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No. 1-21-0105

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAEWOOK LEE, D/B/A EVANSTON GRILL Individually and on behalf of a class of similarly situated individuals, *Plaintiff-Appellant*, v. STATE FARM FIRE AND CASUALTY COMPANY *Defendant-Appellee*.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 2020 CH 04589 The Honorable Allen Price Walker, presiding Notice of Appeal: February 3, 2021

MOTION OF THE RESTAURANT LAW CENTER AND ILLINOIS RESTAURANT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Rules 345 and 361 of the Illinois Supreme Court, the Illinois Restaurant Association and Restaurant Law Center respectfully request that this Court grant leave to file the accompanying brief *Amici Curiae* in support of Plaintiff-Appellant Jaewook Lee d/b/a Evanston Grill. In support of this Motion, *Amici* state as follows:

1. This matter involves a matter of critical importance to *Amici*: whether their members are entitled to insurance coverage for business interruptions caused by government-mandated closures issued by state and local governments in their efforts to protect public health.

2. *Amicus* the Illinois Restaurant Association (the "IRA") is the leading non-profit trade organization for restaurants in Illinois that collectively represents nearly 8,000 members

statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry. The Illinois restaurant industry collectively includes more than 25,000 restaurant owners and operators that, prior to the pandemic, employed nearly 600,000 workers across the state. The IRA is committed to supporting the restaurant industry by promoting local tourism in Illinois, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for its members' interests.

3. *Amicus* the Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association, comprising over one million restaurants and employing over 15-million people. The Law Center provides courts with the industry's perspective on legal issues and highlights the wide-ranging consequences of pending cases like this one, through regular participation in *amicus* briefs on behalf of the industry and its members.

4. Together, *Amici* have a significant and strong interest in supporting and representing the state's legendary restaurant industry, including large franchises, family-run neighborhood restaurants, fine dining establishments, and fast-casual diners. Collectively, *Amici*'s members contribute billions of dollars in annual revenue to the Illinois economy and, prior to the pandemic, provided hundreds of thousands of good jobs to people across the state.

5. *Amici* have a paramount interest in this case, which has wide-ranging implications for the restaurant and hospitality industry. The number one priority of the restaurant industry is to provide a safe and healthy environment for guests and employees. The industry has faithfully and diligently followed governmental orders and health authority guidelines, and adapted their business models, where necessary, to ensure that diners and workers remains safe.

6. Restaurants have suffered extraordinary losses due to the events of the last sixteen months. Some of these losses were caused by governmental orders and should have been covered by the comprehensive business insurance policies carried by so many of our members.

7. *Amici*, therefore, submit this brief to encourage the Court to reverse the decision below and to provide additional context to help the Court as it considers this case. In particular, *Amici* write to inform the Court of the critical importance of the restaurant and hospitality industry in Illinois; the dire economic challenges the industry is currently facing—including as a result of the shutdown orders that have harmed their businesses; and why it is absolutely critical to the survival of the restaurant industry for restaurants to obtain the insurance coverage to which they are entitled so that they can bounce back and provide the stability, energy, and opportunity that they bring to communities across the state.

8. *Amici* respectfully state that their expertise and perspective will inform this Court on issues directly raised and/or implicated by this case.

For these reasons, *Amici* submit that the brief *Amici Curiae* submitted contemporaneously with this motion will assist the Court and respectfully requests that the Court grant leave to file this *Amici Curiae* brief.

Dated: July 15, 2021

Respectfully submitted,

/s/ Matthew Thomas Dattilo

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JAEWOOK LEE, D/B/A EVANSTON GRILL Individually and on behalf of a class of similarly situated individuals, *Plaintiff-Appellant*, v. STATE FARM FIRE AND CASUALTY COMPANY *Defendant-Appellee*.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 2020 CH 04589 The Honorable Allen Price Walker, presiding Notice of Appeal: February 3, 2021

PROPOSED ORDER

THIS CAUSE coming to be heard on the Motion for the Illinois Restaurant Association and Restaurant Law Center for Leave to File a Brief as *Amici Curiae* in Support of Plaintiff-Appellant, due notice been given and the Court being fully advised:

IT IS HEREBY ORDERED that said motion is: ALLOWED / DENIED.

