No. 21-1203

United States Court of Appeals
For the Seventh Circuit

TJBC, INC.

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee,

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS
(HON. DAVID W. DUGAN)
No. 3:20-cv-00815-DWD

AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF DEFENDANT-APPELLEE THE CINCINNATI INSURANCE COMPANY AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1203

Short Caption: TJBC, INC. v. THE CINCINNATI INSURANCE COMPANY

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American Property Casualty Insurance Association

National Association of Mutual Insurance Companies

(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:

Robinson & Cole LLP, Crowell & Moring LLP, Zelle LLP

(3) If the party, amicus or intervenor 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, amicus' or intervenor's stock:

None

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

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Attorney's Signature: s/Wystan M. Ackerman Date: May 5, 2021

Attorney's Printed Name: Wystan M. Ackerman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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INTEREST OF *AMICI CURIAE*

Amicus AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA was formed in 2019 through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies write $412 billion in direct written premium and assumed reinsurance premium, representing nearly 60 percent of the U.S. property-casualty insurance market, including 67 percent of the commercial property insurance market. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and

reasoned development of law that affects its members and the policyholders they insure.

Amicus NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES ("NAMIC") is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner's insurance market and 53 percent of the auto market. Through its advocacy programs, NAMIC promotes public policy solutions that benefit its member companies and the policyholders they serve and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

The issues presented in this and similar cases pending in courts throughout the country that arise from coronavirus-related business income insurance claims will have a significant impact on APCIA's and NAMIC's members, their policyholders, and the property insurance marketplace as a whole. APCIA and NAMIC (collectively, "Amici") believe their unique national viewpoint will be useful to the Court in its analysis of the important issues before the Court.

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this amicus brief. [1]

SUMMARY OF ARGUMENT

Amici seek to fulfill the classic role of *amici curiae* by "[h]ighlighting factual, historical, or legal nuance glossed over by the parties," "[e]xplaining the broader regulatory or commercial context in which a question comes to the court," "[p]roviding practical perspectives on the consequences of potential outcomes," "[o]ffering a different analytical approach," and "[i]dentifying how other jurisdictions . . . have approached" aspects of the issue presented. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). First, Amici explain how the history and purpose of commercial property insurance policies further support the district court's decision. These policies provide important coverage for losses caused by such perils as fire, wind, hail, and vandalism. They do not—and were never intended to—provide coverage for economic losses untethered to physical loss or physical damage.

Second, Amici explain how public policy considerations support enforcing the insurance contract's straightforward terms. Imposing a new and retroactive extra-contractual risk on insurers would threaten insurer solvency and harm

[1] No party or its counsel authored this brief in whole or in part, or contributed money intended to fund preparing or submitting this brief. No other person contributed money intended to fund preparing or submitting this brief other than Amici and their counsel.

Illinois' insurance marketplace. Ignoring the plain language of these policies would open the floodgates to all manner of claims that these policies were never intended to cover. And it would subject insurers to overwhelming claim payment liability that would threaten their solvency and their ability to make good on promises made in existing insurance policies that policyholders rely on every day.

Third, Amici explain how, in addition to the reasons briefed by Defendant-Appellee The Cincinnati Insurance Company ("Cincinnati"), the legal theory proposed by Plaintiff-Appellant TJBC, Inc. ("Plaintiff" or "TJBC") improperly conflates or reorders the insurance policy's (the "Policy") specific requirements for coverage. The Policy requires that a Covered Cause of Loss cause "direct physical 'loss' to property," with loss defined as "accidental loss or damage," and that this in turn cause a suspension of the insured's operations, leading to business income losses. In effect, Plaintiff maintains that the limitation on the use of its restaurant/banquet hall during the pandemic is both the "direct physical loss" and the suspension of operations. But those are separate and distinct requirements, and the "direct physical loss" to property must *cause* the "suspension of operations."

Fourth, Amici explain how courts in Illinois and nationwide have rejected Plaintiff's arguments that dictionary definitions of words used in insurance policies or the existence of some minimal judicial disagreement (among hundreds of cases) renders a policy phrase ambiguous.

Fifth, Amici refute the Restaurant Law Center's central argument, explaining why deliberate physical alterations or reconfiguration of a premises for "social distancing" purposes do not trigger coverage. Such alterations do not constitute "direct physical loss" or "damage" to property caused by a covered cause of loss, do not cause the insured's suspension of operations, and do not satisfy the fortuity requirement.

