IN THE SUPREME COURT OF OHIO

NEURO-COMMUNICATION SERVICES, INC. d/b/a HEARING INNOVATIONS, individually and on behalf of all others similarly situated, Plaintiffs, vs. THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; AND THE CINCINNATI INDEMNITY COMPANY, Defendants.	Case No.: 2021-0130 Certified Question-of-State-Law from the U.S. Northern District of Ohio, Eastern Division; No. 4:20-CV-1275

MEMORANDUM OPPOSING CERTIFICATION FILED BY AMICUS CURIAE UNITED POLICYHOLDERS

Rhonda D. Orin
Marshall Gilinsky
Anderson Kill LLP
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 416-6549

Rorin@andersonkill.com
Mgilinsky@andersonkill.com

Daniel R. Karon (0069304)
KARON LLC
700 W. St. Clair Ave.
Suite 200
Cleveland, Ohio 44113
216-622-1851

dkaron@karonllc.com

Attorneys for *Amicus Curiae*,
United Policyholders

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a highly respected national non-profit 501(c)(3) organization. Founded in 1991, for nearly 30 years UP has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance who are seeking a policy or pursuing a claim for loss reimbursement. UP assists Ohio businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org. UP communicates with the Director of the Ohio Department of Insurance, Jillian Froment, on a regular basis during meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations, maintaining an online help library at uphelp.org/COVID. In addition, UP is presenting considerations to courts and regulators on the special rules of contract construction that are uniquely imperative in the context of insurance.

The application of insurance contracts requires special judicial handling. Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven

into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own set of laws and regulations, yet most insurers operate in multiple states. Most insurers serve three different masters when carrying out their important purpose, and the resulting conflicts that arise often compel judicial balancing, such as the instant case. Insurers must meet their own revenue objectives *and* the reasonable expectations of policyholders, *and* the demands of their investors and shareholders. Judicial oversight is essential to maintain the purpose and value of insurance purchases by individuals and businesses in this complex system.

Insurance policies are adhesive in nature and their language is increasingly less standardized.[1] That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. United

[1] Professor Daniel Schwarcz, *Reevaluating Standardized Insurance Policies,* University of Minnesota Law School, Published in University of Chicago Law Review, Vol. 77, 2011, Minnesota Legal Studies Research Paper No. 10-65.
https://chicagounbound.uchicago.edu/uclrev/vol78/iss4/3/

Policyholders ("UP") respectfully seeks to assist this Court in fulfilling these important roles.

In addition to hosting disaster-relief workshops and clinics around the country and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders.[2] The gist of UP's presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and

---

See NAIC Special Session One: COVID-19: Lessons Learned (Aug. 10, 2020), https://www.youtube.com/watch?v=J2QmaZqd9Vk&feature=youtu.be, and https://content.naic.org/sites/default/files/national_meeting/speakerbios_covid19_lessons_learned_summer_nm_2020_0.pdf (speakers' biographies); Amy Bach, Co-Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://www.uphelp.org/sites/default/files/attachments/8-12-20_bach_c_committee_final_3.pdf; Amy Bach, Co-Founder & Exec. Dir., UP, COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://content.naic.org/sites/default/files/national_meeting/Version%202%20-%20Slideshow%20-%20Consumer%20Liaison%20Cmte%20-%2008.14.20.pdf.

exclusions they added to their policies.[3] Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had *never* paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991 UP has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by UP have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate

[3] Richard P. Lewis, John N. Ellison, Luke E. Debevec, *Here We Go Again: Virus Exclusion for COVID-19 and Insurers,* NU PropertyCasualty360, April 7, 2020 https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/?slreturn=20200927114442.

role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

PRELIMINARY STATEMENT

UP respectfully submits this Amicus Brief to urge this Court to exercise its discretion to decline to answer a question that was certified by the United States District Court, Northern District of Ohio. The request for certification was filed by the insurance company defendants, The Cincinnati Insurance Company, The Cincinnati Casualty Company and The Cincinnati Indemnity Company (collectively "Cincinnati").

First, the question does not address disputed issues of state law that require resolution by this Court. To the contrary, it addresses well-settled principles of contract and insurance law that are not in dispute. These basic principles include giving meaning to all parts of an insurance contract, interpreting words in context of the entire contract and interpreting any ambiguity in favor of coverage. Because such contract principles are sacrosanct, this Court has repeatedly declined to answer certified questions in cases involving contract disputes. It should do the same here.

Second, the certified question should not be answered because it raises issues of fact that must be resolved by the fact-finder in this case, not this Court. According to the Northern District, this Court's response will resolve the ultimate issue of this case.[4] That issue is whether the "all-risk" property insurance policy that Cincinnati sold to plaintiff Neuro-Communication Services, Inc. d/b/a Hearing Innovations ("Neuro-

[4] *See* Judgment Entry Closing the Within Case, ECF No. 44 (describing the certified question as "the primary question driving resolution of this case").