Dated: Entered:

_____
JUDGE

Prepared by:

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

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INTEREST OF *AMICUS CURIAE*

Amicus Restaurant Law Center (the "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 employment group. Through regular participation in *amicus* briefs on behalf of the industry, the Law Center provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

Amicus Illinois Restaurant Association (the "IRA") 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 that includes more than 25,000 restaurant owners and operators, and has employed nearly 600,000 workers 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 its members' interests.

Amici and their members have a significant interest in the important issues raised by this case. Many businesses in the restaurant industry have sought business interruption

coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented executive shutdown orders. Many of those restaurants have been unreasonably and categorically denied coverage on the basis that they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders. Therefore, although whether Plaintiff-Appellant Jaewook Lee d/b/a Evanston Grill[1] has stated a claim for coverage depends on the specific factual allegations in its pleadings, *amici* and their members have a strong interest in highlighting for the Court why certain issues raised in this appeal are important to the broader restaurant industry as a whole.

SUMMARY OF ARGUMENT

Amici write to provide this Court—which is among the first appellate courts in the country to address these issues—with additional context about this case, practical perspectives on potential outcomes, and to emphasize how restaurant and foodservice companies have suffered physical loss or damage as a result of executive shutdown orders.

I. The restaurant industry is a significant sector of the 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.

[1] For ease of reference, *Amici* will hereinafter refer to Plaintiff-Appellant as "Evanston Grill" and Defendant-Appellee State Farm Fire & Casualty Company as "State Farm."

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. Restaurant owners bought this insurance believing that it would cover income lost as a result of physical loss or damage to their property, as they understood those plain, ordinary, everyday words to mean.

Yet when the Governor of Illinois and others issued executive orders that caused precisely what these restaurant owners believed to be physical loss or damage to property—by denying or limiting access to and use of physical property, detrimentally reducing physical property, imposing physical changes, and materially impairing physical spaces that rendered property nonfunctional for its intended purposes—insurers denied coverage without legitimate justification. Facing catastrophic losses, hundreds of restaurants have already closed and countless more will be forced to close—*permanently*. Accordingly, restaurants have turned to the courts to obtain the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. That is especially appropriate here. The circuit court committed some of the same interpretive and analytical errors as the cases it relied on and failed to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them. In addition, many other trial courts—both within Illinois and across the country in state and federal cases—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 as a result of executive shutdown

orders. As courts have done in other hotly contested insurance coverage cases, this Court should thus review the allegations of the complaint as well as the policy language, apply longstanding principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. This Court should reverse the circuit court's decision. 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 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). "Plain and ordinary" terms require no judicial redefinition: they are to be construed according to what a reasonable consumer would expect. Importantly, a court should not inject extrinsic terms or conditions into the policy. Finally, a provision susceptible to more than one reasonable interpretation is ambiguous and should be construed in accordance with a policyholder's reasonable expectations of coverage.

Evanston Grill's policy provides coverage for all "accidental direct physical loss to Covered Property unless the loss is . . . excluded." (C. 12) The Policy provides further coverage under Loss of Income and Extra Expense provisions when an insured's "operations" are "suspended." (C. 10-11)

Evanston Grill has alleged as a matter of fact that "as a result of the Closure Orders, [it] suffered substantial Business Income losses and incurred Extra Expense." (C. 9) Evanston Grill did not allege any loss as a result of the virus being physically on the property.

Many other state courts have found a restaurant's materially similar allegations and executive-mandated restrictions on physical property qualify as direct physical loss or damage for purposes of stating a claim for coverage. Those rulings are consistent with longstanding precedent across the country holding that a property may be physically lost or damaged when it is rendered nonfunctional for its intended purpose or when its appearance or form is altered.