Sixth, Amici respond to United Policyholders' ("UP") argument that a loss of legal rights to use property should trigger coverage under a property insurance policy, explaining how courts have consistently held that a defect in title, for example, is not direct physical loss of or damage to property.

Finally, Amici briefly explain how under the basic structure of an insurance policy, and as courts nationwide have held, the absence of a virus exclusion is irrelevant where a loss is outside the policy's grants of coverage.

This Court should affirm the district court's judgment.

ARGUMENT

I. The History and Purpose of Commercial Property Policies Further Support the District Court's Decision

As Cincinnati points out, property insurance policies provide coverage for losses resulting from a fire or windstorm, for example. (Appellee Br., at 5). They do not cover business income losses unless they are caused by direct physical loss or damage to the insured property. Historically, property insurance insured against

the risk of fire for ships, buildings, and some commercial property at a time when most of the structures in use were made of wood. 10A *Couch on Insurance*, §148.1 (3d ed. 2020). Over time, commercial property coverage expanded to include loss arising from other perils that result in direct physical loss of or damage to property, such as theft, hurricanes, floods, and riots. This type of insurance covers property, such as an insured's building or its personal property (e.g., equipment, furniture), against risks of direct physical loss or damage, such as a fire, windstorm, or theft.

When purchasing property insurance, a business can choose to add Business Income and Extra Expense coverage. This provides additional coverage when insured property is damaged by a fire, for example, requiring the business to suspend operations. In that event, certain losses of business income and extra expenses (such as renting a temporary office) occurring during the "period of restoration" (while the property damage is being repaired) would be covered, subject to the policy's terms and only if those losses were caused by direct physical loss of or damage to the insured property. These additional coverages, such as Business Income and Extra Expense, are another layer, secondary to and dependent on direct physical loss of or damage to property at the insured premises that requires repair or replacement. In other words, the insured's "*operations* are not what is insured—the building and the personal property in or on the building are." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087-KS-MTP,

2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020). As that court also explained in dismissing a similar case:

> One does not buy simply "business interruption insurance." Policyholders are not insuring against "all risks" to their income—they are insuring against "all risks" to their property—that is, the building and its contents. . . . Based on the definition of Covered Property, should a covered peril befall the building or personal property located in or on the building, the insured can make a claim. As a subset of this coverage, should such a loss of or damage to the building or any personal property cause a disruption to a policyholder's business such that it suspends operations, then there is coverage for that income loss during the time of repair, rebuilding or replacement in order to get, for lack of a better phrase, "back to normal."

Id. at *5 n.9 (citations omitted).

As another court recently explained, expanding coverage in the manner that Plaintiff advocates here would conflict with the "general purpose" of property policies and greatly expand coverage for all manner of regulatory actions not involving any physical harm to the insured property:

> [A]n insured does not suffer a "direct physical loss of" property where, as here, the physical premises remain in satisfactory, operable condition. This conclusion accords, moreover, with the general purpose of first-party property insurance policies like the ones at issue here, which are written to protect insureds 'against loss caused by injury to the insured's own property.' *See Port Auth.*, 311 F.3d at 233. As other courts have noted, if first-party property coverage were to be extended in the manner suggested by Plaintiffs, insurers would potentially become 'liable for the negative effects of operations changes resulting from any regulation or executive decree,' *see Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, —— F. Supp.3d ——, 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020), such as, for instance, a regulation that lowers a city's maximum occupancy

> codes, thereby preventing the city's restaurants from seating as many customers as they used to, *see Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F. Supp. 3d 1225, 1232 (C.D. Cal. 2020). For these and other reasons, the vast majority of courts to have considered Plaintiffs' "loss of use" theory have found for the insurers.

Tria WS LLC v. Am. Auto. Ins. Co., 2021 WL 1193370, at *6-7 (E.D. Pa. Mar. 30, 2021); *see also Selery Fulfillment, Inc. v. Colony Ins. Co.*, 2021 WL 963742, at *7 (E.D. Tex. Mar. 15, 2021) ("[T]he general purpose of the Policy is to insure [the insured's] commercial building, personal property in or near there, and lost income resulting from that property loss. . . . Given this purpose, and the provision's language here, the most reasonable reading is that the Policy insures against property damage at the premises rather than a government order that temporarily restricted [the insured's] access to the property.").

