No. 21-2448

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MELCORP, INC. d/b/a GREAT STEAK & POTATO COMPANY,
and all others similarly situated,

Plaintiff-Appellant,

v.

WEST AMERICAN INSURANCE COMPANY,

Defendants-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:20-cv-04839
Hon. Gary Feinerman, District Court Judge

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

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2448

Short Caption: Melcorp, Inc. v. West American Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Restaurant Law Center and Illinois Restaurant Association as Amici Curiae

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Signature: /s/ Angelo I. Amador Date: September 27, 2021

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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 restaurants, 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 that may have industry-wide implications.

Amicus Illinois Restaurant Association is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 members statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry, which includes more than 25,000 owners and operators, and employs hundreds of thousands across the state. The Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for members' interests.

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

Amici and their members have a significant interest in the 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 executive orders or COVID-19. Those restaurants have been unreasonably and categorically denied coverage. Insurers have contended that restaurants have not incurred physical loss or damage, even though their properties were unable to function as the restaurants they were insured to be, suffered detrimental physical alterations and impairments to their physical spaces, and in some instances became completely inaccessible to diners. Some insurers have also contended that coverage was not available because of various policy exclusions.

Whether Plaintiff-Appellant Melcorp, Inc. has stated a claim for coverage depends on the specific factual allegations in its pleadings. The key question is whether those pleadings adequately allege the insured property—in the case of *amici's* members, fully functioning restaurants—suffered "physical loss or damage" as an ordinary person would understand those undefined terms. The key question is *not* whether plaintiffs allege "complete destruction," "permanent dispossession," or other formulations that insurers have conjured amid litigation but chose not to include in their policies. Nor is the key question whether plaintiffs allege their property was lost entirely or partially—which may relate to the amount of any damages but not the predicate issue of coverage. Given the importance of this issue to the restaurant industry, *amici* have a strong interest in emphasizing that—depending on a complaint's allegations and the legal theory pursued, and as many

state courts have found—policyholders may be entitled to coverage for income lost due to physical loss or damage caused by executive orders or COVID-19.[2]

SUMMARY OF ARGUMENT

I. The restaurant industry is a significant sector of the Illinois economy and a major driver of economic activity across the country. The industry creates many 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 Illinois and beyond.

For years, restaurants in Illinois and elsewhere have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought this insurance believing that it would cover income lost as a result of physical "loss or damage" to their property, which is precisely what the policy said.

Restaurant owners suffered what they believed to be physical "loss or damage" to property when executive orders or COVID-19 detrimentally altered physical property, imposed physical changes, impaired physical spaces, and rendered property nonfunctional for its intended purposes. Yet insurers denied coverage anyway,

[2] *Amici* have a strong interest in other pending appeals that raise similar issues. *See, e.g.*, *Legacy Sports Barbershop LLC v. Continental Casualty Co.*, No. 21-2517; *Green Beginnings, LLC v. West Bend Mutual Ins. Co.*, No. 21-2186; *Biltrite Furniture Inc. v. Liberty Mutual Ins. Co.*, No. 21-2513; *M&E Bakery Holdings, LLC v. Westfield National Ins. Co.*, No. 21-2612.

without legitimate justification. Restaurants have turned to the courts for the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. While many decisions have favored insurers, those non-binding decisions have no bearing on this Court's review. Indeed, many of those decisions are tainted by foundational interpretive and analytical errors—including failing to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them, engrafting additional adjectives onto the policy when the insurer opted not to do so itself, and placing undue weight on federal decisions rather than state decisions and the policies themselves.