The circuit court reached a different conclusion because Evanston Grill had not alleged the restaurant "suffered 'an alteration in appearance, shape, color or other material dimension' as a result of the Closure Orders." (Order at 5-6.) But those added words appear nowhere in the policy and reasonable consumers would not expect the policy that covers "loss" to include such a requirement. Moreover, a reasonable consumer would understand that an insurer's agreement to cover "loss" would include protection if an insured lost the ability to use property that was previously usable. (*See id.* at 5) Yet, the executive shutdown orders did just that, as the circuit court recognized. The circuit court thus erred by reading the policy to preclude coverage and by dismissing Evanston Grill's claim.

ARGUMENT

I. Restaurants Are Critical To Illinois's Economy And Culture, And Sought Insurance Coverage To Help Survive Unprecedented Hardship.

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

The restaurant and foodservice industry is the lifeblood of Illinois's 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 was expected to employ nearly 7% more people over the next decade.[2]

Consumer spending at restaurants has a multiplier effect, too. Every dollar spent at table-service restaurants—among the businesses most damaged by the state's shutdown orders—returns approximately two dollars to the state's economy, not to mention the positive impact on the state's tax revenue.[3] A single restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[4] That is certainly the case in Illinois, where ample and diverse dining opportunities drive tourism across the state.

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization.[5] Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a 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 Chicago*, 2019 IL 123123, ¶ 18. That is true of 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.*

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

[3] Nat'l Restaurant Ass'n, *Illinois Restaurant Industry at a Glance* (2019), https://restaurant.org/downloads/pdfs/state-statistics/illinois.pdf.

[4] 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), https://media-cdn.getbento.com/accounts/cf190ba55959ba5052ae23ba6d98e6de/media/EmH1JsVMRNylmKAeF2FJ_Report.pdf.

[5] *Id.* at 13.

Indeed, 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.[6] Restaurants also provide opportunities for historically disadvantaged communities. There are more women and minority managers in the restaurant industry than in any other industry,[7] and restaurants provide opportunity for immigrants to the United States to work and also own their own businesses.[8]

The past successes of the restaurant industry are neither self-sustaining nor guaranteed. In the last twelve months, nationwide restaurant and foodservice sales were "down $270 billion from expected levels."[9] Compared to February 2020, the industry has lost millions of employees—reflected in decreased employment in every single state and the District of Columbia.[10] As of late 2020, 17% of restaurants nationwide—more than 110,000 establishments—were closed permanently or long-term.[11] Those restaurants had, on average, been in business for more than sixteen years. Thus, the restaurant industry's recovery is likely to be measured in years and not months.[12]

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[6] *Factbook, supra* note 4.
[7] *Id.*
[8] Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[9] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021), https://restaurant.org/articles/news/restaurant-sales-pulled-back-from-january.
[10] Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021), https://restaurant.org/articles/news/forty-states-and-dc-lost-jobs-in-january.
[11] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020), https://www.restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in.
[12] Nat'l Restaurant Ass'n, *Restaurant employment fell for the third consecutive month* (Feb. 5, 2021), https://www.restaurant.org/articles/news/restaurant-employment-fell-for-the-third-month.

Illinois restaurants have not been spared. Compared to February 2020, employment in Illinois restaurants is down more than 30%, representing over 140,000 jobs.[13] The numbers for independent restaurants are even starker.[14] These closures can be devastating to neighborhoods. Nearly 90% of adults say "restaurants are an important part of their community."[15] And the harm from closures reverberates through communities, impacting other local businesses and industries as well. As the National Restaurant Association put it, "[v]irtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[16]

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

Faced with unprecedented losses as a result of executive orders 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" commercial 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

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[13] Nat'l Restaurant Ass'n, *supra* note 12.

[14] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

[15] Bruce Grindy, *Consumers are Worried their Restaurants will not Survive the Pandemic*, Nat'l Restaurant Ass'n (Aug, 18, 2020), https://www.restaurant.org/articles/news/consumers-are-worried-restaurants-will-not-survive.

[16] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with.

