Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SERENDIPITOUS, LLC/MELT; MELT FOOD TRUCK, LLC D/B/A MELT; and FANCY'S ON FIFTH, LLC D/B/A FANCY'S ON FIFTH,	)	
PLAINTIFFS,	)	
V.	)	**CASE NO: 20-cv-00873-MHH**
THE CINCINNATI INSURANCE COMPANY,	)	
DEFENDANT.	)	

***AMICUS CURIAE* BRIEF OF**
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

American Property Casualty Insurance Association ("APCIA") and National Association of Mutual Insurance Companies ("NAMIC") (collectively, "Amici") respectfully submit this *amicus curiae* brief to provide the Court with additional background regarding property insurance policies such as the one at issue in this case, and to respond to arguments made by *amici curiae* who have been permitted to file a brief in support of Plaintiffs.

IDENTITY OF *AMICI CURIAE* AND THEIR INTEREST IN THE CASE

APCIA is a primary national trade association for home, auto, and business insurers. APCIA was formed at the beginning of 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.

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.

On issues of importance to the property and casualty insurance industry and marketplace, Amici advocate sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and file *amicus*

curiae briefs in significant cases before federal and state courts. This allows Amici to share their broad national perspectives with the judiciary on matters that shape and develop the law. Amici's interests are in the clear, consistent and reasoned development of law that affects their members and the policyholders they insure.

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 Amici's members, their policyholders, and the property insurance marketplace as a whole. Amici believe their unique national viewpoint will be useful in highlighting fundamental issues before the Court. Accordingly, Amici respectfully submit this *amicus curiae* brief.

ARGUMENT

UNDER THE PLAIN MEANING OF THE POLICY LANGUAGE, THERE IS NO PROPERTY COVERAGE FOR THE PURELY ECONOMIC LOSSES CAUSED BY COVID-19.

Under the plain policy terms, coverage exists for business income losses only if they are caused by "physical loss" or "physical damage" to Covered Property. The weight of the authority from around the nation has recognized that no amount of "artful pleading" can convert claims for purely economic losses into claims for ***physical*** loss or ***physical*** damage to Covered Property insured by a property insurance policy. More than thirty courts throughout the country have now concluded that COVID-19 related claims for business income losses do not

meet the requirement for physical loss or physical damage under businessowners' property insurance policies, like the policy here.[1]

Joining with courts across the country, an Alabama federal court recently agreed that the policy requirement of direct physical loss or damage is not met by business interruption losses caused by temporary governmental restrictions issued during the COVID-19 pandemic. *Hillcrest Optical, Inc. v. Continental Cas. Co.,* 2020 WL 6163142, at *5 (S.D. Ala. Oct. 21, 2020) (property policy afforded no coverage for an optometrist's claims that he incurred a "direct physical loss" of his property following an Alabama State Health Department order requiring the temporary postponement of non-emergency medical procedures due to COVID-19 risks). The court held that, absent a "complete and permanent dispossession of

[1] *E.g., Uncork and Create LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00401, at 10 (S.D.W.V. Nov. 2, 2020) ("[T]he pandemic impacts human health and human behavior, not physical structures. Those changes in behavior, including changes required by governmental action, caused the Plaintiff economic losses."); *West Coast Hotel Mgt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) (because "detrimental economic impact alone is not compensable under a property insurance contract," plaintiff's claims based on temporary loss of use of property due to decrease in business caused by restrictions imposed by government orders concerning COVID-19 are not legally cognizable); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am*., 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (executive order prohibiting in-restaurant dining "merely recognized an existing threat" and "did not represent an external event that changed the insured property"); *Diesel Barbershop, LLC v. State Farm Lloyds*, 5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (to qualify as "physical" loss, there must be a "distinct, demonstrable physical alteration of the property," and lost use of a property does not constitute "direct physical loss"); *10E, LLC v. Travelers Indem. Co.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *5 (C.D. Cal. Sep. 2., 2020) (impairment to economically valuable use of property cannot substitute for physical loss or damage); *Malaube, LLC, v. Greenwich Ins. Co*., 2020 WL 5051581, *8 (S.D. Fla., 2020) (because "direct physical" modifies both "damage" and "loss," actual physical damage is necessary before business interruption coverage will apply); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583, at *4 (M.D. Fla. 2020) (policy required direct physical loss or property damage and plaintiff alleged solely economic losses – "not anything tangible, actual, or physical").