Hewing to the standard of review is particularly important here, where many trial courts (including in Illinois) have found in well-reasoned decisions that plaintiffs *have* stated claims for business interruption coverage. Roughly one third of state courts nationwide to decide these state-law questions have found policyholders stated claims or deserved summary judgment. Those decisions are not controlling here, where the Court must either predict how the Illinois Supreme Court would rule or certify a question so it can weigh in directly. Yet those decisions demonstrate that reasonable minds can disagree about the viability of business interruption claims. Those decisions also support this Court reversing the district court's premature dismissal and making clear that a restaurant may state a claim by alleging it suffered physical loss or damage when executive orders or COVID-19 dispossessed a

restaurant of its tangible physical space, imposed real, detrimental physical alterations on the premises, and rendered property non-functional.

III. Bedrock canons of insurance policy interpretation require that undefined terms be given their "plain and ordinary" meaning. *Gulino v. Econ. Fire & Cas. Co.*, 2012 IL App (1st) 102429, ¶ 18. "[A] policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005). If "the words … are susceptible to more than one reasonable interpretation," then the policy is ambiguous and coverage is available. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108 (1992). In other words, the policyholder prevails so long as its interpretation is reasonable, even if its interpretation is not the *best* reading of the policy. *See id.* at 108-09.

A court should not inject extrinsic terms or conditions into the policy. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co., v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). The policy's terms require no judicial redefinition: they should be construed according to what a reasonable consumer would expect.

Melcorp's policy provides that West American Insurance Company ("WAIC") will pay for "direct physical loss of or damage to Covered Property at the premises

described in the Declarations caused by or resulting from any Covered Cause of Loss." Melcorp Br. at 3. Melcorp has alleged that "Closure Orders forced the Fox Valley Mall [where Melcorp operates its restaurant] to close and thereby prevented Melcorp from operating its food court restaurant," an "undoubtedly 'physical'" loss as Melcorp was "unable to utilize the 'lost' property in the real, material world." *Id.* at 19. In addition, Melcorp alleged that "COVID-19 did not cause any 'physical loss of' property until Governor Pritzker issued the Closure Orders. Without the Closure Orders, there would have been no 'direct physical loss of' property.'" *Id.* at 27.

Many other courts have found similar allegations qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that a property may suffer physical loss or damage when its appearance or form is altered, or when it is rendered nonfunctional for its intended purpose. That is precisely what happened to many restaurants when executive orders or COVID-19 effectively blocked off or nullified large swaths of previously functional square footage, impaired physical property, and imposed visible detrimental physical alterations to the space. As a result, the district court erred by reading the policy to preclude coverage and by dismissing Melcorp's claims.

ARGUMENT

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Hardship And Continue Their Critical Contributions To Illinois'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 the Illinois economy. In 2019, the industry accounted for an estimated $32 billion in sales across 25,851 locations in Illinois. It employed nearly 600,000 at the start of 2020 and is expected to employ nearly 7% more people 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 the state and local executive orders and contamination—returns roughly two dollars to the state's economy, not to mention the positive impact on the state's tax revenue.[4] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[5] That is true in Illinois, where ample and diverse dining opportunities drives tourism across the state.

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a

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

[4] Nat'l Restaurant Ass'n, *Illinois 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).

vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish." *LMP Servs., Inc. v. City of Chi.*, 2019 IL 123123, ¶ 18. That is especially so for the many small (often family-owned) restaurants that make up the vast majority of the industry. They are "a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area." *Id.*

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same. 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 to own their own businesses.[6]

The past successes of the restaurant industry are neither self-sustaining nor guaranteed. Since March 2020, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment has decreased in every state and the District of Columbia.[7] As of late 2020, 17% of restaurants—more than 110,000 establishments, on average in business over 16 years—were closed permanently or long-term.[8]

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[6] *Factbook*, *supra* note 3; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[7] 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).
[8] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).

These closures can devastate neighborhoods as the harm reverberates through communities, impacting "the corner diner, the independents, the individual owners of full-service restaurant chains" as well as other local businesses and industries.[9]

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

Faced with unprecedented losses caused by orders or COVID-19 forcing restaurants to severely alter and restrict their physical premises, restaurants throughout Illinois and across the country turned to their insurers for coverage under "all risk" property insurance policies that included protection for business interruption.

