No. 21-1038

IN THE

United States Court of Appeals for the Sixth Circuit

RICHARD KIRSCH, DDS,

Plaintiff–Appellant,

v.

ASPEN AMERICAN INSURANCE COMPANY,
Defendant–Appellee

On Appeal from the United States District Court for the Eastern District of Michigan
The Honorable Robert H. Cleland
No. 3:20-cv-11930

BRIEF FOR UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF DR. KIRSCH AND REVERSAL

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INTRODUCTION

Dr. Kirsch's dental practice, like many businesses, cannot generate revenue unless its customers are physically present on their property. In response to the Covid-19 pandemic, Governor Whitmer issued orders that rendered Dr. Kirsch's tangible property useless, because seeing patients at that property was too dangerous.

Dr. Kirsch insured against this hazard. Marketed as "business-interruption insurance," Aspen sold a policy promising to replace Dr. Kirsch's practice income if he suffered "physical loss of or damage to" his business property. But Aspen denied Dr. Kirsch's claim, asserting that he had to show "tangible damage" to his property. This has been the groundless claim of the insurance industry in hundreds of cases since March 2020.

The insurers push this narrative as settled law. Not so. Beginning in the 1960s, courts warned insurers that "physical loss of or damage to," and its variants, covers loss-of-use claims. *See, e.g.*, *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962). In case after case, appellate courts rejected a "tangible damage" rule, holding this language provides coverage where property is too dangerous for its intended use.

Courts also "begged carriers to define the phrase to avoid the precise issue before the Court now"—closures caused by a pandemic. *E.g.*, *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *3 (Cherokee Cnty., Okla., Jan. 14, 2021).

Those pleas fell on deaf ears. Insurers are still using the same broad language. They are still insisting that it does not mean what it says—they add text here, delete text there, and claim that this is not what insurance is "for." Those arguments are unpersuasive. Insurers had decades of fair warning that "physical loss" includes "loss of use" and is not limited to "tangible damage." Aspen chose not to heed those warnings. Instead, Aspen continued selling broad coverage that applied regardless of any "tangible alteration." The courts lack power to alter that choice, and it was error for the district court to do so here. Aspen, like everyone, ought to be held to the words it used—not the words it now wishes it had used.

The Court should **REVERSE**.

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INTEREST OF *AMICUS CURIAE*[1]

United Policyholders ("UP") is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide a meaningful intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of the law. During the pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating Covid-19 losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance—coverage for Covid-19 losses—by identifying arguments and authority that has escaped the lower courts' attention to date.

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[1] The parties have consented to the filing of this brief. No party or their counsel has authored this brief in whole or in part, nor has any party or its counsel contributed money intended to fund preparing or submitting this brief. No person—other than UP, its members, and its counsel—has contributed money intended to fund the preparation and submission of this brief.

STATEMENT OF THE CASE

Aspen's policy, after accounting for definitions, promises to pay for lost business income:

> caused by direct physical partial or total loss of or damage to[2] the building or blanket dental practice personal property at the described premises caused by or resulting from ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited in Section II, of this Coverage Part.
>
> * * * * *

These promises must be identified by splicing together multiple terms of the policy. The first provision is below, promising to pay:

> for the actual loss of practice income you sustain, or the Valued Daily Limit, as described under Limits of Insurance provision III.E.6., due to the necessary suspension of your practice during the period of restoration. The suspension must be caused by direct physical damage to the building or blanket dental practice personal property at the described premises caused by or resulting from a covered cause of loss or power failure.

[2] The preposition "to" appears twice: in the coverage grant and in the definition. The district court thought this changed the meaning of the policy. [R. 18, PID 473-74.] That is incorrect. The word "to" introduces the covered property in both places, dropping out when the definition is substituted. If anything, it introduces an ambiguity that must be construed against Aspen. *See* BRYAN GARNER, THE REDBOOK §11.45, at 234-35 (4th ed. 2018).

[R. 1-2, PID 142 (emphasis added).] The scope of this promise depends on the word "damage." The policy defines "damage" as:

> [P]artial or total loss of or damage to your covered property.

[*Id.* at 158 (emphasis added).] The term "covered cause of loss" means:

> ALL RISK OF DIRECT PHYSICAL LOSS except as excluded or limited in Section II, of this Coverage Part.

[*Id.*]

In contrast to the "all risks" policies issued to 83 percent of small businesses in the United States, this policy contains no exclusions addressing viruses or pandemics. [R. 18, PID 469]; *see Business Interruption/Businessowners' Policies*, NAT'L ASSOCIATION OF INS. COMMISSIONERS (last updated Dec. 19, 2020) ("NAIC") (available at content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm).