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, or, in policies like State Farm's, when a restaurant suffers "accidental direct physical loss to Covered Property[,]" *e.g.* its premises. These policies provide business owners 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 that included business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed that 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 shutdown orders causing direct physical loss or damage, as policyholders understood those words to mean.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, are 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—whether as restaurants, bars, venues, or another type of food service business—and based on the type of dining offered, the available square footage at the outset of the policy period, and historical revenue data. Insurance premiums 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 restricted physical access to and use of restaurant premises and required restaurants to make physical, detrimental alterations that would enforce social distancing mandates but materially reduce the functionality of their premises. In barring on-premises dining, the executive orders caused the loss of millions of square feet of vibrant physical space that once served guests. Social distancing requirements imposed on restaurants dispossessed them of their tangible spaces and forced very real, material detrimental physical changes and alterations to their premises. Dining rooms closed or limited. Areas blocked off. Barriers erected. Physical layout altered. Fixtures and furniture removed. Self-service stations eliminated. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials were frequently rapid, featuring boilerplate language asserting that coverage was excluded because the restaurant supposedly has not satisfied the

industry-standard physical loss or damage requirement. Those denials follow the telegraphed statements by insurers and trade groups.[17] Those denials were also frequently issued without meaningful (if any) investigation, regardless of the information provided by the policyholder.

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

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

This Court should closely scrutinize the policy language, apply longstanding principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so here, for three reasons.

First, "[t]he construction of insurance policies is a matter of law subject to *de novo* review." *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 308 Ill. App. 3d

[17] 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 "a widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Insurance Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, MDL 2964, Docket No. 20 C 5965, — F. Supp. 3d —, 2021 WL 679109, at *4 (N.D. Ill. Feb. 22, 2021). In early April 2020, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, *APCIA Releases New Business Interruption Analysis* (Apr. 7, 2020), https://insurancenewsnet.com/oarticle/american-property-casualty-insurance-association-releases-new-business-interruption-analysis.

597, 599, 720 N.E.2d 622, 624 (1999), as modified on denial of reh'g (Dec. 3, 1999). "A trial court's decision on a motion to dismiss a complaint is reviewed de novo, without deference to the trial court's rulings." *In re Parentage of A.H. v. Harlow H.*, 2017 IL App (1st) 133703, ¶ 21, 69 N.E.3d 902, 907. Furthermore, "the construction, interpretation, or legal effect of a[n insurance] contract is a … question of law" which appellate courts review *de novo*. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 129, 835 N.E.2d 801, 821 (2005); *citing Hessler v. Crystal Lake Chrysler–Plymouth, Inc.*, 338 Ill. App. 3d 1010, 1017, 273 Ill. Dec. 96, 788 N.E.2d 405 (2003). "On appeal, the reviewing court must accept all well-pleaded facts in the pleading as well as any reasonable inferences arising from them." *In re Application for a Tax Deed*, 2021 IL 126150, ¶ 17. A motion to dismiss can only be granted if the Court determines "that the plaintiff would not be entitled to recover under any possible set of facts." *Id.* 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).

Second, this Court's review of the important issues in this case comes at a time when shutdown-related business interruption litigation is in its early stages. As of the week ending June 28, 2021, a total of 1,937 business interruption lawsuits have been filed, with only a small fraction decided to date. *See* Penn Law, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/cclt-case-list/ (last visited July 13, 2021). Nationally, policyholders have fared much better in state court than in federal court.[18]

[18] According to the Penn Law Covid Coverage Litigation Tracker, of the 83 dispositive motions decided to date in state court, 46 of them (55%) have resulted in a full dismissal with prejudice, while in the remaining 37 cases (45%), courts have denied dispositive motions brought by insurers entirely or in part, or have allowed the plaintiff(s) leave to amend to reflect the ruling. https://cclt.law.upenn.edu/. Contrast this with 358 dispositive

The federal courts have overlooked important differences in factual allegations. Many federal decisions have failed to apply the reasonable-interpretation rule and other basic rules of insurance policy interpretation—including by redefining the policy language based on extrinsic case law or arcane legal publications that ordinary people would never consult. Yet other decisions appear to be the result of a reflexive, self-fulfilling feedback loop. As an example, an early yet unremarkable federal court decision has already been cited more than fifty times—even though it was unreported, not particularly detailed or persuasive, and had not yet 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.); *see also Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690 (N.D. Ill. 2020). It is therefore all the more important for this Court to carefully consider the issues here, liberally construe the complaint's allegations, and apply core policy-interpretation principles in determining whether a claim has been stated.