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

Due to the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage. In doing so, restaurants

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

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 and contamination causing direct physical "loss or damage."

For *amici*'s members, the insured property is a restaurant and the physical design of that space is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create the kind of warm, inviting ambience that draws guests in. Restaurant dining is an experience, not just a financial transaction. The physical space and layout play a crucial role in that experience, and maximizing the available space is a key to financial viability.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner as the policyholder intends, based on the type of business, available square footage at the outset of the policy period, and revenue data. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a

fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when executive orders or contamination imposed detrimental alterations that impaired a restaurant's physical space and prevented it from functioning as the restaurant that was insured. Millions of square feet of vital physical space were lost when on-premises dining was limited or barred entirely. Restaurants were dispossessed of their tangible spaces and their premises experienced very real, material, and detrimental physical changes and alterations. Dining rooms closed or limited. Areas blocked off. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations gone. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause, often featuring boilerplate language asserting that coverage is unavailable due to the industry-standard "loss or damage" requirement. Those denials followed telegraphed statements by insurers and trade groups,[10] and were frequently issued without meaningful (if any) investigation.

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[10] For example, Society 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 "a widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Ins. Co.*, MDL 2964, 2021 WL 679109, at *4 (N.D. Ill. Feb. 22, 2021). In early April, the American Property Casualty Insurance Association similarly opined, without

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

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

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case 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, "[t]he construction of an insurance policy is a question of law" subject to *de novo* review. *Lyerla v. AMCO Ins. Co.*, 536 F.3d 684, 687 (7th Cir. 2008). This Court thus interprets the policy "without deference to the district court." *Trujillo v. Rockledge Furniture LLC*, 926 F.3d 395, 397 (7th Cir. 2019). Indeed, because "de novo review is compelled, no form of appellate deference is acceptable." *Oneida Tribe of Indians of Wis. v. State of Wis.*, 951 F.2d 757, 760 (7th Cir. 1991). Reviewing the complaint "in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor," the "issue is not whether a plaintiff will ultimately prevail but whether the [plaintiff] is entitled to offer evidence to support the claims." *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

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reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 7, 2020).

Second, this Court's review comes at a time when shutdown-related business interruption litigation remains in its early stages. Among the trial-level decisions to date in state courts—where the judiciary is well-versed in applying the state law that governs insurance policies—roughly one third have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[11] Many federal district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[12]

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[11] *See e.g.*, Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/ (last accessed September 23, 2021); *JDS Constr. Grp., LLC v. Cont'l Cas. Co.*, 2021 WL 4027824 (Ill. Cir. Ct. Aug. 12, 2021); *Snoqualmie Ent. Auth. v. Affiliated FM Ins. Co.*, 2021 WL 4098938 (Wash. Super. Ct. Sept. 3, 2021); Minute Order, *Nev. Prop. 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B (Nev. Dist. Ct. Aug. 16, 2021); *Santino, LLC v. Society Ins. Co.*, 2021 WL 2288231 (Wis. Cir. Ct. Mar. 1, 2021); Tr. Dec., *Colectivo Coffee Roasters, Inc. v. Society Ins. Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Jan. 29, 2021), Dkt. 71 ("*Colectivo* Tr."); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); *MacMiles, LLC v. Erie Ins. Exch.*, 2021 WL 3079941 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Ross Stores, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 3700659 (Cal. Super. Ct. July 13, 2021); *Queens Tower Rest. Inc. v. Cincinnati Fin. Corp.*, 2021 WL 456378 (Ohio Ct. C.P. Jan. 7, 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).