Communication") encompasses Neuro-Communication's claim for coverage of the losses that it suffered due to loss or damage caused by the coronavirus as well as governmental orders related thereto. Despite the Northern District's conclusion to the contrary, that question presents, at the very least, a mixed question of fact and law, which this Court is not allowed to resolve.

To make matters worse, the certified question presents these fact issues outside the context of this case. For example, the certified question inquires about the meaning of a contractual term that is not in the Cincinnati policy. It inquires about the application of that term to circumstances different from those at issue. If this Court were to answer the question, it would not only usurp the role of the fact-finder, it would result in a decision not squarely applicable to this case. Doing so would create serious confusion for policyholders, insurance companies and the courts in Ohio.

Third, the certified question is not ripe for resolution because discovery has not been conducted and the record is incomplete. Neuro-Communication has not had a full and fair opportunity to marshal its evidence and present its case. For example, Neuro-Communication has been unable to present evidence showing that even though insurance companies have known for decades that courts do not interpret the phrase "direct physical loss or damage" to require structural, visible damage, Cincinnati failed to use different language in its policies that clearly requires "structural" or "visible" damage in order to trigger coverage. Neuro-Communication also has been unable to present evidence showing that Cincinnati failed to exclude coverage for loss or damage arising from COVID-19 despite knowing that pandemics were inevitable and eventually would give rise to claims like this one. Neuro-Communication has been deprived of a chance

to extract admissions from Cincinnati about the meaning of the coverage that it provides for "loss" as distinct from "damage." Neuro-Communication has even been deprived of the chance to explore if Cincinnati follows a practice of seeking certification at the outset of cases in order to avoid being subjected to such discovery.

Still further, whether the virus causes physical loss or damage to insured property is a fact issue that will turn on expert testimony and findings by a trier of fact and cannot be resolved in the absence of a record. Such evidence could easily change the outcome of the case. The certified question cannot be considered without it.

This Court is fully empowered with the discretion to decline to answer the certified question. *See Tri Cnty. Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC*, S.D.Ohio No. 2:13-CV-317, 2014 WL 32307, *2 (Jan. 6, 2014), (*citing Pennington v. State Farm Mut. Auto. Ins. Co.,* 553 F.3d 447, 450 (6th Cir.2009) ("It is well within the discretion of this Court to decide whether to certify")); *Id. (citing Drown v. Wells Fargo Bank, NA,* S.D.Ohio No. 2:10–CV–00272, 2010 WL 4939963, at *1 (Nov.30, 2010), citing *Lehman Bros. v. Schein,* 416 U.S. 386, 390–91, 94 S.Ct. 1741(1974) ("Though federal courts may certify questions to the Ohio Supreme Court, it is not mandatory")).

To avoid creating bad precedent that will be harmful for policyholders across the state, UP respectfully requests that this Court exercise that discretion and decline to answer the certified question presented by defendants.

STATEMENT OF FACTS

As to the operative facts, UP adopts the Statement of Facts submitted by Neuro-Communication.

LEGAL ARGUMENT

A. THERE IS NO QUESTION OF STATE LAW TO BE RESOLVED, AS THE BASIC PRINCIPLES OF INSURANCE COVERAGE IN OHIO ARE CLEAR.

The procedural rules permit this Court to answer certified questions when "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." Ohio S. Ct. Prac. R. 9.01(A). That is not the case here. Insurance policies are contracts that are subject to well-established principles of interpretation in Ohio. Insurance coverage law in Ohio is settled as well. There is no unresolved question of law that may be determinative of this proceeding. Thus, it would not be appropriate for this Court to answer the certified question.

1. Insurance policies in Ohio are interpreted in accordance with well-settled principles of contract interpretation.

The law of contracts is settled in Ohio. *See e.g.,* In *Beverage Holdings, L.L.C. v. 5701 Lombardo L.L.C.,* 159 Ohio St.3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 13 *reconsideration denied*, 157 Ohio St.3d 1567, 2020-Ohio-313, 138 N.E.3d 1174, ("[o]ur legal standards for the interpretation of contracts are well established"); *Cincinnati City School Dist. Bd. of Educ. v. Conners,* 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78 ¶ 15 (stating that contract law is "well-established" law).

Insurance policies are contracts that are subject to these established principles. *See United Ohio Ins. Co. v. Brooks,* 3d Dist. Putnam No. 12-11-04, 2012-Ohio-1469, ¶ 13 ("The law concerning contract interpretation, including insurance policies, is well-established"); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 218, 2003-Ohio-5849, 797 N.E.2d 1256, ("An insurance policy is a contract."); *Sarmiento v. Grange Mut. Cas.*

Co., 106 Ohio St.3d 403, 404, 2005-Ohio-5410, 835 N.E.2d 692 ("An insurance policy is a contract, and the relationship and rights of the insurer and insured are contractual in nature.").