property" (such as a theft), a "direct physical loss" requires some tangible alteration of the property, relying on Alabama precedent, [2] combined with the treatise COUCH ON INSURANCE 10A § 148:46 relied on regularly by Alabama courts, and the additional authority from across the country. *Hillcrest Optical*, 2020 WL 6163142, at *4, 6-7. [3]

The overwhelming weight of judicial authority recognizes that, under Alabama law and elsewhere, temporary governmental restrictions do not constitute a "direct physical" loss of or damage to property and are not a Covered Cause of Loss because, as here, the insureds' business losses were caused by the temporary and intangible restrictions on their business operations. Vague allegations regarding a "threat," possibility, or speculative "likely presence" of the virus also fail to allege "physical" loss or damage to property. To the extent Plaintiffs vaguely claim that the coronavirus was in fact present on their premises, the coronavirus does not cause any tangible alteration to property (which can be readily decontaminated through normal cleaning measures), nor does the coronavirus result in the permanent dispossession of any property. For reasons

[2] *See Downs v. Lyles*, 41 So.3d 86, 92 (Ala. Civ. App. 2009) (finding physical trespass where appellant impermissibly traveled across, projected debris onto, and directed water onto appellee's property); *Town of Gurley v. M & N Materials, Inc.*, 143 So.3d 1, 13 (Ala. 2012) (inverse condemnation claim); *Hous. Auth. of the Birmingham Dist. v. Logan Props., Inc.*, 127 So.3d 1169, 1176 (Ala. 2012) (same).

[3] Further, the court emphasized that "the Alabama Supreme Court has found the mere presence of a pollutant in an area could not be reasonably understood to mean a 'discharge, dispersal, release, or escape' – a physical act," citing *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 289, 805 (Ala. 2002).

explained more fully below, this Court should grant the Defendant's motion to dismiss for lack of any physical loss or damage.

A. The Requirement of "Physical" Loss or Damage to the Insured Property Is Fundamental to the Property Policies at Issue.

Historically, property insurance grew out of the insurance against the risk of fire for ships, buildings, and some commercial property at a time when most of the structures in use were made wholly or primarily of wood. 10A Couch on Insurance, 3rd ed., §148.1 (June 2020 Update). Over time, commercial property coverage expanded to include loss arising from other types of perils that result in physical loss or damage to property, such as theft, hurricanes, floods, and riots.

Fundamentally, this type of insurance covers *property*—such as a building (if the insured owns the building) and the insured's business personal property (e.g., equipment, furniture, etc.)—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 some 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 conditions). These additional coverages, such as Business Income and Extra Expense, are 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, as one court recently explained, 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) (emphasis in original). 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*. Here, as Plaintiff has pled, the Policy purchased is a "commercial property" policy. Thus, just as the Declarations state, the Policy carries property coverage as well as liability coverage. 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 (S.D. Miss. Nov. 4, 2020) (emphasis added; record citations omitted).

As explained above, business interruption coverage is intended to help businesses recover when they cannot operate because property has been *physically lost or damaged* by a covered cause of loss. On the other hand, the risks of *non-physical harm* and its consequences – such as business income losses caused by governmental regulatory actions – are outside the boundaries of property coverage. The policies at issue are *property* policies. Coverage for the risks of economic

losses in a pandemic like COVID-19 does not exist under the plain language of the property policy at issue. Like virtually all property policies, this policy unambiguously provides that business interruption losses must result from physical loss or damage for the coverage to apply.

Insurers can and do calculate and pool the risk of property damage from fires, floods, and hurricanes, which occur to different policyholders in different locations at different times and unpredictably. Fortunately, there is no such thing as a nationwide fire or flood or hurricane because insurance could never spread such a risk. The risk of economic losses in a pandemic, which could hit all or a very large number of members of a risk pool at virtually the same time, is very different. To impose such a risk on the insurer here would violate the plain language of the property policy, and fundamentally distort the insurance mechanism. As the National Association of Insurance Commissioners has explained, "[b]usiness interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19," insurance is designed for circumstances where "a relatively small number of claims are spread across a broader group" rather than a global pandemic, and "if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing." NAIC

Statement on Congressional Action Relating to COVID-19, Mar. 25, 2020 (https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm).