Business interruption coverage helps businesses recover when they cannot operate because property has been physically lost or damaged by a covered cause of loss. Risks of nonphysical harm and its consequences, such as business income losses caused by governmental regulatory actions unrelated to physical harm to property, are outside the boundaries of property coverage. As a result, coverage for the risks of economic losses in a pandemic like COVID-19 does not exist under the plain language of policies like Cincinnati's. Like virtually all property insurance policies, Cincinnati's policy unambiguously limits coverage for business

interruption losses to situations in which those losses are caused by direct physical loss or physical damage.

II. Imposing a New and Retroactive Extra-Contractual Risk on Insurance Carriers Would Harm Illinois' Insurance Marketplace, To the Detriment of Insurers and Policyholders

The National Association of Insurance Commissioners ("NAIC") has explained that "[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19."[2] 'While there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, [insurers] cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss. . .."[3] Enforcing the clear insurance policy requirement is critical to contract certainty and a strong insurance system.

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[2] *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMMISSIONERS (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm)).

[3] *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 362 (W.D. Tex. Aug. 13, 2020). Insurers ask courts to enforce their policies as written, not to put a thumb on the scale to protect them from insolvency. *See* UP Amicus Br. at 15-16. APCIA and NAMIC demonstrate why enforcing contract terms is important. If insurers were forced to bear the financial responsibility for helping businesses stay afloat through the pandemic without regard to their policies' terms, the result would harm not only insurers, but their policyholders and the insurance marketplace.

Insurers calculate and pool the risks of covered damage to property, which impacts different policyholders in different locations at different times. Insurers can and do insure the risk of property damage from risks such as tornadoes, theft, and fires, which unpredictably impact individual policyholders in separate incidents. But the risk of economic losses in a pandemic, which could hit all or many members of a risk pool at virtually the same time, is fundamentally different. To impose such a risk on Cincinnati would violate the plain language of its property policy and fundamentally distort the insurance mechanism.[4]

The National Association of Insurance Commissioners ("NAIC") has explained that requiring insurers to cover businesses uninsured economic losses from the pandemic "would create substantial solvency risks for the [insurance] sector."[5] In May 2020, APCIA estimated that Illinois COVID-19-related business

[4] In response to the pandemic, there have been many attempts to shift the massive societal costs to insurers, including suits such as this one seeking to force insurers to pay for the economic cost of widespread closures under property policies that cover "physical loss of or damage to property," not an economic downturn. Other proposals targeting insurers for funding the costs of the pandemic have sought to retroactively alter insurance policies through legislative action.

[5] *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMMISSIONERS (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm)). Rating agencies agree with NAIC on the threat to insurer solvency if courts and governments were to impose coverage for the COVID-19 pandemic based on property policies contrary to the plain language of their terms. *See, e.g.*, *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, BUSINESS WIRE (May 5, 2020, 11:07 AM), https://www.businesswire.com/news/home/ 20200505005723/

interruption losses for businesses with fewer than 250 employees and some business interruption coverage—should coverage be mandated—would range from $3 billion to $11 billion per month. By comparison, total monthly premiums for commercial property policies written in Illinois amount to only $160 million, of which business interruption premiums constitute a small fraction.

Nationwide small business losses from the COVID-19 pandemic have been estimated at between $255 billion and $431 billion *per month*. *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), https://www.apci.org/media/news-releases/release/60522/. By contrast, the total property casualty industry surplus, for companies of all sizes, is currently about $800 billion to protect auto, home, and business policyholders from all types of future insured losses. *Id.* These funds are set aside to pay insured losses caused by tornadoes, wildfires, and other daily events that occur throughout the country. *Id*. Thus, treating insurers as a deep pocket to pay for COVID-19 losses would be short-sighted, as well as unjust. Forcing insurers to pay claims for uncovered

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en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital; *Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/Casualty Ratings*, S&P GLOB. RATINGS (Apr 27, 2020, 2:50 PM), https://www.spglobal.com/ratings/en/ research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312.

pandemic risks would jeopardize the industry's ability to pay existing covered property claims, such as claims for theft, wind and hail damage, or vandalism.[6]

The overly expansive interpretation of the policy sought here would adversely impact insurers, policyholders, and the insurance marketplace in Illinois. Significantly, the NAIC expressed concern that requiring insurers to cover such claims would "potentially exacerbate the negative financial and economic impacts the country is currently experiencing."[7] There is no doubt many businesses across the country have experienced economic strain, but as amicus UP points out, "elected legislatures (not unelected judges) have the province to help industries that are failing due to catastrophic losses." UP Amicus Br. at 18. Funding for businesses in duress must come from government-backed pandemic recovery solutions, not efforts to force property insurers to pay for economic losses despite the limitations of their contractual obligations.