[12] *See, e.g.*, *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 4302834 (W.D. Mo. Sept. 21, 2021); *Urogynecology Specialist of Fla.*

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

More troubling, many decisions may be the result of a self-fulfilling feedback loop premised on what appears to be the application of federal common law on business interruption insurance. But no such law exists—state law controls these questions. Many courts also improperly rely on a treatise that erroneously describes requiring "*physical alteration*" as the "widely held" majority rule, when the majority have long taken the opposite view. *See* Masters, Kozak, Greenspan & Lewis, *Couch's "Physical Alteration" Fallacy*, 56:3 Tort, Trial & Ins. Practice L.J. (Am. Bar Ass'n forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3916391. Likewise, many courts have relied on *Eljer* as requiring "an alteration in appearance, shape, color or other material dimension," but the policy there defined "physical damage" as a "physical injury to tangible property." 197 Ill. 2d at 287, 301-02. By contrast, standard-issue policies like the one here have no such definition.

LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *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); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 513 F. Supp. 3d 808 (N.D. Ohio 2021); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021).

Rather than tally decisions by other courts or follow their faulty reasoning, this 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 alleged executive orders caused physical loss, after granting motion to dismiss initial complaint). While insurers "can cite decisions where courts" adopt their position, "[s]ome of them merely note that claimants haven't even alleged physical damage using the words 'physical.' Others go further. The virus damages lungs not property, they say. But can this merely be asserted to become true? … Pointing to scientifically unsupported conclusions from other courts isn't enough." Mem. Dec., *New Castle Hotels LLC v. Zurich Am. Ins. Co.*, No. X07-HHD-CV-21-6142969-S, at 5, 6 (Conn. Sup. Ct. Sept. 7, 2021).[13]

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts 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

[13] The federal appellate decisions to date are not to the contrary, as each focuses on the specific allegations at issue and is necessarily limited to those allegations. *See Oral Surgeons, P.C. v. The Cincinnati Ins. Co.*, 2 F.4th 1141, 1145 & n.2 (8th Cir. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. The Cincinnati Ins. Co.*, ---F. App'x---, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2021 WL 4304607, *3-4 (6th Cir. Sept. 22, 2021). *See also K.C. Hopps*, 2021 WL 4302834, at *6-8 (distinguishing *Oral Surgeons* and finding "'physical loss' or 'physical damage' under the Policy not only includes actual, tangible physical alteration of the property, but also includes physical contamination which renders the property unsafe").

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

This Court faces a similar task in interpreting the meaning of the policy here. Based on the undisputed policy-interpretation principles that govern—and recognizing that many state and federal courts have found plaintiffs stated business interruption claims—this Court is on solid ground in concluding that Plaintiff's allegations meet the industry-standard physical loss or damage requirement, that no policy exclusions apply, and that the judgment below should be reversed.[14] This Court should conclude that coverage is available under the plain meaning of the terms of the policy, as a layperson would understand them.

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

Melcorp alleges that its property suffered physical loss, was materially impaired, and was no longer functional as intended after a series of executive orders

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[14] *See Colectivo* Tr. at 38-39 ("I think the fact that there are so many different cases that each party has been able to find simply demonstrates that … that the issues around the nature of the policy language here and the particular facts present here are such that the case is not amenable to decision on a motion to dismiss."). The *Colectivo* case is currently pending before the Wisconsin Supreme Court. *See* No. 2021AP463 (Wis.).

issued starting in March 2020. *See* Melcorp Br. at 6-7. WAIC, like other insurers, has insisted that the executive orders that impaired policyholders' property have not caused physical "loss or damage." WAIC, like other insurers, further contends that only events like hurricanes and fires trigger business interruption coverage. But those positions are 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 Illinois law, policy provisions and exclusions are "to be construed liberally in favor of the insured and 'most strongly against the insurer.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Glenview Park Dist.,* 158 Ill. 2d 116, 122 (1994); *see Phusion Projects, Inc. v. Selective Ins. Co.,* 2015 IL App (1st) 150172, ¶¶ 38-40. A "policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific." *Gillen*, 215 Ill. 2d at 393.