B. The Plain Meaning of the Policy Requires "Physical Loss" or "Physical Damage" for Coverage to Apply.

The policy makes the requirement of direct physical loss clear. The insuring agreement states: "We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Loss."[4] "Loss" is defined as "accidental physical loss or accidental physical damage," and "Covered Loss" is defined as a "direct 'loss'" that is not excluded or limited by the coverage part. *Id*. [electronic page Nos. 25, 58, 111.]

Coverage for "Business Income" losses, in turn, is tethered to the requirement of a direct physical loss. The policy states:

> We will pay for the actual loss of "Business Income" … you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to the property at a "premises" caused by or resulting from any Covered Cause of Loss."

Policy, Def. Op. Br., Ex. A [electronic page No. 103]. Thus, for Business Income losses to be covered, they must be sustained during a "suspension" of operations that is caused by "direct" "accidental physical loss" or "accidental physical damage." A suspension of operations for some reason other than "direct physical

[4] The Policy is attached to Defendant's Brief in Support of its Motion to Dismiss as Exhibit A "Def. Op. Br., Ex. A", at [electronic page No. 23].

loss" or "direct physical damage" – such as because of a government restriction on business operations – is not covered. The plain language must be enforced.

Plaintiffs' *amici*, however, urge that COVID-19 causes "physical" loss or damage to property because: (1) the policy does not define "physical" to mean "structural," (2) the Insurance Service's Office's ("ISO") introduction of the virus exclusion in the early 2000's shows that the insurance industry "knew" viruses can cause "physical loss or damage"; and (3) the alleged threatened or actual presence of the virus on property, combined with government orders limiting business operations, somehow amounts to a "physical loss." These arguments contradict the plain language of the policy and well-settled Alabama law governing the interpretation of insurance contracts.

1. Undefined Terms are Afforded Their Plain Meaning

The assertion that "physical" does not mean "physical" unless the policy defines it to include "structural" or "visible" damage is simply not the law. Insurance policies are enforced according to their plain meaning. *Crook v. Allstate Indem. Co*., 2020 WL 3478552, at *4 (Ala. June 26, 2020) ("When analyzing an insurance policy, a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them."); *Western World Ins. Co. v. City of Tuscumbia*, 612 So.2d 1159, 1161 (Ala. 1992) ("The language in an insurance policy should be given the same meaning that a person of ordinary intelligence would reasonably give it .").

Courts do not require every term in a policy to be separately defined. In *Carpet Installation & Supplies of Glenco v. Alfa Mut. Ins. Co*., 628 So.2d 560 (Ala.1993), for example, the Alabama Supreme Court explained, "where questions arise as to the meaning of an undefined word or phrase, the court should simply give the undefined word or phrase the same meaning that a person of ordinary intelligence would give it." *See also Nationwide Mut. Ins. Co. v. Thomas*, 103 So.3d 795, 804 (Ala. 2012); ("Although the [ ] policy does not define the terms used in the [policy exclusion at issue], the terms are not unusual, technical, or otherwise unclear"). When a term has a plain meaning, it will be enforced. *E.g., Crook*, 2020 WL 3478552 at *7; *Thomas*, 103 So.3d at 804; *City of Tuscumbia*, 612 So.2d at 1161.

Further, the idea that every term or phrase in an insurance policy must be separately defined is neither feasible nor desirable. Insurance policies would become unnecessarily complex and cumbersome, undermining the ability of a person of ordinary intelligence to comprehend them. Instead, insurance policies are written against a backdrop of existing law, and use ordinary language. As a leading treatise (often relied on by Alabama courts) discussing the "physical" loss or damage requirement in property insurance policies explains: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical

alteration of the property." 10A Couch on Insurance, 3rd ed., §148:46 (June 2020 Update); *see also Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, No. 1:20-CV-275-JB-B, 2020 WL 6163142, at *7 (S.D. Ala. Oct. 21, 2020) (citing same treatise section in dismissing similar coronavirus-related case).

The policy terms at issue are clear. A person of ordinary intelligence would understand that for there to be "physical" loss or damage, there must be damage to the *physical* structures of the property[5] or, at a minimum, permanent loss or dispossession of property (such as a theft).[6] The policy terms require "accidental physical loss or accidental physical damage" for coverage to apply; there is no coverage for non-physical, purely economic losses.