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[6] Retroactive imposition of a new, massive, and extra-contractual risk on insurance carriers could well lead to insurer insolvencies, creating an anticompetitive market and adversely affecting the availability and affordability of insurance in Illinois. *See generally* NAT'L ASS'N OF INS. COMMISSIONERS, CYCLES AND CRISES IN PROPERTY/CASUALTY INSURANCE: CAUSES AND IMPLICATIONS FOR PUBLIC POLICY (Nat'l Ass'n of Ins. Commissioners eds. 1991). The effect would reach all property and casualty insurers providing primary coverage, as well as excess insurance carriers and reinsurers. Any insurer insolvency would affect insurance guaranty associations and also clog the courts with complex insurance rehabilitation and liquidation proceedings.

[7] NAT'L ASS'N OF INS. COMMISSIONERS, *supra*.

UP's suggestion that insurers have profited as a result of enormous windfalls through the pandemic, UP Amicus Br. at 16-18, is flatly untrue. Rather, "[p]rivate U.S. property/casualty insurers' net income after taxes declined to $35.1 billion in nine-months 2020 from $48.4 billion in nine months 2019. Insurers' overall profitability as measured by their annualized rate of return on average policyholders' surplus fell to 5.5% from 8.3% a year earlier."[8] As ISO and the APCIA reported, "[t]he COVID-19 crisis in the United States was slowly building up since early in the year, and the large-scale disruptions of daily life and economic activities started around the middle of March 2020. Accordingly, the impacts of COVID-19 on underwriting results are visible only in the second and third quarters." *Id.* UP is simply wrong in claiming that insurers "enjoyed substantial windfalls in 2020 while the rest of the economy suffered." UP Amicus Br. at 18. The ISO and APCIA report shows that "insurers' financial results deteriorated in nine-months 2020 due to the COVID-19 pandemic and a historic catastrophe season." Spector and Gordon, Property/Casualty Insurance Results: Nine-Months 2020, at 1, available at https://www.verisk.com/siteassets/media/downloads/insuranceresultsreport2020q3.pdf..

[8] Spector and Gordon, Property/Casualty Insurance Results: Nine-Months 2020, available at: https://www.verisk.com/siteassets/media/downloads/insuranceresultsreport2020q3.pdf.

Insurers are not, and cannot be, guarantors against the consequences of all unfortunate events that impact society at large. Yet insurers play a vital role in helping individuals and businesses prepare for and recover from the potentially devastating effects of catastrophic events such as hurricanes, storms, and wildfires. Insurance claims payments help ensure the economic security of individuals and businesses and help sustain many related industries. In 2019, "these payments in Illinois[,] as measured by direct property/casualty incurred losses, were $17.0 billion."[9] The ability of insurers to honor their promises made in insurance policies covering property perils would be dangerously undermined by a finding of coverage for purely economic losses attributable to the COVID-19 pandemic.

Finally, the Illinois insurance industry has a significant impact on the economy that extends well beyond its responsibilities to collect premiums and settle covered claims. It employs licensed professionals, pays taxes, owns municipal bonds, and serves people in their times of greatest need. As the Insurance Information Institute reports in *A Firm Foundation: How Insurance Supports the Economy*, U.S. Department of Commerce data shows that in 2018 in Illinois, "the insurance industry provided 158,436 jobs" and "accounted for about $15.7 billion in compensation." INS. INFO. INST., *supra* note 5. "The insurance

[9] INS. INFO. INST., *A Firm Foundation: How Insurance Supports the Economy View by State*, https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/state-fact-sheets/illinois-firm-foundation (last visited Apr. 22, 2021).

industry contributed $38.5 billion to the Illinois gross state product (GSP) in 2017, accounting for 4.66 percent of the state GSP." *Id.* In 2019, insurance companies in Illinois paid premium taxes totaling $423.5 million. *Id.*