Even federal courts in Ohio have recognized that insurance policies are governed by the state's rules of contractual interpretation. *See HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.,* 757 F. Supp. 2d 738, 744 (N.D. Ohio) (citing *St. Marys Foundry, Inc. v. Employers Ins. of Wausau,* 332 F.3d 989, 992 (6th Cir. 2003) (applying Ohio law) ("standard rules of contract interpretation apply when constructing insurance policies"). Recently, in a case involving claims from COVID-19, the Southern District of Ohio held: "Ohio case law provides a 'clear answer' to how the policy language at issue should be interpreted." *See Fujitec America, Inc. v. AXIS Surplus Ins. Co.,* 458 F. Supp. 3d 736, 746 (S.D. Ohio 2020).

Legal principles specific to insurance policies are equally well-settled in Ohio. Among other things, insurance policies are interpreted in accordance with what a reasonably prudent person applying for insurance would have understood them to mean, not an insurance company or a lawyer. *Snedegar v. Midwestern Indem. Co.*, 64 Ohio App.3d 600, 604, 582 N.E.2d 617 (10th Dist.1989). Every word in an insurance policy is to be given meaning and the insurance company, being the one who selected the language in the contract, must be specific in its use. *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d 63, 65, 543 N.E.2d 488, 490 (1989), *citing American Financial Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St.2d 171, 239 N.E.2d 33 (1968). All words are to be interpreted in accordance with the meaning that is clearly apparent from the contents of the entire policy. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 241, 374

N.E.2d 146 (1978). Where "provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurance company and liberally in favor of the policyholder." *King v. Nationwide Ins. Co.,* 35 Ohio St.3d 208, 519 N.E.2d 1380, 1383 (1988).

This Court has repeatedly affirmed such bedrock principles of contract and insurance law. *See, e.g., Faruque v. Provident Life & Acc. Ins. Co*., 31 Ohio St.3d 34, 508 N.E.2d 949, 952 (1987) ("Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer.") (*quoting Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95, 313 N.E.2d 844 (1974)); *Thompson v. Preferred Risk Mut. Ins. Co.,* 32 Ohio St.3d 340, 513 N.E.2d 733, 736 (1987) ("[I]t is beyond question that any ambiguity will be resolved in favor of the insured and against the insurer."); *Marusa v. Erie Ins. Co.,* 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, 234 ("Because the cause before us involves the interpretation of an insurance contract, any ambiguities will be construed strictly against the insurer and liberally in favor of the insured") (citation omitted). When a contract is subject to more than one interpretation, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such interpretation is the only one that can fairly be placed on the language in question." *Andersen v. Highland House Co.,* 93 Ohio St.3d 547, 2001-Ohio-1607, 757 N.E.2d 329; *Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co*., 183 Ohio App. 3d 29, 2009-Ohio 2526, 915 N.E.2d 687, 692-93 (3d Dist.) (emphasis added).

As the certified question does not challenge any of these principles, it does not present an unsettled issue of Ohio law.

2. Because this case involves a contract dispute in which the law is well-settled, this Court should decline to answer the certified questions.

This Court has repeatedly—and appropriately—declined to answer certified questions in contract disputes like this one. One example is *Lutz v. Chesapeake Appalachia, L.L.C.*, where this Court held: "Because the rights and remedies of the parties are controlled by the specific language of their lease agreement, we decline to answer the certified question and dismiss this cause." 148 Ohio St.3d 524, 2016-Ohio-7549, 71 N.E.3d 1010. That case regarded an oil and gas lease, which this Court identified as "a contract that is subject to the ***traditional rules of contract construction***." *See id.* at ¶ 11 (emphasis added). So, too, is the insurance contract here.

Declining to answer certified questions is well within this Court's discretion. *See e.g. Tri Cnty. Wholesale Distributors, Inc. v. Labatt USA Operating Co., LLC*, S.D.Ohio No. 2:13-CV-317, 2014 WL 32307, *2 (Jan. 6, 2014), (citing *Pennington v. State Farm Mut. Auto. Ins. Co.,* 553 F.3d 447, 450 (6th Cir.2009) ("It is well within the discretion of this Court to decide whether to certify")); *Id., (*citing *Drown v. Wells Fargo Bank, NA,* S.D.Ohio No. 2:10–CV–00272, 2010 WL 4939963, at *1 (Nov.30, 2010), citing *Lehman Bros. v. Schein,* 416 U.S. 386, 390–91, 94 S.Ct. 1741 (1974) ("Though federal courts may certify questions to the Ohio Supreme Court, it is not mandatory")). As aptly noted by the Northern District of Ohio, "the Ohio Supreme Court generally declines to accepted [sic] fact-based or fact-intensive questions." *Gilbert v. Norfolk Southern Ry. Co.*, N.D. Ohio No. 3:06CV1573, 2007 WL 2084342, fn. 1 (July 19, 2007).