[5] *E.g., Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 WL 5500221, at *4 (S.D. Cal. Sept. 11, 2020) (physical loss or damage generally requires a "distinct, demonstrable, physical alteration" and "detrimental economic impact does not suffice"); *10E, LLC v. Travelers Indem. Co.*, 2020 WL 5359653, at *5 (C.D. Cal. Sep. 2, 2020) (same); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co*., 2020 WL 5258484, at *5-7 (E.D. Mich. Sept. 3, 2020) (plaintiff failed to demonstrate tangible damage to covered property as "plainly" required by the policy term "direct physical loss"); *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.,* 2020 WL 5938755, at *5 (N.D. Ga. Oct. 6, 2020) (no coverage where government order did not generate a change of physical elements of the insured property).

[6] *E.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am*., 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) (no "physical loss" where plaintiff's property has not been permanently misplaced, or become unrecoverable, as a result of COVID-19); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, at *4 (C.D. Cal. Oct. 2, 2020) ("direct physical loss" does not include "deprivation of property without physical change in the condition of the property"); *cf. Hillcrest Optical,* 2020 WL 6163142, at *5 (without deciding whether a "permanent dispossession" of property would even constitute a "direct physical loss," held that temporary inability to operate business due to government COVID-19 order was not a "permanent dispossession" of property).

2. The Absence of a Virus Exclusion Does Not Create Coverage.

Plaintiffs and their amici incorrectly assert that the absence of a virus exclusion in the policy somehow confirms that the coronavirus causes physical loss or damage.[7] When, as here, a loss falls *outside* a policy's *unambiguous* coverage grants, the presence or absence of any policy exclusion is irrelevant.

It is well established that the absence 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) ("the 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."); *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) (a claim alleging breach of contract is not covered under a professional liability policy even without an express exclusion because there is no 'wrongful act' and no 'Loss' to trigger coverage) *citing* 23 APPLEMAN ON INSURANCE 2d (Holmes ed. 2003) § 146.6[I], pp. 120-121, fn. omitted.); *Yale Univ. v. Cigna Ins. Co*., 224 F.Supp.2d 402, 410 (D. Conn. 2002) ("The mere

[7] These arguments mischaracterize what the insurance industry said when it introduced the virus exclusion, though the issue is simply not pertinent to the Court's analysis.

absence of specific exclusions, standing alone, does not create coverage where it otherwise does not exist under the express terms of the policy."). *See also Pettit v. Erie Ins. Exchange*, 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.").

Simply put, with no coverage under a policy to begin with, the absence of an exclusion does not create coverage. Courts should not look beyond the plain language of a policy to find coverage based on what the policy does not provide. Here, the prerequisite for coverage is direct physical loss or damage. As the court explained in *Rose 1 LLC v. Erie Ins. Exchange*, 2020 WL 4589206 (D.C. Super. Aug. 6, 2020): "[E]ven in the absence of [a pandemic] exclusion, Plaintiffs would still be required to show a "direct physical loss." The same is true here.

3. The Threatened or "Likely" Presence of the COVID-19 Virus Does Not Cause or Constitute Physical Loss or Damage.

"The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) (holding that the insured "failed to plead a direct physical loss – a prerequisite for coverage"). For this Court to find "physical loss" or "physical damage" based solely on the threatened or "likely" presence of the Covid-19 virus,

it would have to ignore a well-developed body of caselaw that requires insureds to identify some distinct and demonstrable alteration to their property, or a permanent dispossession of property (most commonly, theft). The U.S. District Court for the Southern District of Alabama, applying Alabama law, recently dismissed a COVID-19 property coverage claim because "absent allegations of some tangible alteration to property, [insureds] have suffered no direct physical loss of property in other business interruption disputes arising consequent to COVID-19 closure." *Hillcrest Optical*, 2020 WL 6163142 at *7.

Courts thus have developed a bright-line rule that economic losses must be tethered to physical losses to be covered. A holding that the threatened or "likely presence" of the virus alone is enough to establish "physical loss" or "physical damage" would erode this bright-line rule and open the floodgates to all manner of claims that these first-party property policies were never intended to cover. Such a result would represent a significant and unprecedented expansion of coverage beyond what courts previously have allowed.