Critically, the policyholder is entitled to coverage so long as its interpretation is reasonable, even if it is not necessarily the only interpretation. *See Outboard*, 154 Ill. 2d at 108-09. "[I]f a provision of the insurance policy can reasonably be said to be ambiguous, that provision will be construed in favor of the insured." *Abrams v. State Farm Fire & Cas. Co.*, 306 Ill. App. 3d 545, 549 (1st Dist. 1999). A provision of an insurance policy is "ambiguous" if "the words … are susceptible to more than one reasonable interpretation." *Outboard*, 154 Ill. 2d at 108.

When construing an insurance policy, a court gives undefined terms their "plain and ordinary" meaning. *Gulino*, 2012 IL App (1st) 102429, ¶ 18. A phrase's "plain and ordinary meaning" is "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business [person], or to a lay[person]." *Eljer*, 197 Ill. 2d at 301. Such a meaning "can be derived from a dictionary." *Gulino*, 2012 IL App (1st) 102429, ¶ 18. "[I]f a term has multiple dictionary definitions, it is ambiguous." *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 43. Definitions should not be derived from arcane legal sources or other materials that "most people" would not consult. *See Eljer*, 197 Ill. 2d at 301.

Here, the plain language of the policy supports finding coverage for physical loss or damage caused by executive orders that physically impaired property. WAIC agreed to pay for "direct physical loss of or damage" to covered property. The policy provides coverage if the policyholder shows physical loss of **or** damage to property. "The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.'" *In re Society Ins. Co.*, 2021 WL 679109, at *8-10. To read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage." *Id.*[15]

[15] *See also Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3-5; *Henderson Rd.*, 513 F. Supp. 3d at 821-23; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6.

Had WAIC wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly. "If an insurer relies on an exclusionary provision, it must be clear and free from doubt that the provision prevents coverage." *Bozek v. Erie Ins. Grp.*, 2015 IL App (2d) 150155, ¶ 20. But WAIC chose not to do either, despite knowing these terms can reasonably be construed (and indeed have been construed by courts) more broadly than the narrow reading WAIC favors. Each of those terms must therefore be given its plain and ordinary meaning, consistent with the knowledge and expectations of an ordinary, reasonable consumer, and construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[16] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[17] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

For many restaurants, that was exactly what happened when executive orders imposed real, detrimental, physical alterations to their spaces and barred access to the property—banning or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The executive orders "deprived" Melcorp and other restaurants of property in a way that is perceptible

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

[17] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed July 5, 2021).

through the senses because they no longer possessed the same rights to their property and large swaths of their property were rendered non-functional.

The district court erred in finding otherwise based on its improper conclusion that Melcorp only alleged "loss of use of its property" due to the Closure Orders rather than a physical loss. Melcorp Br. A-4. The district court glossed over Melcorp's allegations and improperly found that Melcorp did not show a physical alteration to the condition or location of Melcorp's property. *Id.* at A-5. However, Melcorp made such allegations of physical changes to its property—allegations which other courts have relied on in finding policyholders have stated claims.[18]

Reasonable policyholders would understand that interposing physical barriers within a restaurant, blocking off physical space, and detrimentally changing property in other physical ways constitute physical alterations and impair a restaurant's function. Likewise, reasonable policyholders would understand that property is non-functional when contaminated with a dangerous substance. Therefore restaurants have suffered physical "loss or damage" as a result of executive orders or COVID-19.

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 what "the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and

[18] *See Colectivo* Tr. at 43-44 (noting that losing a dining room via executive order constitutes a physical loss).

ordinary understanding, to a business [person], or to a lay[person]." *Eljer*, 197 Ill. 2d at 301. Plain and ordinary 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 Melcorp has sufficiently alleged as a matter of fact that the relevant executive orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. Melcorp should be able to test whether it can offer evidentiary support to obtain a jury verdict in its favor.

B. Recent and Longstanding Precedent Supports Reversal.

In reversing the judgment below, this Court will be squarely within the mainstream of recent coverage decisions that have found restaurants and other businesses adequately alleged that they suffered physical "loss of or damage" to property as a result of state and local executive orders or COVID-19.