Because this case is a contract dispute, this Court should decline to answer the certified question.

B. THE CERTIFIED QUESTION PRESENTS ISSUES OF FACT TO BE DECIDED BY A FACT-FINDER AND NOT THIS COURT.

The corollary of the principle that this Court is limited to answering certified questions of state law is that it may not answer certified questions that raise fact issues. Even when certified questions present mixed questions of law and fact, this Court should decline to respond. *See Ashipa v. Knab*, S.D. Ohio No. 1:08-CV-879, 2010 WL 2629864, *1 (June 28, 2010), *adopted,* S.D. Ohio No. 1:08CV879 2010 WL 5184789 (Dec. 15, 2010). Questions about "the application of law to a particular case are mixed questions of law and fact, not pure questions of law." *Id.*

The certified question here asks this Court to decide: (1) if "the general presence in the community, or on surfaces at a premises, of the novel coronavirus known as SARS-CoV-2, constitute[s] direct physical loss or damage to property"; and (2) if "the presence on a premises of a person infected with COVID-19 constitute[s] direct physical loss or damage to property at that premises." *See* Certification Order to Ohio Supreme Court, ECF No. 43 at 2. While "direct physical loss or damage" is not set off in quotes, it clearly is a reference to an insurance policy provision (albeit *not* any provision in the Cincinnati policy, as discussed below). Thus, the question calls for this Court to apply facts to policy language, which is the task of a fact-finder - not this Court.

Moreover, for this Court's answer to be applicable to this case, the question would need to address all facts of the case, put in proper context and after discovery. *See Henderson Road Rest. Sys. v. Zurich American Ins. Co.*, N.D. Ohio No. 1:20 CV 1239, 2021WL168422 (Jan. 19, 2021) (deeming another case to be inapplicable

because "[t]he distinct policies use different language and were applied to different facts").[5]

The context for answering the certified question here, however, is all wrong. The controlling facts here include the specific language of the insurance policy,[6] the property at issue,[7] the use of that property by the policyholder,[8] the impact of government orders on the functionality of that property,[9] and what caused the government to issue those

---

[5] See also *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434-HU, 1999 WL 619100 at *6 (D.Or. Aug. 4, 1999), where the court held:

> Although damage determinations are not subject to an objective standard of review, the court notes that what may constitute damage in the retail clothing industry might not constitute damage to the personal property of a homeowner. For example, if an article of retail clothing has an odor strong enough that it must be washed to remove it, (and the garment therefore cannot be sold as new) it has sustained physical damage and would be covered under an "all-risk" property insurance policy. The same piece of clothing in an individual's wardrobe, for example a shirt worn around a smokey campfire, would not be said to be physically damaged if a mere washing would remove the odor.

[6] In this case, the policy covers "direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." A Covered Cause of Loss is defined as a "direct 'loss'" except those that are expressly and specifically excluded or limited. A "loss" is defined as "accidental physical loss or accidental physical damage." *See* Complaint at ¶13. But the words used in the certified question - direct physical loss or damage" - are different.

[7] This case regards the policyholder's medical offices in Boardman and Youngstown, where it rendered services to patients who contracted COVID-19, including one who died from the disease shortly after being in those offices. *See* Compl. ¶¶1, 7, 31. Those facts are different from generic questions about "the presence [of the virus] in the community."

[8] The policyholder here is in the business of rendering health services to mostly elderly patients who were singled out by the Department of Health as "high risk of severe illness from contracting [and therefore carrying] COVID-19." *See* the Governor's Executive Order 2020-01D, dated March 9, 2020, declaring a State of Emergency. Again, these facts are different from generic questions about "the presence [of the virus] in the community."

[9] The orders applicable to this case include the Governor's Executive Order 2020-01D dated March 9, 2020, declaring a State of Emergency, followed by orders that expressly barred health providers (like the policyholder) from rendering non-essential medical services. *See e.g.*, Director's Order for the Management of Non-Essential Surgeries and Procedures throughout Ohio, issued by the Ohio Department of Health on March 17, 2020; Director's Stay at Home Order, issued by the Ohio Department of Health on March 22, 2020 (ordering that all "[n]on-essential business and operations must cease"). There could be coverage for the policyholder's

orders.[10] The certified question cannot be applied even to this facts of this case because it fails to address those facts.