In particular, courts in other jurisdictions have explicitly rejected the argument that losses arising from the mere threat or *possibility* of damage to property constitute "physical loss" or "physical damage." The Northern District of California recently held that it would "follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct

physical loss of or damage to' covered property." *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, *3 (N.D. Cal. Nov. 9, 2020).

For example, although Alabama has not specifically addressed this issue, the court in *Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.,* 17 F.Supp.3d 323, 330 (S.D.N.Y. 2014) found no coverage for losses where a utility company preemptively shut off the insured's power in anticipation of a potential flood. The *Newman* court correctly reasoned that when an insured's premises are closed for reasons "exogenous to the premises themselves," there is no covered physical loss or damage. *Id*. at 331. In so holding, the court reiterated the well-established standard that "physical loss or damage" unambiguously "requires some form of actual, physical damage to the insured premises to trigger . . . coverage." *Id*. Likewise, in *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815 (S.D. Iowa 2015), the court addressed the distinction between actual and threatened loss of use, and rejected the insured's contention that the threat or risk of property damage from flooding caused the actual loss of use of its facility. The court declined to interpret the policy in a way that would stretch "'physical' beyond its ordinary meaning" and which "may, in some cases, 'render the word 'physical' meaningless.'" *Id*. at 825 (quoting *Source Food Tech., Inc. v. United States Fid. & Guar. Co*., 465 F.3d 834, 835 (8th Cir. 2006)). If a court were to conclude that a mere "threat" of physical damage were sufficient to trigger coverage, that could mean that every time a hurricane or wildfire is predicted to damage a building,

there would be coverage even when the storm or fire turns in a different direction and never touches the building.[8]

In a similar vein, courts have found that various forms of perceived or reputational harm to property do not trigger coverage even where they rendered the property unusable. For example, in *Source Food Tech., Inc. v. United States Fid. & Guar. Co*., 465 F.3d 834 (8th Cir. 2006), the Eighth Circuit held that the insured suffered no physical loss to property where its economic losses resulted from the USDA's prohibition on beef imports that were put in place to protect against *potential* contamination from mad cow disease. *Id.* at 835. While no evidence showed that the beef was in fact contaminated, the insured argued that the USDA's actions caused physical loss because their products were being treated *as though* physically contaminated. *Id.* at 836. The court rejected this argument and found that to characterize the insured's loss as "physical loss to property" would render the word "physical" meaningless. *Id.* at 838. Here, Plaintiffs are asking this Court to treat all covered premises *as though* the virus was present, even when there is no

[8] Other cases in which courts have denied coverage for losses arising from an unrealized threat of physical loss or damage to covered property include*: Heller's Gas, Inc. v. Int'l Ins. Co. of Hannover Ltd*., No. 4:15-CV-01350, 2017 WL 4119809 (M.D. Pa. Sept. 18, 2017) (denying coverage for "direct physical loss" where sinkhole on non-covered property rendered propane tanks on adjacent covered property unusable); *Witcher Const. Co. v. Saint Paul Fire and Marine Ins. Co.,* 550 N.W.2d 1 (Minn. Ct. App. 1996) (denying coverage for losses from business interruption due to delay required to inspect property for potential damage from an explosion nearby); *Fujii v. State Farm Fire & Cas. Co.*, 71 Wash. App. 248 (1993) (no "direct physical loss" to covered dwelling where damage to dwelling was likely to occur absent preventive measures after a landslide); *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807 (1990) ("prophylactic costs – incurred to pay for measures taken in advance of any release of hazardous waste – are not incurred 'because of property damage").

allegation or evidence that it in fact was present and caused some physical harm to the property. *Source Food* establishes that courts should not make this factual leap.