ARGUMENT

This case presents a basic lesson in textualism. Aspen promised to insure business income if Dr. Kirsch suffered "physical loss of or damage to" his property. [R. 1-2, PID 158.] The disjunctive "or" shows that there are two bases for coverage: "physical loss of" the property or "physical damage to" the property. When a deadly pandemic prevents someone from physically using property as it was intended, ordinary people would describe that as a "physical loss of" the property.

Unhappy with the policy's ordinary meaning, Aspen argues that the policy requires "tangible alteration" to trigger coverage. Aspen is wrong. The policy nowhere uses that (or any other) more specific term to displace the broad, ordinary meaning of "physical loss." Despite this, the district court accommodated Aspen's request to narrow coverage to "tangible alteration." The Court needs to correct this error.

The basic rule of textualism is that words are given their natural meaning, not a narrow or contrived one. A. SCALIA & B. GARNER, READING LAW §62, at 355-58 (2012) (explaining that courts "have only to say what the very words mean"). This is crucial for insurance cases. Insurers write all of the forms and, as a result, terms are strictly construed against

them, not in their favor. The text must control, even if the insurer can contrive a narrow reading of broad language. Courts are not authorized to construe language in the insurer's favor based on a conviction that the insurer could not have meant what it said. *See id.*

What Aspen said in its policy of insurance is clear: It insured "physical loss of" Dr. Kirsch's property and not just "tangible damage to" that property.

I. Decades of case law warned insurers that this language is broad and not limited to tangible damage.

Only a few years ago, this Court noted that "direct physical loss" is exceptionally broad. *K.V.G. Props., Inc.* v. *Westfield Ins. Co.*, 900 F.3d 818, 820-21 (6th Cir. 2018) (Michigan law). In the Court's words, "one would struggle to think of damage not covered by this language." *Id.* That case involved an illicit marijuana farm, but the comment was prescient.

Before the pandemic, precedent from fifteen jurisdictions addressed insurers' "tangible damage" argument. In all but one, appellate courts ruled against the industry. Despite this consensus, insurers insist that the weight of authority tilts their way. They do so by citing a swath of unpublished or trial-level decisions (both pre- and post-pandemic).

Virtually all of those cases did not face, or have not yet faced, appellate scrutiny. It is not accurate to equate the rulings of trial courts with the judgments of state and federal appellate courts. And the bulk of published appellate law cuts decidedly against Aspen.

A. The overwhelming weight of published authority gives "physical loss" its broad, ordinary meaning.

Insurance coverage is a matter of state law. *Telxon Corp.* v. *Fed. Ins. Co.*, 309 F.3d 386, 391 (6th Cir. 2002). Before the pandemic, four states' high courts[3] and seven other states' intermediate appellate courts[4] held in binding decisions that "physical loss" and its variants included property that is rendered unsafe or unusable, even without tangible or

[3] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[4] *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622 (Ill. Ct. App. 1999) (asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (electrical grid shutdown); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth odor); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

structural damage. Federal appellate courts (including this one) reached the same conclusion under the law of four other states.[5]

Below, Aspen cited binding cases from three jurisdictions.[6] Of those three, only New York has taken the insurers' side much (though not all) of the time. The other two (Washington and California) generally provide coverage without "tangible damage," with only minor exceptions. *Compare, e.g.*, *Hughes*, 18 Cal. Rptr. at 655 (rapid erosion of land underneath property caused "direct physical loss" to the home, even when the building was undamaged) *with MRI Healthcare of Glendale, Inc.* v. *State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 798-99 (2010) (when an MRI machine would not "ramp up" due to an excluded inherent defect,

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[5] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (chemical odors); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Am. Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (theft).

[6] [R. 12, PID 271, 277 (citing *MRI Healthcare*, 187 Cal. App. 4th at 798-99, *Fuiji* v. *State Farm. & Cas. Co.*, 857 P.2d 1051, 1052 (Wash. Ct. App. 1993), and *Roundabout Theatre Co.* v. *Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002)).]

the machine did not experience "direct physical loss").[7] Aspen's other decisions carried no precedential value.

If Aspen wants to keep score, then it is at least 14-1 in favor of Dr. Kirsch. The law in some jurisdictions is nuanced. But it is false to claim that most states require "tangible alteration" to trigger the broader term "physical loss" in a business-interruption policy.

There is no reason to believe the Michigan Supreme Court would follow the one state where the insurers' position has generally prevailed, rather than the fourteen states that have generally rejected it. The sheer weight of authority makes it impossible to discuss each case. But the key decisions illustrate why Aspen's position has persuaded few appellate judges.