As one example, the certified question asks if certain actions constitute "direct physical loss or damage." But that phrase is not used in the Cincinnati policy. That policy covers "direct loss," which is defined as "accidental physical loss or accidental physical damage." *See* Complaint at ¶13 [ECF No. 1]. Because the wording is different, Ohio contract law dictates that the answer to the certified question will not necessarily apply.[11]

Also, the certified question asks if "direct physical loss or damage" results from the "general presence [of the virus] in the community" or "on surfaces." But this case is not about such generic issues. This case is about specific facts that are not addressed in the certified question. Those facts include that the majority of the patients who visited the policyholder's office were elderly, and therefore at higher risk than "the community" of contracting (and carrying) COVID-19.[12] At least two of them actually contracted COVID-19 at the relevant time, one of whom died shortly after being at the insured

---

losses from those shutdowns, depending upon the government's reasons for ordering them. But the applicability of these orders to the policyholder's coverage claim is not, and could not be, addressed by the certified question or resolved by this Court's answers.

[10] Whether the government's reasons for ordering those shutdowns arose, even in part, from the presence and impact of the virus and/or infected persons on physical premises is a fact question to be explored in discovery. The absence of any such discovery is another reason why the certified question is not ripe for resolution. *See infra* at Section C.

[11] It is beyond dispute that even minor differences in contract wording can lead to entirely different results. Contracts must be enforced exactly, and only, as written. *See Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, 293 (holding that "a court may look no further than the writing itself to find the intent of the parties"). *See also McKinley Development Leasing Company Ltd. v. Westfield Ins. Co.,* Stark C.P. No. 2020 CV 00815 (Feb. 9, 2021).

[12] *See supra* at N.7.

premises. *See* Complaint at ¶31. Such facts could easily produce different answers about coverage than the limited facts that the certified question presents.

Moreover, certain fact issues that are central to this case are not even addressed by the certified question. The certified question does not address whether coverage could arise from the government orders that required medical practitioners – like Neuro-Communication – to cease rendering non-essential medical services.[13] That determination would rest on facts that have not yet been explored in discovery.[14] For example, the orders could give rise to coverage if they resulted, at least in part, from executive branch officials' assessment of the potential transmission of the virus due to its presence on property – which effectively turns functional property into something that is useless and potentially fatal. The facts about why the government issued the orders could not be altered – or overridden – by any answer to the certified question.

Thus, a fact-finder may find coverage under the particular facts of this case, regardless of this Court's answers to the certified question. But since the Northern District sees the certified question as dispositive, if this Court answers it in the negative, the fact-finder will never get that chance.

To avoid usurping the function of the fact-finder in this case, disrupting the ordinary course of jurisprudence in Ohio and creating precedent for doing so in other cases, this Court should decline to answer the certified question.

[13] *See supra* at N.8.

[14] *See supra* at N.9.

C. EVEN IF CERTIFICATION WERE PROPER, IT WOULD CREATE BAD PRECEDENT FOR THIS COURT TO ANSWER THIS QUESTION BEFORE DISCOVERY HAS BEEN CONDUCTED AND WITHOUT THE BENEFIT OF A FULL RECORD.

Even if certification were deemed proper, the certified question is not ripe for resolution because the record is incomplete. The issue at the very heart of the certified question - whether the virus causes physical loss or damage to insured property - is a fact issue that will turn on expert testimony and findings by a trier of fact. Thus, the certified question cannot be resolved fully and fairly in the absence of a complete record.

Lower courts have repeatedly held that cases like this one must be decided on the merits after discovery. *See e.g., Francois Inc. v. The Cincinnati Insurance Company*, Lorain C.P. No. 20CV201416 (Sept. 29, 2020) ("The complaint [seeking coverage for business interruption losses of a restaurant due to COVID-19] states claims which arguably fit the terms and conditions of the insurance policy and therefore the claims and defenses need to be developed with a record. The parties should proceed with discovery on liability/coverage while the damages issues are bifurcated"); *SSF II, Inc v. The Cincinnati Insurance Company,* Franklin C.P. No. 20CV-04-002644 (Sept. 8, 2020) (denying Cincinnati's motion to dismiss plaintiff's claim for business interruption related to COVID-19 and ordering discovery to proceed as to liability); *Dino Palmieri Salon v. State Automobile Mut. Ins. Co.,* Cuyahoga C.P. No. CV-20-932117 (Nov. 17, 2020) at *8-11 (full adjudication is needed to evaluate plaintiffs' claims that the presence of COVID-19 caused them to suffer physical loss); *cf. Mastellone v. Lightning Rod Mut. Ins. Co.,* 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 (8th Dist.) (relying on full case record, including expert opinions and review of the entire policy, to

render judgment about discrete terms in a different insurance policy, not involving COVID-19 claims or a Cincinnati policy).[15]

See also McKinley Development Leasing Company Ltd. v. Westfield Ins. Co., Stark C.P. No. 2020 CV 00815 (Feb. 9, 2021) (denying insurance company motion to dismiss, made prior to discovery); *Queens Tower Restaurant Inc. dba Primavista v. Cincinnati Financial Corp.*, Hamilton C.P. No. A 200 1747 (Jan. 7, 2021) (same); *Chapparells Inc. v. Cincinnati Ins. Co.*, Summit C.P. No. CV-2020-06-1704 (Oct. 21, 2020) (same); *Sylvester & Sylvester v. State Automobile Mut. Ins. Co.*, Stark C.P. No 2020 CV 00817 (Jan. 7, 2021) (same).