Likewise, in *Meridian,* the court denied coverage for the loss of market value of covered property where the loss was based on perceived, but not actual, damage to the property. *See Meridian Textiles Inc. v. Indem. Ins. Co. of N. Am.*, No. CV06-4766 CAS, 2008 WL 3009889 (C.D. Cal. Mar. 20, 2008). The court held that the requirement that a loss be "physical" would preclude claims for "detrimental impact unaccompanied by a distinct, demonstrable, physical alteration of the property." *Columbiaknit, Inc. v. Affiliated FM Insurance* Co., No. Civ. 98-434-HU, 1999 WL 619100 (D. Or. Aug.4, 1999) also rejected a loss of use argument that was premised on perceived rather than demonstrated damage to property. The court held that under Oregon law, the phrase "direct physical loss of or damage to" is not ambiguous, and that without a "distinct and demonstrable physical change" to the property, there was no covered loss." *Id*. at *7.[9] In short,

[9] Other cases in which courts denied claims premised on reputational or perceived harm to property include: *Royal Indem. Ins. Co. v. Mikob Properties, Inc.,* 940 F. Supp. 155 (S.D. Tex. 1996) ("physical damage to part of the insured's premises did not cause a necessary suspension of operations or tenancy in the other, undamaged units" and "[e]ven if the character of the apartment complex was adversely impacted by the fire, there was no 'necessary suspension of operations or tenancy' in [undamaged buildings]"); *Borton & Sons, Inc. v. Travelers Ins. Co., No.* 18100-6-III, 2000 WL 60028 (Wash. Ct. App. Jan. 25, 2000) (denying coverage for losses resulting from insureds inability to sell undamaged apples due to reputational harm suffered from selling other damaged apples); *Glens Falls Ins. Co. v. Covert*, 526 S.W.2d 222 (1975) (where sealed goods fell to floor but could not be inspected for internal damage, decrease in market value due to loss of warranty not covered because there was "no evidence of physical loss or damage. . .").

courts have rejected all manner of attempts by insured parties to advance variations of constructive loss or damage arguments in lieu of demonstrating actual physical alteration or damage to covered property. This "likely presence" argument is yet another such variation.

The policy language here at issue is both clear on its face and has been widely construed to exclude coverage absent actual demonstrable physical alteration to property or permanent dispossession of property (such as theft). This Court need not – and should not – adopt a radical new construction of the terms "physical loss" or "physical damage" that effectively obviates the requirement that the insured meet their burden of proof. It would be particularly inappropriate to do so in a case where the impact would go far beyond the particular facts and circumstances at issue here. The coronavirus has spread to every corner of the globe. If Plaintiffs' argument were correct, then almost any organization or enterprise could assert, without having to satisfy any further burden of proof, that the virus was "likely present" on its premises.

Moreover, for this Court to hold that the "likely presence" of the virus is enough to trigger coverage, it would have to presume both that the virus is in fact omnipresent and that the mere likelihood of its presence causes business premises to be dangerous and uninhabitable. In reality, despite the alleged "likely presence" of the virus, countless essential businesses such as grocery stores, food processing facilities, fulfilment centers for online retailers, and daycare centers

have remained open and operational throughout the pandemic. If, as Plaintiffs assert, it was the "likely presence" of the virus that caused them to lose the use of their property, that raises the question of why other essential businesses have been able to carry on using their premises despite presumably being equally at risk of viral infiltration. The answer, of course, is that it is not the "likely presence" of the virus that caused Plaintiffs' economic losses. Rather, their losses result from public health measures put in place to mitigate the spread of the virus by promoting "social distancing" and restricting opportunities for people to congregate in large numbers in enclosed spaces. By no stretch of the imagination can Plaintiffs plausibly argue that such restrictions on gatherings caused physical loss or damage to their covered property. Finally, the fact that many businesses have remained open despite the "likely presence" of the virus is evidence that the threat is neither so imminent nor of such a magnitude that it can meet the narrow exception set out in those few cases finding physical loss or damage based solely on a pending threat.

While the impact and reach of the coronavirus is unprecedented, the fundamentals of the legal analysis remains unchanged. Construction of the terms "physical loss" and "physical damage" has always hinged on the word "physical," and there is no authority for the proposition that courts can simply assume that physical alteration to property occurred without evidence to that effect.

4. Conclusory Allegations of the Presence of the COVID-19 Virus Fail to Plausibly Satisfy the Direct Physical Loss or Damage Requirement.