III. Plaintiff's Theory That the Loss of Use of the Insured Premises Constitutes "Direct Physical Loss of or Damage to Property" Improperly Conflates or Reorders the Policy's Specific Requirements for Coverage

In addition to the reasons briefed by the parties, Plaintiff's legal theory fails because it improperly conflates or reorders the Policy's specific requirements for coverage. The Policy requires that direct physical loss or damage to property result in a suspension of business operations, as follows:

Covered Cause of Loss
↓
Direct Physical Loss of or Damage to Property
↓
Suspension of Business Operations
↓
Business Income Losses and Extra Expenses

Plaintiff's interpretation muddles and conflates these specific and distinct requirements. Plaintiff argues that the government orders limited its business operations and that this suspension resulted in or constituted what it claims was the "direct physical loss"—i.e., a loss of or limitation on the use—of its property. Plaintiff's argument further illustrates why its interpretation of the policy is incorrect. The policy contemplates that a covered "risk of direct physical loss"

(e.g., a fire or tornado) acts upon the property, causing direct physical loss of or damage to that property. In turn, because of that loss or damage, the insured is forced to suspend its business until the property can be rebuilt, repaired, or replaced—during the "period of restoration."

Plaintiff's interpretation cannot be reconciled with the plain language of the policy because the direct physical loss of or damage to property at the insured premises must *cause* the suspension of operations, not the other way around. Plaintiff's position, in effect, is that the loss of use (or limitation on use) of its restaurant/banquet hall constitutes both the "direct physical loss" and the suspension of its operations, while the Policy treats these as two separate, distinct requirements. The "direct physical loss" cannot be the same thing as a "suspension of operations," nor can "direct physical loss" be caused by a "suspension of operations." Rather, "Business Income Coverage requires the suspension of operations to be caused by 'direct physical loss of or damage to property' of the insured." *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins. Co.*, No. CV 20-2401, 2021 WL 131556, at *5 (E.D. Pa. Jan. 14, 2021); *see also Karmel Davis & Assocs., Att'ys-at-Law, LLC v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-CV-02181-WMR, 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021) ("[T]he Policy is clear that a direct physical loss must cause the suspension of operations[.]").

IV. Dictionary Definitions and the Existence of Some Minimal Judicial Disagreement Over the Meaning of "Direct Physical Loss of or Damage to Property" Do Not Render the Phrase Ambiguous

Given the overwhelming authority nationwide rejecting its "loss of use" theory, Plaintiff attempts to inject ambiguity into the phrase "direct physical loss of or damage to property" by invoking dictionary definitions and the mere fact that the issue has been litigated extensively, with a very small minority of courts agreeing with Plaintiff's position, out of hundreds of rulings nationwide. (Appellant's Br., at 20-24). As a general matter, neither dictionary definitions nor some minimal disagreement among trial courts provides a legitimate basis to find ambiguity in the clear text of an insurance policy.

Plaintiff cites online dictionaries with definitions of "loss" and "physical" that Plaintiff maintains support its interpretation of "direct physical loss." (Appellant's Br., at 20-21). This attempt to create ambiguity with dictionary definitions warrants little attention from this Court. As this Court observed in *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*,

> [t]he existence of multiple dictionary definitions does not compel the conclusion that a term is ambiguous. *New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162, 1193–94 (3d Cir. 1991) (dictionaries are "imperfect yardsticks of ambiguity"); *Trico Industries, Inc. v. Travelers Indemnity Co.*, 853 F.Supp. 1190, 1195 (C.D. Cal. 1994) ("nearly every word can be considered ambiguous when read by itself and out of context"); *Fireman's Fund Ins. Companies v. Ex–Cell–O Corp.*, 702 F. Supp. 1317, 1324 (E.D. Mich. 1988) ("if merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous"). Nor does the

> presence of profound judicial disagreement over the interpretation of [a term] make it ambiguous. *New Castle County*, 933 F.2d at 1196; *Fireman's Fund Ins. Companies*, 702 F.Supp. at 1323 n. 7.