Without discovery, the policyholder will be unable to establish facts that are important to its case. For example, it will be unable to show that Cincinnati has known for decades that property policies are regularly understood to cover invisible, non-structural damage: the kind that is caused by COVID-19. Discovery should reveal that Cincinnati has long been aware of decisions finding coverage for loss events such as vapor;[16] E. coli,[17] cat urine odor,[18] airborne asbestos fibers,[19] Chinese drywall odor,[20]

---

[15] *See e.g. Dino Palmieri Salon,* Case No. CV-20-932117 at *7 (deeming *Mastellone* inapposite because that court had not evaluated the policy in a vacuum; it had "interpreted the policy in question–as well as whether plaintiffs had satisfied the terms of that policy–with the benefit of evidence, including expert opinions."

[16] *See Midwest Specialties, Inc. v. Westfield Ins. Co.*, 2d Dist. Montgomery No. 14027, 1994 WL 107192 (Mar. 30, 1994), holding that vapor from an accidental chemical reaction produced direct physical loss.

[17] *See Cooper v. Travelers Indem. Co.*, No. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002), holding that the presence of e-coli bacteria in a restaurant's well, which forced the restaurant's closure, was direct physical damage to the property.

[18] *See Mellin v. Northern Security Ins. Co.*, *Inc.*, 115 A.3d 799, 803 (N.H.2015), holding that cat urine odor emanating into condominium caused direct physical loss under insurance policy. "Physical loss" as used in insurance policy "need not be read to include only tangible changes to

ammonia,[21] microscopic fungus on garments,[22] mold,[23] gasoline,[24] bacteria,[25] "off-tasting" soda,[26] methamphetamine odors,[27] carbon monoxide,[28] spiders,[29] and data

---

property that can be seen or touched but can also encompass changes that are perceived by the sense of smell and in the absence of structural damage."

[19] *See Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002), holding, in the context of asbestos fibers within buildings, that "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality;" *Board of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. App. Ct.1999), holding that release of harmful asbestos fibers in a building constitutes physical loss within meaning of insurance contract.

[20] *See TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 709 (E.D. Va. 2010), holding that toxic gas released by Chinese drywall rendered home uninhabitable resulting in direct physical loss or damage under insurance policy even in the absence of structural alteration; *In re Chinese Manufactured Drywall Products Liab. Lit.*, 759 F.Supp.2d 822, 831 (E.D. La. 2010), holding that while the mere presence of a potentially injurious material in a home may not qualify as a covered physical loss, "when these types of materials are activated, for example by releasing gases or fibers [and posing danger to inhabitants and rendering property unfit or unusable for its intended purposes], courts have held there exists a physical loss."

[21] *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 2:12–cv–04418 (WHW)(CLW), 2014 WL 6675934 at *6 (Nov. 25, 2014 D.N.J.), holding that accidental release of ammonia gas into packaging facility was covered "because the ammonia physically rendered the facility unusable for a period of time," even though there was no structural alteration.

[22] *See Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434-HU, 1999 WL 619100 at *6 (D. Or. Aug. 4, 1999), holding: "In making the determination [of coverage], courts consider the nature and intended use of the property itself and the purpose of the insurance contract."

[23] *See Prudential Prop. & Cas. Ins. Co v. Lillard-Roberts*, No. CV–01–1362–ST., 2002 WL 31495830, at *9-10 (D. Ore. June 18, 2002), holding that the presence of mold in covered property and the risk of systemic fungal disease was "direct physical loss to property."

[24] *See Western Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52 (Colo.1968) – Where gasoline vapors penetrated the foundation of the insured church and rendered it uninhabitable, the property was suffered a "direct physical loss."

[25] *See Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005), holding that bacteria contamination of home's water supply constituted "direct physical loss." Whether functionality of insured's property was nearly eliminated or destroyed, or whether property was made useless or uninhabitable for purposes of rising to the level of physical loss in insurance policy may be question of fact.