Plaintiffs argue that the requirement of "physical loss" or "physical damage" is met by their vague, conclusory allegations of the presence of the novel coronavirus at their premises. To prop up this claim, Plaintiffs and their amici point to a handful of cases which are either distinguishable or involve inapplicable law. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), for example, a Missouri federal court was persuaded that a policyholder had adequately stated a claim for direct physical loss, relying heavily on dictionary definitions of "physical" as "having a material existence, perceptible especially through the senses and subject to the laws of nature." *Id*. at *4. The court held that the plaintiffs' allegations that the virus had "attached" to their property, rendering it "unsafe and unusable," established "direct physical loss."[10]

But as explained above, commercial property insurance covers property, not people. It is not health or life insurance. Plaintiffs make no attempt to allege any facts that could establish that the coronavirus caused any physical harm or "tangible injury," *Hillcrest Optical*, 2020 WL 6163142, at *7, of any kind to any of their insured property. The presence of the virus does not affect property, it can be eliminated with disinfectant, and it is spread largely if not entirely through the air.

[10] *See also Blue Springs Dental Care LLC v. Owners Ins. Co*., 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020) (also applying Missouri law and summarily concluding that plaintiffs had adequately stated a claim based on the analysis in *Studio 417*).

Several courts have recently recognized, and correctly so, that a court cannot assume or infer that the presence of the coronavirus causes any physical impact on property. Common sense dictates that "even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant." *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020). "Property . . . is not physically damaged or rendered unusable or uninhabitable [by the coronavirus]. . . . No repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. *In short, the pandemic impacts human health and human behavior, not physical structures*." *Id.* (emphasis added). The court further explained that, because routine cleaning eliminates the virus on surfaces, there would be nothing for the policy to "cover," and a covered "loss" is required to invoke business income coverage under the policy. *Id.*; *see also Mama Jo's, Inc. v. Sparta Ins. Co*., 2020 WL 4782369 (11th Cir. August 18, 2020) ("an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'").

As another court explained, "[t]he coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020); *see also Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020

WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020) (explaining that "speculative allegations that the COVID-19 virus, or individuals infected by the virus, likely had entered Plaintiffs' premises" were insufficient because "[e]ven assuming the truth of these allegations, the presence of the virus itself, or of individuals infected the virus, at Plaintiffs' business premises or elsewhere do not constitute direct physical losses of or damage to property").

These courts' rejections of insureds' arguments that the presence of the coronavirus constitutes direct physical loss or damage to property are consistent with CDC guidance on COVID-19. The CDC recommends cleaning and disinfection of business premises with standard household cleaning products if someone is sick, but the CDC does *not* recommend that any property be disposed of and replaced because of contact with the coronavirus. Rather, even clothing worn by an ill person can simply be laundered. *See* CDC, "Disinfecting Your Facility" (available at https://www.cdc.gov/coronavirus/2019-cov/community/disinfecting-building-facility.html). The CDC also notes that "[i]f **more than 7 days** [have passed] since the person who is sick visited or used the facility, additional cleaning and disinfection is not necessary," recognizing that any viral particles become noninfectious on their own within that time period (if not sooner). *Id.* (emphasis in original). The CDC further explains that "COVID-19 is thought to spread mainly through close contact from person to person, including between people who are physically near each other (within about 6 feet)," and

"[s]pread from touching surfaces is *not* thought to be a common way that COVID-19 spreads." CDC, "How It Spreads" (available at https://www.cdc.gov/corona-virus/2019-ncov/prevent-getting-sick/how-covid-spreads.html) (emphasis added).

A need to conduct regular (or even enhanced) cleaning of surfaces has never been found to constitute direct physical loss or damage to property, and such a result would make no sense because such cleaning is, or should be, done regularly in business premises throughout our country – and was done before the advent of SARS-CoV-2. *See Mama Jo's Inc.*, 2020 WL 4782369, at *8 (need for cleaning does not demonstrate "direct physical loss"); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1144 (Ohio App. Ct. 2008) (similar result).

Plaintiff's position is also illogical because commercial property insurance policies are intended to insure all types of businesses, including hospitals and other medical facilities, as well as essential businesses, such as supermarkets. If the mere presence of the coronavirus (or the common flu virus or other coronaviruses before the advent of SARS-CoV-2) constituted direct physical loss of or damage to property, that would mean that many businesses that have continued to operate throughout the pandemic, such as hospitals, have been experiencing an event triggering their property insurance coverage virtually every day. That is not what is intended by any reasonable reading of the text of these policies.

5. Plaintiffs' Allegations Asserting the Alleged Presence of the Coronavirus Are Not Analogous to Other Types of Contamination That Some Courts Have Found Sufficient to Trigger Coverage Under Property Insurance Policies.