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[7] *Compare also Fuiji*, 857 P.2d at 1052 (no "physical loss" to a "dwelling" when only the "engineering unit" had actually suffered damage) *with Graff*, 54 P.3d at 1269-70 (rejecting a "visibility" standard for "physical damage" and holding that meth residue triggered coverage) (Washington law). There is also variation in some other states. *See Mastellone* v. *Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1143 (Ohio Ct. App. 2008) (construing the term "physical injury" as requiring structural damage); *Source Food Techs., Inc.* v. *U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (narrowing Minnesota law on "physical loss"). This does not diminish the fact that fourteen jurisdictions allow recovery without "tangible damage."

Start with *Hughes* and *Murray*. Both policies promised to pay for "direct physical loss to the property." *Murray*, 509 S.E.2d at 16; *Hughes*, 18 Cal. Rptr. at 655. In *Hughes*, erosion swept away the building's support, causing cosmetic damage but making it unsafe to inhabit. 18 Cal. Rptr., at 655. In *Murray*, unstable rocks above a house prompted an evacuation order from the government. 509 S.E.2d at 16-17.

The insurers denied coverage in both cases. Like here, they contended that their policies "only insured the physical damage to the dwelling." *Id.* at 16-17. Both courts disagreed:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another.
>
> Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Id. (quotations omitted, emphasis added).

Both courts stressed that the property was not safe—giving weight to the most important characteristic of physical property. *Id. Hughes*

reasoned that "[i]t goes without question that [homeowners]' 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 18 Cal. Rptr. at 655. *Murray* echoed this, pointing out that the houses beneath the cliff "could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." 509 S.E.2d at 17. That was a "physical loss."

These arguments generally prevailed over the insurance industry's cramped positions. Other cases include *First Presbyterian*, where the Colorado Supreme Court held that loss of use can be a "physical loss." 437 P.2d at 55. There, "the accumulation of gasoline around and under the church building . . . ma[de] further use of the building highly dangerous" and caused a "direct physical loss." *Id.* And in *Wakefern*, the court rejected "the narrowly-parsed definition of 'physical damage' which the insurer urges us to adopt" and held that "loss of function" sufficed. 968 A.2d at 735-38.

This discussion could go on for pages, but UP will stop here. The Court should, however, review the many other pre-Covid cases that found coverage. *See, e.g.*, *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (e-coli contamination); *General Mills, Inc.* v. *Gold*

Medal Ins. Co., 622 N.W.2d 147, 152 (Minn. App. 2001) (FDA rule that harmless oats were nonetheless "adulterated"); *Manpower Inc.* v. *Ins. Co. of Pa.*, 2009 WL 3738099 (E.D. Wis., Nov. 3, 2003) (police order forbidding access to unstable building); *TRAVCO* v. *Ward*, 2010 WL 2222255 (E.D. Va., June 3, 2010) (toxic gas); *Or. Shakespeare Festival Ass'n* v. *Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450 (D. Or., June 7, 2016) (wildfire smoke), *vac'd as a condition of settlement*.

Having failed to "defin[e] direct physical loss or damage as they (and others before them) have argued it should be interpreted," Aspen must honor its broadly worded promise of coverage. *Cherokee Nation* v. *Lexington Ins. Co.*, 2021 WL 506271, *4 (Cherokee Cnty., Okla., Jan. 14, 2021). The Court of Appeals is not in the business of rescuing insurance companies who regret their choice to sell broadly worded insurance coverage.

B. *Couch on Insurance* cannot bear the weight the insurers put on it.

The district court relied heavily on a single treatise section that purports to summarize the law. 10A STEVEN PLITT, ET AL., COUCH ON INSURANCE §148:46 (3d ed., 2020 update). That section of Couch distorts

the state of things. It cites only *First Presbyterian* and *Hampton Foods* as pro-policyholder cases. *Id.* It then cites five cases as supporting the insurers' restrictive view: two from New York, the *MRI* case from California, an Oregon federal district court opinion (abrogated three years later in *Trutanich*, *supra*), and this Court's unpublished decision in *Universal Image*. *Id.*

This is a markedly incomplete survey. Yet insurers cite it as authoritative. The Court should be skeptical of such assertions. Indeed, even Couch's attempt to reconcile the split supports Dr. Kirsch. It posits that the key factor in the "physical loss" analysis is whether a fortuitous, external force changed the condition of the property. *Id.* That test is met here: the pandemic was fortuitous, and it made Dr. Kirsch's property unsafe.

