its insured purpose.

Date: August 3, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

Gabriel K. Gillett
(admitted *pro hac vice)*
Rebecca R. Fate
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that the foregoing **Brief of The Restaurant Law Center and Ohio Restaurant Association, as Amici Curiae In Support of Respondent and Answering the Certified Question in the Affirmative** was filed via the Court's electronic filing system and served pursuant to Civ.R. 5(B)(2)(f) on August 3, 2021, to the following:

Daniel G. Litchfield (pro hac vice)
LITCHFIELD CAVO LLP
303 West Madison Street, Ste. 300
Chicago, IL 60606
Tel: (312) 781-6669
Fax: (312) 781-6630
Litchfield@litchfieldcavo.com

Rodger L. Eckelberry (0071207)
BAKER & HOSTETLER LLP
200 S. Civic Center Dr., Suite 1200
Columbus, OH 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616
reckelberry@bakerlaw.com

Michael K. Farrell (0040941)
Daniel M. Kavouras (0089773)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, Ohio 44114
Phone 216-621-0200
Fax 216-696-0740
mfarrell@bakerlaw.com
dkavouras@bakerlaw.com

Counsel for Defendants/Petitioners, The Cincinnati Insurance Company, The Cincinnati Casualty Company, The Cincinnati Indemnity Company

Daniel W. Wolff (0074168)
Laura A. Foggan *(pro hac vice)*
CROWELL & MORING LLP
1001 Pennsylvania Avenue Northwest
Washington, DC 44060
(202) 624-2774
(202) 628-5116 (fax)
dwolff@crowell.com
lfoggan@crowell.com

Counsel for Amici Curiae American Property Casualty Insurance Association and National Association of Mutual Insurance Companies

Yechiel Michael Twersky (pro hac vice)
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
T: 215-875-3052
Fax: 215-875-4605
mitwersky@bm.net

Nicholas A. DiCello (0075745)
SPANGENBERG SHIBLEY & LIBER, LLP
1001 Lakeside Ave., Suite 1700
Cleveland, Ohio 44114
Phone: 216-696-3232
Fax: 216-696-3924
ndicello@spanglaw.com

Counsel for Respondent, Neuro-Communication Services, Inc.

Charles H. Cooper, Jr. (0037295)
Sean R. Alto (0087713)
COOPER & ELLIOTT, LLC
305 West Nationwide Boulevard
Columbus, Ohio 43215
(614) 481-6000
(614) 481-6001 (fax)
chipc@cooperelliott.com
seana@cooperelliott.com

Counsel for Amicus Curiae Childcare Centers

Robert P. Rutter (0021907)
Robert A. Rutter (0081503)
RUTTER & RUSSIN, LLC
One Summit Office Park, Suite 650
4700 Rockside Road
Cleveland, Ohio 44131
(216) 642-1425
brutter@OhioInsuranceLawyer.com
bobbyrutter@OhioInsuranceLawyer.com

Counsel for Amicus Curiae Francois, Inc.

Lee E. Plakas (0008628)
Gary A. Corroto (0055270)
Maria C. Klutinoty Edwards (0086401)
Collin S. Wise (0089657)
Jeananne M. Wickham (0097838)
TZANGAS | PLAKAS | MANNOS LTD.
220 Market Avenue South, Eighth Floor
Canton, Ohio 44702
(330) 455-6112
(330) 455-2108 (fax)
lplakas@lawlion.com
gcorroto@lawlion.com
mklutinotyedwards@lawlion.com
cwise@lawlion.com
jwickham@lawlion.com

Counsel for Amicus Curiae Restaurants, Bars, and Developers

Daniel R. Karon (0069304)
KARON LLC
700 West St. Clair Avenue, Suite 200
Cleveland, Ohio 44113
(216) 622-1851
dkaron@karonllc.com

Rhonda D. Orin
Marshall Gilinsky
ANDERSON KILL LLP
1717 Pennsylvania Avenue Northwest
Washington, D.C. 20006
(202) 416-6549
Rorin@andersonkill.com
Mgilinsky@andersonkill.com

Counsel for Amicus Curiae United Policyholders

Leo M. Spellacy, Jr. (0067304)
THRASHER DINSMORE & DOLAN, LPA
1111 Superior Avenue, Suite 412
Cleveland, OH 44114
(216) 255-5431
(216) 255-5450 (fax)
lspellacy@tddlaw.com

Counsel for Amicus Curiae Cleveland Building & Construction Trades Council

Timothy J. Fitzgerald (0042734)
KOEHLER FITZGERALD LLC
1111 Superior Avenue East, Suite 2500
Cleveland, OH 44114
(216) 539-9370
(216) 916-4369 (fax)
tfitzgerald@koehler.law

Counsel for Amicus Curiae Ohio Insurance Institute

Marc M. Seltzer
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100
(310) 789-3150 (fax)
mseltzer@susmangodfrey.com