40 F.3d 146, 152 (7th Cir. 1994); *see also Koontz v. Ameritech Servs., Inc.*, 645 N.W.2d 34, 42 (Mich. 2002) ("A word is not rendered ambiguous . . . merely because a dictionary defines it in a variety of ways."); *Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 805-06 (Tex. App. 1999) ("We agree with those courts holding that such [dictionary] definitions provide no significant help in determining whether a term has two reasonable meanings."); *Citation Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998) ("Nor does the mere existence of multiple dictionary definitions of a word, without more, suffice to create an ambiguity, for most words have multiple definitions."); *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 375 (Minn. Ct. App. 1992) ("The existence of multiple dictionary definitions of the word . . . does not prove the word is ambiguous."); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 501 n.8 (E.D. Mich. 2020) ("Of course, the fact that a word can be defined in more than one way does not make the relevant term ambiguous."); *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 501 (E.D. Pa. 2006) ("If multiple definitions alone created ambiguity, insurance policies would either lose all meaning or would devolve into epic tomes.").

In any event, Plaintiff's resort to dictionary definitions, in addition to being misguided, does not actually support its position. Courts that have rejected Plaintiff's "loss of use" theory have also noted that dictionary definitions support their rulings finding no coverage where property has not been physically altered or damaged. *E.g.*, *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840, at *5 (E.D.N.Y. Mar. 5, 2021) (citing definition of "physical" in support of holding that "direct physical loss" does not include mere loss of use); *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1230 (C.D. Cal. 2020) (same, citing dictionary definition of "loss"); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020) (same).

That the meaning of "direct physical loss" of property has been the subject of unprecedented litigation in the context of the COVID-19 pandemic, with a very small number of decisions supporting Plaintiff's position (compared with over one hundred decisions supporting Cincinnati's position), also does not demonstrate that the phrase is ambiguous. Indeed, this Court also observed in *Flanders Elec. Motor Serv., Inc.* that even "the presence of profound judicial disagreement over the interpretation of" a term in an insurance policy does not "make it ambiguous." *Flanders Elec. Motor Serv., Inc.*, 40 F.3d at 152; *see also, e.g., City of Austin v. Decker Coal Co.*, 701 F.2d 420, 426 n.17 (5th Cir. 1983) ("[T]he fact that courts may disagree as to the import of a contract term does not . . . mean that it is

ambiguous."); *Chief of Staff LLC v. Hiscox Ins. Co.*, No. 20 C 3169, 2021 WL 1208969, at *4 (N.D. Ill. Mar. 31, 2021) ("[D]isagreement among courts regarding the interpretation of an insurance policy provision does not, by itself, render the provision ambiguous."); *State Farm Mut. Auto. Ins. Co. v. Salerno*, 459 N.E.2d 1075, 1076 (Ill. App. Ct. 1984) (rejecting argument that "conflicting decisions of the courts regarding identical policy provisions establish that those provisions are ambiguous"); *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 713 (Va. 2012) ("[A]n insurance policy is not ambiguous merely because courts of varying jurisdictions differ with respect to the construction of policy language.").

Here, out of hundreds of actions in which policyholders and insurers have litigated the meaning of "direct physical loss" in the context of business income losses occasioned by the current pandemic, there is broad, nationwide judicial *agreement* that the phrase is neither ambiguous nor applicable to a mere loss of use unaccompanied by actual, tangible, physical harm to property. *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 20 C 4249, 2020 WL 7889047, at *3 (N.D. Ill. Dec. 22, 2020) (agreeing with the "overwhelming majority" reading the "unambiguous terms" "direct physical loss" to require physical alteration to the property); *see also Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL 7867553, at *3 (W.D.N.Y. Dec. 29, 2020) ("In New York, as in the vast majority of jurisdictions to consider the issue, policy language providing coverage for 'direct

physical loss or damage' unambiguously requires some form of actual, physical damage to the insured premised to trigger loss of business income and extra expense coverage."); *Kahn v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607, at *1 (M.D. Pa. Feb. 8, 2021) ("The vast majority of courts analyzing these claims have sided with the insurers, largely agreeing that the commercial insurance policies unambiguously foreclosed coverage where the business property suffered no physical damage or any tangible injury other than pure economic loss."). This Court should join the "vast majority" of courts and reject Plaintiff's attempts to create ambiguity where it does not exist.