[26] *See Customized Distrib. Servs. v. Zurich Ins*. Co., 862 A.2d 560, 564 (N.J. App. Div. 2004), holding that a "direct physical loss" does "not require actual physical damage to or alteration of the material composition of the property."

loss.[30] But despite this knowledge, Cincinnati failed to specify in its policy form that damage must be either "structural" or "visible." Against that backdrop, a fact-finder may deem Cincinnati's insistence that such limitations are plain on the face of its policy to lack credibility.

Without discovery, Neuro-Communication will be deprived of the chance to extract admissions from Cincinnati about the differences between "loss" and "damage," which Cincinnati's policy separates with the word "or." Discovery about the differences between these forms of coverage could prove critical to a final and just resolution here.

Discovery is needed for Neuro-Communication to show that Cincinnati has known for decades that pandemics were inevitable and would eventually give rise to claims like this one. *See e.g.* "PANDEMIC Potential Insurance Impacts," Lloyd's Emerging Risks Team Report (May 2008), available at https://www.lloyds.com/news-and-insights/risk-reports/library/pandemic-potential-insurance-impacts. A fact-finder

---

[27] *See Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or.1993), holding that saturation of covered dwelling by methamphetamine fumes constituted a loss for purposes of insurance policy in the absence of any structural alteration of insured property.

[28] *See Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B., 1998 WL 566658 at *4 (Mass. Super. Aug. 12, 1998), holding that carbon monoxide levels in apartment building sufficient to render building uninhabitable were a "direct physical loss" under a property policy.

[29] *See Cook v. Allstate Ins. Co.*, 48D02-0611-PL-01156 (Ind. Super. 2007), holding that infestation of spiders that rendered a house unsuitable for occupancy constitutes a direct physical loss even when house's structural integrity remains intact.

[30] *See American Guar. & Liab. Ins. Co. v. Ingram Micro*, *Inc* .No. 99–185 TUC ACM., 2000 WL 726789 at *2 (D. Ariz. April 18, 2000), holding that where policyholder's loss of custom computer programming configurations prevented policyholder from conducting its ordinary business, coverage "is not restricted to the physical destruction or harm of computer circuitry, but includes loss of access, loss of use and loss of functionality."

could deem it significant that, despite this knowledge, Cincinnati failed to exclude coverage for such claims.[31]

Discovery also may reveal that Cincinnati adopted an internal strategy in most, if not, all COVID-19 cases of seeking certification of questions at the outset of a case in hopes of avoiding its obligation under the Rules to reveal harmful, internal information in discovery.

Other evidence to be developed in discovery regards the underwriting of the insurance policy at issue, the considerations on which the premium was based, the handling by Cincinnati of the policyholder's claim and expert analyses of the ways that the coronavirus impacts and alters property.

Cincinnati inadvertently underscores the importance of such discovery by going to great lengths to avoid it. In this case, for example, Cincinnati's initial response to Neuro-Communication's complaint for insurance coverage was to seek dismissal with prejudice, which would have ended the action without discovery. *See* Defendants' Motion to Dismiss, ECF No. 9-1. When that motion failed, Neuro-Communication confirmed its intent to seek disclosure of such matters as the drafting history of the Cincinnati policy form. *See e.g.,* Discovery Plan, ECF No. 38. Cincinnati derailed that process by persuading the district court to certify these questions and dismiss the case. *See* Order of Certification to the Supreme Court of Ohio, ECF No. 43. Moreover, this is not the first time that Cincinnati has sought - without success - to have questions

[31] *See e.g., Customized Distribution Servs. v. Zurich Ins*. Co., 862 A.2d 560, 566 (N.J. App. Div. 2004) where a New Jersey Appellate Court reversed a lower court's grant of summary judgment to an insurance company on the ground that: "[s]ince 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here." *Id*. at 566.

certified to this Court. *See e.g. Troy Stacy Enterprises, Inc. v. The Cincinnati Ins. Co.*, Civ. No. 1:20-cv-00312 (S.D. Ohio Jan. 22, 2021); *Cincinnati Ins. Co. v. St. Paul Protective Ins. Co.*, N.D. Ohio No. 3:06 CV 2729, 2007 WL 2584029 at *3-4 (Sept. 7, 2007).

Answering the certified question in a vacuum, without evidence or context, would not only be unfair to Neuro-Communication in this case, it would create a harmful precedent for policyholders across the Buckeye State.

CONCLUSION

For the foregoing reasons, UP respectfully requests that this Court exercise its discretion to decline to answer the questions certified by the Northern District of Ohio.

Dated: February 18, 2021

Respectfully submitted,

Attorneys for *Amicus Curiae*,
United Policyholders

Rhonda D. Orin
Marshall Gilinsky
Anderson Kill LLP
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 416-6549
Rorin@andersonkill.com
Mgilinsky@andersonkill.com

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

/s/ _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies on February 18, 2021, that the undersigned electronically filed and served the foregoing document through this Court's ECF system to all counsel of record in this action.