Several powerful examples come from the Northern District of Illinois, where two 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"). Those 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"). The fact that restaurants could physically alter their property to mitigate losses and restore lost function evidences that they have suffered *physical* loss or damage as a result of executive orders:

> Another way to understand the physical nature of the loss inflicted by the shutdown orders is to consider how a restaurant might mitigate against the suspension of operations caused by, say, a 25%-capacity limitation on the number of guests inside the restaurant. If the restaurant could expand its *physical* space, then the restaurant could serve more guests and the loss would be mitigated (at least in part). The loss is physical—or at the very least, a reasonable jury can make that finding.

Society, 2021 WL 679109, at *9 (rejecting Society's argument that the policy's "period of restoration" implies a limit on coverage as opposed to a time period).

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 513 F. Supp. 3d 808 (N.D. Ohio 2021). Applying policy-interpretation principles like those in Illinois, the district court granted summary judgment for the policyholder and found that executive 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 820.

Courts around the country have come to similar conclusions. In *Seifert v. IMT Insurance Co.*, the Chief Judge of the District of Minnesota denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully

occupying and controlling the premises to provide services within it." 2021 WL 2228158, at *4-5.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, a district court in Virginia denied an insurer's motion to dismiss, explaining that if the insurer "wanted to limit liability of 'direct physical loss' to strictly require structural damage to property, then [insurers], as the drafters of the policy, were required to do so explicitly." 2020 WL 7249624, at *6-10 (E.D. Va. Dec. 9, 2020).

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, a state court in North Carolina reasoned that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world." 2020 WL 6281507, at *3 (N.C. Sup. Ct. Oct. 9, 2020). 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 executive orders that forbade the policyholders from "putting their property to use for the income-generating purposes for which the property was insured." Granting summary judgment to the plaintiff, the court then concluded that "direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered."

Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *supra* notes 11, 12.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," resulting from a landslide. *Hughes v. Potomac Ins. Co. of D.C.*, 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."

Similarly, in *Murray v. State Farm Fire & Casualty Company*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further rockfalls. 203 W.Va. 477, 481, 493-93 (1998). The insurer argued that, while the policies might cover damage to homes hit by rocks, they "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 492-93. The West Virginia Supreme Court disagreed, reasoning that "'[d]irect

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

The court continued: the insured properties "were homes, buildings normally thought of as a safe place in which to dwell or live" but until the risk of rockfalls abates, "plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *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." *Id.*[19]

Melcorp has alleged its insured property suffered "direct physical loss" and has been rendered materially non-functional as a result of executive orders. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional, in whole or in part, and can no longer serve customers on premises as intended.

This Court should hold that, when evaluating the sufficiency of such allegations of physical loss or damage caused by executive orders or COVID-19

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[19] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss" when "a building's function may be seriously impaired or destroyed").

that imposed material, detrimental, physical alterations to a plaintiff's property, Illinois courts should liberally construe plaintiff's allegations and properly apply Illinois policy-interpretation principles. Under those well-established standards, this Court should conclude that Melcorp has stated a claim by alleging executive orders or COVID-19 caused physical loss or damage to property and that no policy exclusion precludes coverage.

CONCLUSION

The judgment below should be reversed.

September 27, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Seventh Circuit Rule 29 because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: September 27, 2021

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

CERTIFICATE OF SERVICE

I, Gabriel K. Gillett, an attorney, hereby certify that on September 27, 2021, I caused the foregoing **Brief of the Restaurant Law Center and Illinois Restaurant Association as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF procedure (h)(2) and circuit rule 31(b), and upon notice of this court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the **Brief of the Restaurant Law Center and Illinois Restaurant Association, as *Amici Curiae* In Support of Plaintiff-Appellant and Reversal** to be transmitted to the court via UPS overnight delivery, delivery fee prepaid within five days of that date.

/s/*Gabriel K. Gillett*
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