V. Deliberate Physical Alterations to Properties to Improve Safety and Protect Human Health Are Not Direct Physical Loss of or Damage to Property and Are Not Fortuitous

The Restaurant Law Center suggests that "changes and alterations" to insured premises, such as closing a dining room, changing the layout, removing furniture or installing plexiglass to improve safety during the pandemic constitute "direct physical loss and damage." (Restaurant Law Center Amicus Br. at 11, 20). Plaintiff makes no such argument, and thus speculation of its amicus about potential new allegations should be disregarded. In any event, courts have consistently rejected the notion that deliberate modifications to insured premises by the policyholder can constitute direct physical loss or damage to property. As one court explained, there was no direct physical loss where insured argued that it

"had to move equipment around, add Plexiglass, and do other things to restore the property and make it functional and reasonably safe for patrons" because "none of those activities can reasonably be described as repairing, rebuilding, or replacing. Neither can disinfecting or cleaning property that is contaminated." *Indep. Rest. Grp. v. Certain Underwriters at Lloyd's*, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021); *see also Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. CV 20-3033, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021) (similar). As Judge Alonso recently explained, "additions such as Plexiglas, hand sanitizer, air purifiers or improved HVAC systems do not constitute repairs to damaged property where a plaintiff has not alleged damage to property. Instead, those additions constitute improvements to stop the spread of virus from one person to another." *L&J Mattson's Co. v. Cincinnati Ins. Co.*, 2021 WL 1688153, at *6 n.3 (N.D. Ill. Apr. 29, 2021). Moreover, "[o]ne does not replace, rebuild or repair a countertop (or a doorknob or a floor) because SARS-CoV-2 (or salmonella, MRSA or the flu virus) is present on the surface. One simply cleans the surface." *Id.* at *5.

Another court concluded that modifications made to an insured restaurant did not trigger coverage because, among other reasons, they were not the alleged cause of the suspension of operations. *Café La Trova LLC v. Aspen Specialty Ins. Co.*, No. 20-22055-CIV, 2021 WL 602585, at *9 (S.D. Fla. Feb. 16, 2021).The Central District of California recently dismissed similar allegations with prejudice,

explaining that "Plaintiff does not allege that any alterations were made to remedy existing loss or damage," and "Plaintiff is alleging that COVID-19 and ensuing public health restrictions required prolonged closures, not that its business has been slowed by its own alterations." *Los Angeles County Museum of Natural History Foundation v. Travelers Indemnity Co. of Connecticut*, Case No. 2:21-cv-01497, at 6 (C.D. Cal. Apr. 15, 2021); *see also Unmasked Mgmt. Inc. v. Century-Nat'l Ins. Co.*, 2021 WL 242979 at *2, 6 (S.D. Cal. Jan. 22, 2021) (no physical loss of or damage to property where insured alleged expansion of outdoor dining areas, installation of plexiglass, rearranging of furniture, and installation of custom signage, hand sanitizing stations, and shelving).

Deliberate changes to property plainly do not constitute, nor were they undertaken to repair or replace, direct physical loss or damage to property. Moreover, any alterations put in place intentionally by Plaintiff were plainly not fortuitous. *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1282 (6th Cir. 1995) ("[C]ourts generally do not recognize deliberate actions that produce predictable and anticipated damages as fortuitous events under all-risk insurance policies"). For all of these reasons, if the Court considers the Restaurant Law Center's argument that deliberate modifications to property trigger coverage—and the argument should not be considered because it was not even made by Plaintiff—the Court should reject this legally erroneous theory.

VI. A Property Insurance Policy Does Not Insure Against a Change in a Legal Right to Use Property

In its amicus brief, UP characterizes what Plaintiff has lost as "[t]he loss of an important legal right (the right to use) associated with a thing (here, a building housing a restaurant and banquet hall)," and goes on to discuss legal theory of property rights as a "'bundle of sticks,' a collection of individual rights" determined by state law. UP Amicus Brief, at 3, 4 (quoting *United States v. Craft*, 535 U.S. 274, 278 (2002)). UP goes on to argue that a limitation on the right to "use" property is a "direct physical loss" of property. *Id.* at 6. UP cites no property insurance case supporting that position, which would lead to absurd results, in which a property insurance policy would insure against any change in zoning or other land use law, or other regulations of businesses.