Adam J. Levitt
DICELLO LEVITT GUTZLER LLC
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
(312) 214-7900
(440) 953-9138 (fax)
alevitt@dicellolevitt.com

Mark Lanier
THE LANIER LAW FIRM PC
10940 West Sam Houston Parkway North
Suite 100
Houston, Texas 77064
(713) 659-5200
(713) 659-2204 (fax)
wml@lanierlawfirm.com

Timothy W. Burns
BURNS BOWEN BAIR LLP
One South Pinckney Street, Suite 930
Madison, Wisconsin 53703
(608) 286-2302
tburns@bbblawllp.com

Counsel for Amicus Curiae Interim Co-Lead Counsel for the Consolidated Action Pending Against Petitioners in the Southern District of Ohio

Erik L. Walter (0078988)
DWORKEN & BERNSTEIN CO., LPA
60 South Park Place
Painesville, OH 44077
(440) 316-2655
ewalter@dworkenlaw.com

Brian J. Clifford (pro hac vice)
Stacy Manobianca (pro hac vice)
35 Nutmeg Drive
Trumbull, CT 06611
(203) 287-2100
233 Mount Airy Road
Basking Ridge, NJ 07920
(973) 446-7300
BClifford@sdvlaw.com
SManobianca@sdvlaw.com

Counsel for Amicus Curiae
Saxe Doernberger & Vita, P.C.

Adam H. Fleischer (pro hac vice)
BATESCAREY LLP
191 North Wacker Drive, Suite 2400
Chicago, IL 60606
(312) 762-3100
(312) 762-3200 (fax)
afleischer@batescarey.com

Drew H. Campbell (0047197)
David K. Stein (0042290)
Anne Marie Sferra (0030855)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (fax)
dcampbell@bricker.com
dstein@bricker.com
asferra@bricker.com

Counsel for Amicus Curiae
State Automobile Mutual Insurance Company

Randolph H. Freking (0009158)
FREKING MYERS & REUL L.L.C.
600 Vine Street, 9th Floor
Cincinnati, Ohio 45202
(513) 721-1975
(513) 651-2570 (fax)
randy@fmr.law

John Scott Black
Richard D. Daly
Melissa Wooden Wray
DALY & BLACK, P.C.
2211 Norfolk Street, Suite 800
Houston, Texas 77098
(713) 655-1405
(713) 655-1587 (fax)
jblack@dalyblack.com
rdaly@dalyblack.com
mwray@dalyblack.com

William R.H. Merrill
Burton S. DeWitt
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
(713) 651-9366
(713) 654-6666 (fax)
bmerrill@susmangodfrey.com
bdewitt@susmangodfrey.com

Seth Ard
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
(212) 336-8330
(212) 336-8340 (fax)
sard@susmangodfrey.com

Steven Sklaver
Jesse-Justin Cuevas
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100
(310) 789-3150 (fax)
ssklaver@susmangodfrey.com
jcuevas@susmangodfrey.com

Counsel for Amicus Curiae Reeds Jewelers of Niagara Falls, Inc.

Michael H. Carpenter (0015733)
Michael N. Beekhuizen (0065722)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
(614) 365-4100
(614) 365-9145 (fax)
carpenter@carpenterlipps.com
beekhuizen@carpenterlipps.com

Counsel for Amicus Curiae Nationwide Mutual Insurance Company

Mark A. DiCello (0063924)
Kenneth P. Abbarno (0059791)
Mark Abramowitz (0088145)
Justin Hawal (0092294)
DICELLO LEVITT GUTZLER LLC
7556 Mentor Avenue
Mentor, Ohio 44060
(440) 953-8888
(440) 953-9138 (fax)
madicello@dicellolevitt.com
kabbarno@dicellolevitt.com
mabramowitz@dicellolevitt.com
jhawal@dicellolevitt.com

Amy E. Keller
Daniel R. Ferri
Mark Hamill
Laura E. Reasons
DICELLO LEVITT GUTZLER LLC
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
(312) 214-7900
(440) 953-9138 (fax)
akeller@dicellolevitt.com
dferri@dicellolevitt.com
mhamill@dicellolevitt.com
lreasons@dicellolevitt.com

Jeff J. Bowen
Jesse J. Bair
Freya K. Bowen
BURNS BOWEN BAIR LLP
One South Pinckney Street, Suite 930
Madison, Wisconsin 53703
(608) 286-2302
jbowen@bbblawllp.com
jbair@bbblawllp.com

Douglas Daniels
DANIELS & TREDENNICK
6363 Woodway, Suite 700
Houston, Texas 77057
(713) 917-0024
douglas.daniels@dtlawyers.com

Counsel for Amicus Curiae Troy Stacy Enterprises Inc.

/s/*Gabriel K. Gillett*
Gabriel K. Gillett
JENNER & BLOCK LLP
Counsel for Amici Curiae