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 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). This Court, commenting on the numerous disputes that had arisen over the

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motions decided in federal court to date: 299 have resulted in full dismissal with prejudice (83.5%), 32 cases resulted in full dismissal without prejudice (8.9%), five more resulted in partial dismissal with prejudice (1.4%) and only 22 of the motions have been denied (6.1%). *Id.*

term "sudden" in insurance policies, found the volume of disagreement alone "reflect[ed] an inherent ambiguity caused by the use of the word sudden." *St. Paul Fire & Marine Ins. Co. v. Lefton Iron & Metal Co., Inc.*, 296 Ill. App. 3d 475, 486, 694 N.E.2d 1049, 1057 (1998). The Supreme Court agreed several years later, finding the term "sudden" ambiguous, as used in the pollution exclusion, in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 120, 607 N.E.2d 1204, 1218 (1992).

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

The different districts of this Court face a similar task in interpreting the meaning of the industry-standard physical loss or damage requirement as cases involving different insurance carriers and different policy terms are presented for review. The very real disagreement among trial courts about whether plaintiffs have stated a claim merely reinforces that this Court is on solid ground in reversing the decision below. This Court should conclude that the plain meaning of the undefined term "physical loss"—as a normal layperson would understand it—covers losses allegedly incurred as a result of executive shutdown orders that limited access and use and imposed material physical alterations on restaurants.

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

As a result of a series of executive orders issued by Governor Pritzker in March 2020, Evanston Grill's property was unusable and uninhabitable as a restaurant. (*See* C. 5)

State Farm, like other insurers, has insisted that the shutdown orders that impaired policyholders' property have not caused physical "loss" to property. State Farm, like other

insurers, further contends that "loss" required an alteration in "appearance, shape, color, or in other material dimension" to trigger business interruption coverage. (C. 126) But State Farm's position is inconsistent with the policy's language and foundational principles for interpreting it. State Farm's position is also contrary to both historical and recent precedent. The circuit court was therefore wrong to dismiss the complaint.

A. Policy Language And Policy-Interpretation Principles Support Reversing The Decision Below.

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) (citation omitted); *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 v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 393 (2005).

"[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 Marine Corp. v. Liberty Mut. Ins. Co*., 154 Ill. 2d 90, 108 (1992).

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]," *Travelers Ins. Co.*, 197 Ill. 2d at 301 (citation omitted). Such a meaning "can be derived from a dictionary." *Gulino*, 2012 IL App (1st) 102429, ¶ 18. It should not be derived from arcane legal sources or other materials that "most people" would not consult.

In this case, coverage and benefits attach to "physical loss to Covered Property."[19] The term "physical loss" is not defined in the policy. (C. 79-81) The poor grammar and syntax of this provision immediately give rise to ambiguity. As commonly used, the word "loss" is almost always paired with the preposition "of" – *e.g.*, loss *of* property, loss *of* income, loss *of* privilege. On the rare occasions when loss is followed by the preposition "to" it refers to losses (often intangible or emotional) experienced by people and institutions – *e.g.*, for example, referring to the death of a community leader as a loss *to* the community. Thus, it is not clear what "physical loss to Covered Property" means. Under these circumstances, the words must be given their plain and ordinary dictionary meanings consistent with the knowledge and expectations of an ordinary, reasonable consumer—not an expert steeped in insurance law and practice.

Here, construing its allegations in the most favorable light, Evanston Grill has met its burden to plead that it has suffered direct physical "loss" to property consistent with the plain and ordinary meaning of those terms. Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[20] Loss is

[19] Unlike many policies issued by State Farm's peers, the policy refers only to "loss" and not to "damage." Many other courts are currently hearing appeals involving coverage for "loss of or damage to" provisions, in which insurers are arguing that "loss" and "damage" are essentially the same. That question is not presented here and should not be resolved here.