Plaintiffs have also undertaken a misguided attempt to analogize the vaguely alleged potential presence of the coronavirus in their premises to cases in other jurisdictions involving contamination with asbestos, mold or ammonia. Even if these cases reflected Alabama law (and they do not), as a recent decision in the Southern District of Alabama explained, these cases involved "physical contamination of premises that were rendered unusable due to *an event which had a tangible effect on the property*." *Hillcrest Optical*, 2020 WL 6163142, at *5 (emphasis added); *see also Real Hosp., LLC*, 2020 WL 6503405, at *6 ("In each of those cases there was a *pervasive, physical impact on the insured property* for which each court concluded was *tantamount to physical loss or damage*.") (emphasis added).

The release of asbestos fibers from building materials, for example, typically necessitates physical damage to building components that are the source of such a release, and the remedy can involve repair or replacement of those building components. *See Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 301 (Minn. Ct. App. 1997) ("[t]he events that caused the release of asbestos fibers in the [insured's] properties include: closet doors dislodging from their tracks and scraping the ceiling; residents screwing bolts directly into the ceiling to hang plants; residents and maintenance staff accidentally striking the ceiling with broom

and mop handles"); *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (explaining that the "mere presence of asbestos" did not constitute "physical loss or damage"; for coverage to exist, "[t]he effect of asbestos fibers in such quantity [would have to be] *comparable to that of fire, water or smoke* on a structure's use and function") (emphasis added). With respect to mold, Plaintiffs cite a case in which the court concluded that "[b]ecause the house has visible mold which may not be removable, the house has suffered 'distinct and demonstrable' damage" and "[t]hat is sufficient to constitute a 'direct' and 'physical' loss." *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002).[11] In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), the release of ammonia into the insured premises, due to a contractor's mistake in performing its work, required evacuation of all properties within one mile of the premises and extensive remediation of the premises by a specialized contractor. *Id.* at *3.

These cases are not comparable to Plaintiffs' allegations here. Even if there were clear evidence of the coronavirus on surfaces within the premises (which is not alleged), either a simple cleaning with ordinary household cleaners and/or the simple expiration of seven days or less will leave the premises as useable as ever.

[11] *See also W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (gasoline spill impacted foundation and soil surrounding insured premises).

There is no physical damage to any property, and nothing approaching the type of permanent dispossession that would constitute a physical loss of property. While the Court may be "sympathetic to Plaintiff[s] and all insureds that experienced economic losses associated with COVID-19, there is simply no coverage under the policies if they require 'direct physical loss of or damage' to property." *Infinity Exhibits*, 2020 WL 5791583, at *5.

CONCLUSION

For all of the foregoing reasons, Amici respectfully urge the Court to grant Cincinnati Insurance Company's motion to dismiss with prejudice, and hold that Plaintiffs have failed to allege any direct physical loss or damage to property.

Respectfully submitted,

s/ Brenen G. Ely
Brenen G. Ely (ASB-0366-E54B)
Counsel for APCIA and NAMIC

OF COUNSEL:
ELY & ISENBERG, LLC
2100-B SouthBridge Parkway, Suite 380
Birmingham, Alabama 35209
Telephone: (205) 313-1200
Facsimile: (205) 313-1201
bely@elylawllc.com

CERTIFICATE OF SERVICE

I do hereby certify that a true and accurate copy of the foregoing has been served on all parties of record via CM/ECF electronic filing system and/or U.S. Mail on this the 23rd day of November, 2020.

James S. Williams
Alyse Nicole Windsor
Thomas A. Woodall
SIROTE & PERMUTT PC
2311 Highland Avenue South
Birmingham, Alabama 35205
jwilliams@sirote.com
awindsor@sirote.com
twoodall@sirote.com

Augusta S. Dowd
Craig A. Shirley
William Chambers Waller, IV
WHITE ARNOLD & DOWD, PC
2025 3rd Avenue North, Suite 500
Birmingham, Alabama 35203
adowd@whitearnolddowd.com
cshirley@whitearnolddowd.com
cwaller@whitearnolddowd.com

Dylan Cook Black
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
dblack@bradley.com

s/ Brenen G. Ely
OF COUNSEL