Another telling indictment of this section is that a district court in Oregon rejected it—despite Couch's assertion that Oregon follows the "majority," pro-insurer rule. *James W. Fowler Co.* v. *QBE Ins. Corp.*, 474 F. Supp. 3d 1149, 1155-59 (D. Or. 2020) (Oregon law). The insurer cited Couch in support of its tangible-damage argument, but the court disagreed. Instead, following Scalia & Garner's admonition about the

word "or," and as instructed by Oregon law, the court held that "physical loss" occurs when the property, "while intact and undamaged, is rendered useless to [the policyholder]." *Id.* at 1158. That is the majority rule.

II. The better-reasoned Covid-19 cases follow the consensus.

Insurers' refusal to pay Covid-19 claims generated a flood of litigation. Aspen claims that more trial-level decisions favor insurers. But since 83% of small-business policies contain a "virus" exclusion, that is not surprising. *See* NAIC, *supra*. But these orders also contain serious errors, egregious departures from the text, or both. Given existing law, appellate benches may well invert that count. In any event, a growing number of trial courts are staying faithful to the text of the policies and the actual, pre-pandemic consensus. This Court should adopt their reasoning.

A recent ruling by Judge Chang in the Covid-19 MDL litigation is representative.[8] *In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins.*

[8] There are many other Covid-19 decisions that the Court should review, including one by Judge Polster. *Henderson Rd. Rest. Sys.* v. *Zurich Am. Ins. Co.*, 2021 U.S. Dist. LEXIS 9521 (N.D. Ohio, Jan. 19, 2021); *see also Ungarean* v. *CNA Ins.*, No. GD-20-006544 (Pa. Com. Pl., Mar. 22, 2021) (www.law360.com/articles/1368933/attachments/0) (Slip op.); *Derek Scott Williams PLLC* v. *Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 37096

Litig., MDL No. 2964, 2021 U.S. Dist. LEXIS 32351 (N.D. Ill., Feb. 22, 2021). *Society* analyzed the policy text in detail and concluded that coverage existed for Covid-19 losses. *Id.* at *15-16.

Judge Chang started, as one should, with the text. "The policy requires that the business suspension must be *caused by* direct physical loss of (or damage to) covered property . . . caused by or result[ing] from a Covered Cause of Loss." *Id.* at *32. Searching in vain for textual clues on what "Covered Cause of Loss" meant, he observed that "the policy turns back on itself and defines Covered Cause of Loss only as a 'Direct Physical Loss.'" *Id.* at *32-33.

This is revealing. "One would expect that, in defining what is a Covered *Cause* of Loss, the policy would set forth a definition that describes a *cause* of loss—not the loss itself." *Id.* at *32. But it does not. By defining a key term in a circular manner, that text means nothing and is inoperative. SCALIA & GARNER §16, at 134. "To give meaning to what is

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(N.D. Ill., Feb. 28, 2021); *NECO, Inc.* v. *Owners Ins. Co.*, 2021 U.S. Dist. LEXIS 28761 (W.D. Mo., Feb. 16, 2021); *Choctaw Nation of Okla.* v. *Lexington Ins. Co.*, 2021 WL 714032 (Bryan Cty., Okla., Feb. 15, 2021); *Cherokee Nation*, 2021 WL 506271, *3-7; *Elegant Massage, LLC* v. *State Farm Mut. Auto. Ins. Co.*, 2020 U.S. Dist. LEXIS 231935 (E.D. Va., Dec. 9, 2020); *Studio 417* v. *Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020).

meaningless is to create a text rather than to interpret one." *Id.* Judge Chang correctly held that this language cannot bar coverage. 2021 U.S. Dist. LEXIS 32351, at *37.

He then turned to the core question of whether the policyholder's "loss is 'physical' in nature." *Id.* This is key because "the operative text is 'direct physical loss of or damage to' covered property." *Id.* He swiftly desiccated the "tangible alteration" argument:

> The disjunctive "or" in that phrase means that "physical loss" must cover something different from "physical damage." It is axiomatic that courts interpret contracts so as to give effect to all of their provisions. That interpretive principle refutes [the insurer]'s first argument: that the coronavirus could not constitute "direct physical loss of or damage to" the covered property because the virus "does not cause a tangible change to the physical characteristics of property."

Id. (cleaned up). This is not surprising; it's what the word "or" means. SCALIA & GARNER §12, at 116-17; *Sec. Ins. Co.* v. *Kevin Tucker & Assocs.*, 64 F.3d 1001, 1007 (6th Cir. 1995).