[20] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed Apr. 1, 2021).

defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[21] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world. Indeed, Evanston Grill has been "deprived" of its property in a way that is perceptible through the senses because, during the effective period of the executive orders, Evanston Grill no longer possessed the same rights to its property as it did before large sections of its property had been rendered non-functional.

The circuit court erred in finding otherwise. The circuit court read caselaw to require a plaintiff to plead that the property had "suffered 'an alteration in appearance, shape, color or other material dimension'" to state a claim. (Memorandum Opinion and Order, "Order" at 5-6.) But that requirement is derived from the Supreme Court's interpretation of policy terms in a Travelers insurance policy that defined "physical damage" as a "physical injury to tangible property" – terms that do not appear in any relevant portion of the policy disputed here. Evanston Grill submits that no reasonable policyholder would have understood "loss" to require "damage" and further to require "physical alteration" to the structure of the premises as the only basis for receiving the coverages provided under the policy.

By contrast, reasonable policyholders would understand that restricting access to and use of property is a material loss and interposing barriers, blocking off physical space, and changing property in other material physical ways to comply with social distancing requirements constitutes physical alterations. Therefore, even under the district court's

[21] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last accessed Apr. 1, 2021).

(mis)interpretation of the meaning of the policy language, restaurants have suffered physical "loss" as a result of executive shutdown orders.

Policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. A policy term means 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 ordinary understanding, to a business [person], or to a lay[person]." *Travelers Ins. Co.*, 197 Ill. 2d at 301. Plain and ordinary policy terms require no judicial redefinition or clarification.

The language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that Evanston Grill has sufficiently alleged as a matter of fact that the executive orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. Evanston Grill's case against State Farm should proceed and ultimately test whether Evanston Grill can provide sufficient evidentiary support for its claims to obtain a jury verdict in its favor.

B. Precedent Supports Reversing The Decision Below.

In reversing the judgment below, this Court will be within the mainstream of coverage decisions nationally that have found restaurants and other businesses adequately alleged that they suffered physical loss or damage as a result of executive shutdown orders.

Top of mind are two recent decisions from the U.S. District Court for the Northern District of Illinois. Judge Chang, presiding over an MDL involving claims against Society Insurance, denied Society's motion to dismiss under the law of Illinois and other states. *In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2021 WL 679109, at *1

(N.D. Ill. Feb. 22, 2021). The court found that plaintiffs "need not plead or show a change to the property's physical characteristics," because the policies at issue covered "loss" in addition to "damage." *Id.* at *8. The court further reasoned that a jury could find plaintiffs suffered physical losses because the shutdown orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Id.* at *9.

Similarly, in *Derek Scott Williams PLLC v. Cincinnati Insurance Co.*, Judge Kennelly denied a motion to dismiss business interruption claims in a putative class action against Cincinnati Insurance. Case No. 20 C 2806, — F. Supp. 3d —, 2021 WL 767617, at *1 (N.D. Ill. Feb. 28, 2021). Applying Texas law (though noting no "appreciable difference" among the law of the various states), the court found that Cincinnati's proposed interpretation "writes the term 'loss' out of the definition, which contradicts the basic principle that 'each word [in a contract] has some significance and meaning.'" *Id.* at *3-4 (citation omitted). The court was "persuaded" that a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of [plaintiff's] business premises." *Id.*

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, Case No: 1:20 CV 1239, — F. Supp. 3d —, 2021 WL 168422 (N.D. Ohio Jan. 19, 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 *10.

Courts around the country have come to similar conclusions. In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, a district court in Virginia denied State Farm's motion to dismiss a claim for business income coverage under a policy that required a "direct physical loss," explaining that the term's meaning was ambiguous because "if Defendants 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." Civil Action No. 2:20-cv-265, 506 F.Supp.3d 360, 2020 WL 7249624, at *6-10 (E.D. Va. Dec. 9, 2020).

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court, applying policy interpretation principles like Illinois', 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." No. 20-CVS-02569, 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" 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.*, *Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 796, 801 (W.D. Mo. 2020) (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").