Shanon J. Carson
Y. Michael Twersky
Berger & Montague
1818 Market Street, Suite 3600
Philadelphia, PA 19103
215-875-3052
Fax: 215-875-4604
scarson@bm.net
mitwersky@bm.net
COUNSEL FOR PLAINTIFF NEURO-COMMUNICATION SERVICES, INC. RE: 4:20-cv-1275-BYP

Greg Frederic Coleman
William A. Ladnier
Greg Coleman Law
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
865-247-0080
Fax: 865-522-0049
greg@gregcolemanlaw.com
will@gregcolemanlaw.com
COUNSEL FOR PLAINTIFF NEURO-COMMUNICATION SERVICES, INC. RE: 4:20-cv-1275-BYP

Daniel M. Kavouras
Michael K. Farrell
Baker & Hostetler LLP
127 Public Square, Suite 2000
Cleveland, OH 44114
216-621-0200
Fax: 216-696-0740
dkavouras@bakerlaw.com
mfarrell@bakerlaw.com
COUNSEL FOR DEFENDANTS CINCINNATI INSURANCE COMPANY, CINCINNATI CASUALTY COMPANY, AND CINCINNATI INDEMNITY COMPANY RE: 4:20-cv-1275-BYP AND 1:20-CV-517-MWM; COUNSEL FOR DEFENDANT THE CINCINNATI INSURANCE COMPANY RE: 1:20-cv-312-MWM

Paul G. Roche
Litchfield Cavo LLP
82 Hopmeadow Street, Suite 210
Simsbury, CT 06089
860-413-2800
Fax: 860-413-2801
roche@litchfieldcavo.com
COUNSEL FOR DEFENDANTS CINCINNATI INSURANCE COMPANY, CINCINNATI CASUALTY COMPANY, AND CINCINNATI INDEMNITY COMPANY RE: 4:20-cv-1275-BYP

Laurence J. Tooth
Litchfield Cavo LLP
303 West Madison Street, Suite 300
Chicago, IL 50505
312-781-6663
Fax: 312-781-6630
tooth@litchfieldcavo.com
COUNSEL FOR DEFENDANTS CINCINNATI

Rodger L. Eckelberry
Baker & Hostetler LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
614-462-5189
Fax: 614-462-2616
reckelberry@bakerlaw.com
COUNSEL FOR DEFENDANTS

INSURANCE COMPANY, CINCINNATI CASUALTY COMPANY, AND CINCINNATI INDEMNITY COMPANY RE: 4:20-cv-1275-BYP AND 1:20-CV-517-MWM; AND COUNSEL FOR DEFENDANT THE CINCINNATI INSURANCE COMPANY RE: 1:20-cv-312-MWM

Carrie Dettmer Slye
Baker & Hostetler LLP
312 Walnut Street, Suite 3200
Cincinnati, Ohio 45202-4074
513-929-3400
Fax: 513-929-0303
cdettmerslye@bakerlaw.com
COUNSEL FOR DEFENDANT CINCINNATI INSURANCE COMPANY RE: 1:20-cv-649-MWM

Douglas Daniels
DANIELS & TREDENNICK
6363 Woodway, Suite 700
Houston, Texas 77057
Telephone: 713-917-0024
douglas.daniels@dtlawyers.com
COUNSEL FOR PLAINTIFF TROY STACY ENTERPRISES, INC. RE: 1:20-cv-312-MWM

CINCINNATI INSURANCE COMPANY, CINCINNATI CASUALTY COMPANY, AND CINCINNATI INDEMNITY COMPANY RE: 4:20-cv-1275-BYP AND 1:20-CV-517-MWM; AND COUNSEL FOR DEFENDANT THE CINCINNATI INSURANCE COMPANY RE: 1:20-cv-312-MWM

Michael P. Baniak
Daniel Litchfield
Litchfield Cavo LLP
303 West Madison Street, Suite 300
Chicago, IL 50505
312-781-6663
Fax: 312-781-6630
baniak@litchfieldcavo.com
litchfield@litchfieldcavo.com
COUNSEL FOR DEFENDANT CINCINNATI INSURANCE COMPANY RE: 1:20-cv-649-MWM

Gary F. Lynch
Kelly K. Iverson
Jamisen Etzel
Nicholas Colella
CARLSON LYNCH LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
412-322-9243
Fax: 412-231-0246
glynch@carlsonlynch.com
kiverson@carlsonlynch.com
jetzel@carlsonlynch.com
ncolella@carlsonlynch.com
COUNSEL FOR PLAINTIFFS SWEARINGEN SMILES LLC, AND ELEISHA J. NICKOLES DDS RE: 1:20-CV-517-MWM

/s/
Attorneys for *Amicus Curiae*,
United Policyholders