Contrary to UP's unsupported position, a property insurance policy provides coverage for the actual property; it does not insure legal title to property (unlike a title insurance policy). Courts have consistently held that a defect in title to property which has the legal effect of depriving the insured of even *all* of the rights to the property is not a tangible, "physical loss," and therefore not covered by property insurance policies. *See, e.g., HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 527 N.E.2d 1179, 1180 (Mass. App. Ct. 1988) (finding no coverage for defect in title to equipment, explaining that "if 'all risk' coverage were as broad as the plaintiff argues, there would be little reason for one to purchase title insurance");

Nevers v. Aetna Ins. Co., 546 P.2d 1240, 1241 n.1 (Wash. Ct. App. 1976) (policy insuring against "all risks of physical loss or damage to the described property from any external cause" did not insure against defective title to boat, explaining that "[t]he purpose of the insuring agreement is clearly to insure against damage Or physical loss To the boat caused by fortuitous or external circumstances, rather than to warrant the quality of plaintiff's title"); *Dae Assocs., LLC v. AXA Art Ins. Corp.*, 158 A.D.3d 493, 494 (N.Y. App. Div. 2018) (property insurance policy insuring "all loss or damage to insured property" did not cover stolen artwork that had to be returned to its rightful owner); *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (defective title to a vessel was not "physical loss or damage," and "[i]t is not reasonable to interpret a policy so broadly that it becomes another type of policy altogether"); *Eveden, Inc. v. N. Assur. Co. of Am.*, 2014 WL 952643, *5 (D. Mass. Mar. 12, 2014) ("Intangible losses, such as a defect in title or a legal interest in property, are generally not regarded as 'physical' losses in the absence of actually physical damage to the property."); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38 (2018) (finding no coverage for counterfeit wine because "nothing happened *to the covered property*").

In the COVID-19 insurance litigation, courts have persuasively explained with hypothetical examples why an argument similar to the one made by UP here defies common sense. For example, if "a teenager broke curfew, and his parents

punished him by taking away the keys to his car," then he "undoubtedly" would have "lost the ability to use the car." *Michael Cetta, Inc.*, 2020 WL 7321405, at *6. But "we would not say that there had been a "direct physical loss of or damage to" the car." *Id.*; *see also Plan Check Downtown III, LLC*, 485 F. Supp. 3d at 1231-32 (using various hypothetical examples to explain why insured's interpretation of "direct physical loss" "is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds"). Similarly here, Plaintiff did not lose its building or the property within it. It instead temporarily lost its ability to use the building for dine-in restaurant service—a property right that was never insured.

VII. The Absence of a Virus or Pandemic Exclusion Does Not Create Coverage

Finally, Plaintiff briefly attempts to attribute significance to the fact that its property policy does not contain a virus or pandemic exclusion. (*See* Appellant's Br., at 3). But when, as here, a loss falls outside a policy's coverage grants, the presence or absence of any policy exclusion is irrelevant. The lack of an exclusion cannot create coverage under a policy. *E.g.*, *Advance Watch Co. v. Kemper Nat. Ins. Co*., 99 F.3d 795,805 (6th Cir. 1996) ("[T]he absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention

to provide coverage for liability for the kind of occurrence or injury alleged by the claimant against the insured.").[10]

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to affirm the judgment of the district court.

[10] *See also Sanzi v. Shetty*, 864 A.2d 614, 620-21 (R.I. 2005) ("The simple fact that later policies provide a specific exclusion does not mandate the inclusion of that coverage in the earlier policies."); *Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co.*, No. 08 CIV. 10518 (SCR), 2012 WL 13070116, at *8 (S.D.N.Y. Oct. 26, 2012) (professional liability policy did not cover breach of contract claim even without an express exclusion because there is no "wrongful act" and no "loss" to trigger coverage) (citing 23 APPLEMAN ON INSURANCE 2d § 146.6[I], pp. 120-121 (Holmes ed. 2003) (fn. omitted); *Pettit v. Erie Ins. Exch.*, 709 A.2d 1287, 1294 (Md. 1998) ("Insurance companies have an interest in drafting policies with as few ambiguities as possible; therefore, it is likely that they would include 'redundant' exclusions so as to reduce the possibility of doubt that the activity in question is excluded.") (citation omitted).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as superseded by Circuit Rule 32(c), and Fed. R. App. P. 29(a)(5), as superseded by Circuit Rule 29 (limiting amicus briefs to no more than 7,000 words), because this brief contains 6,482 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 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 365 in size 14, Times New Roman.

/s/ Wystan M. Ackerman

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2021, I electronically filed the foregoing 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wystan M. Ackerman