These cases favoring policyholders are consistent with longstanding precedent across the country. For example, more than fifty years ago, a California appellate court considered the case of a couple whose home was left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," the result of a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (1962), abrogated in part, on other grounds, by Cal. Ins. Code § 532 (West). The insurer argued the policy only insured the house itself not the land underneath it. *Id.* at 245-46. The court rejected that argument, reasoning that it would "render the policy illusory." *Id.* at 248-49.

To accept the insurer's argument, the court held, "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.*, the Supreme Court of West Virginia considered a case where large boulders had fallen from a man-made

highwall onto two homes, leaving the homes of two other plaintiffs at risk of further rockfalls. 203 W. Va. 477 (1998). The insurer argued that, while the policies might cover the damage to those homes actually 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 court reasoned that "'[d]irect physical loss' provisions require only that a covered property be injured, not destroyed." *Id*. at 493 (citation omitted).

The court continued: the insured properties "were homes, buildings normally thought of as a safe place in which to dwell or live …. The record suggests that until the highwall on defendant Harris' property is stabilized, the plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* It therefore held that the "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.*[22]

Evanston Grill has alleged that its insured property suffered direct "physical loss" and was been rendered non-functional as a restaurant. By drawing heavily from the Supreme Court's ruling in *Travelers*–which turned on different and defined policy terms—

[22] *See also, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12–cv–04418 (WHW)(CLW), 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 because covered properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, Case No. 1:15-cv-01932-CL, 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"), vacated by joint stipulation in *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.,* No. 1:15-CV-01932-CL, 2017 WL 1034203, at *1 (D. Or. Mar. 6, 2017).; *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss to property under an all-risk insurance policy" when "a building's function may be seriously impaired or destroyed").

the circuit court erred. Under the terms of State Farm's policy, Evanston Grill suffered physical loss when it was forced to close and significantly limit the use of its premises. To the extent that Evanston Grill physically altered its premises to conform to the social distancing mandates of applicable government orders when it was permitted to re-open, those changes represent physical loss too. Just like a home suffers physical loss when it is uninhabitable, a restaurant suffers physical loss when it is rendered non-functional and can no longer serve customers on premises as intended.

This Court should conclude that Evanston Grill has sufficiently stated a claim by alleging the executive orders caused "physical loss" of its property and rendered the property non-functional for its intended purpose.

CONCLUSION

The judgment below should be reversed.

Dated: July 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345(b), 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 6,625 words.

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAEWOOK LEE, D/B/A EVANSTON GRILL Individually and on behalf of a class of similarly situated individuals, *Plaintiff/Appellant*, v. STATE FARM FIRE AND CASUALTY COMPANY *Defendant/Appellee*.	Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 2020 CH 04589 The Honorable Allen Price Walker, presiding

NOTICE OF FILING

To: *See* Attached Certificate of Service

PLEASE TAKE NOTICE that on July 15, 2021, I caused the foregoing **Motion For Leave To File A Brief *Amici Curiae* In Support Of Plaintiff Appellant and Brief *Amici Curiae* In Support of Plaintiff-Appellant** to be electronically submitted to the Clerk of the Illinois Appellate Court, First Judicial District by using the Odyssey eFileIL system.

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CERTIFICATE OF SERVICE

I, Matthew Thomas Dattilo, an attorney, certify, that on July 15, 2021, I caused the foregoing **Motion For Leave To File A Brief *Amici Curiae* In Support Of Plaintiff-Appellant** and **Brief *Amici Curiae* In Support of Plaintiff-Appellant** to be submitted to the Clerk of the Illinois Appellate Court, First Judicial District, by using the Odyssey eFileIL system. Because of the suspension of First District Local Rule 22(e) due to the COVID-19 pandemic, paper copies of the file-stamped **Brief of *Amici Curiae* In Support Of Plaintiff-Appellant** will not be transmitted to the Court.

I further certify that on July 15, 2021, I caused one copy of the above-named motion and brief to be served upon counsel of record listed below via electronic mail properly addressed to the following:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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