So too in Michigan, which has confirmed—at the insistence of insurers—that the word "or" is disjunctive. *E.g.*, *Century Sur. Co.* v. *Charron*, 583 N.W.2d 486, 489 (Mich. Ct. App. 1998); *Morbark Indus., Inc.* v. *W. Empl'rs Ins. Co.*, 429 N.W.2d 213, 218 (Mich. Ct. App. 1988);

see also Bosco v. *Bauermeister*, 571 N.W.2d 509, 513 (Mich. 1997) (reversing the Michigan Court of Appeals because its "analysis of the policy failed to give meaning to all the pertinent policy language").

Society observed that the "more challenging interpretive question is whether the restrictions imposed on the [policyholders]' use of their premises count as *physical* loss." 2021 U.S. Dist. LEXIS 32351 at *38. It concluded that they did. Although the restaurants could offer take-out services, the Covid-19 orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Id.* at *39. "It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales the restaurant could make." *Id.* "No, instead the [policyholders] cannot use (or cannot fully use) the physical space." *Id.*

That is what happened to Dr. Kirsch. Responding to a pandemic, Governor Whitmer's edict caused Dr. Kirsch to lose his property for two months. In every sense, that loss "relates to natural or material things." *Physical*, WEBSTER'S THIRD NEW INT'L DICTIONARY 1706 (1993) (contrasting "physical" things with "things mental, moral, spiritual, or imaginary").

The virus is not mental, moral, spiritual, or imaginary. It is a physical thing, albeit invisible to the naked eye. It caused physical losses—prompting governments to dispossess people of their physical, real property. The extreme danger caused by the pandemic "ma[de] further use of the building highly dangerous," no less than the gasoline fumes in *First Presbyterian*, 437 P.2d at 55, or the rocks in *Murray*, 509 S.E.2d at 16-17. In both cases, the government subordinated the owners' property rights to its compelling interest in protecting human life. *See id.*

It did not matter that the policies insured property, and not people. The government barred the use of physical property in response to a physical threat, and that was enough. *Id.* Churches, houses, or dentist's offices that are unsafe for human use can "scarcely be considered [churches, houses, or dentists' offices] in the sense that rational persons would be content to reside there." 509 S.E.2d at 17.

Finally, *Society* addressed an argument pressed by the insurance industry:

> Remember that [the insurer] promised to pay only for loss of business income during the "period of restoration" . . . . The definition of "Period of Restoration" says that coverage for loss of business income "ends . . . when the property at the described premises should be repaired, rebuilt, or

> replaced with reasonable speed and similar quality; or the date when business is resumed at a new permanent location." In [the insurer]'s view, "repaired, rebuilt, or replaced" implies that covered "physical loss or damage" is necessarily tangible, requiring a physical injury to the covered property rather than mere loss of use.

2021 U.S. Dist. LEXIS 32351 at *40-41 (cleaned up).

Judge Chang considered and rejected this point. Reading the policy as a whole, he concluded that "too many textual clues point the other way." *Id.* at *41. The Period of Restoration "describes a *time* period during which loss of business income will be covered, rather than an explicit definition of coverage." *Id.* The coverage grant applied to "loss of" property, not just "damage to" property. *Id.* The construction-as-a-whole canon cannot be used to render other terms meaningless. *Id.*

Further supporting this reading was that "repair" and "replace" need not be construed narrowly. *Id.* "There is nothing inherent in the meanings of those words that would be inconsistent with characterizing the [policyholders]' loss of their space due to the shutdown orders as a physical loss." *Id.* at *41. "If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to 'repair' the space by

installing those safety features." *Id.* Other courts agree. *Derek Scott Williams*, 2021 U.S. Dist. LEXIS 37096, *12 ("'Repair,' however, is not inherently physical; one need only consider common references to repairing a relationship or repairing one's health.") (citing Merriam-Webster); *see also NECO*, 2021 U.S. Dist. LEXIS 28761 at *19-20; *Cherokee Nation*, 2020 WL 506271, *7-8 & n.15; *Ungarean*, slip op., at 14-16.

At worst, tension exists under either side's interpretation. The court could either ignore the disjunctive coverage grant, or it could adopt an alternate (though still reasonable) reading of "repair" and "replace." 2021 U.S. Dist. LEXIS 32351 at *40-41. As a result, the policy terms were ambiguous and the tie went to the policyholder. *Id.* That should have occurred here. *Kevin Tucker*, 64 F.3d at 1007; *Allstate Ins. Co.* v. *McCarn*, 645 N.W.2d 20, 23-24 (Mich. 2002) ("[W]here there is doubt, the policy should be construed in favor of the insured."). Dr. Krisch's reading of the policy is reasonable, and the district court erred in dismissing the case on the pleadings.

A court cannot avoid this ambiguity by reading "loss of" as meaning total loss. Aspen defined "damage" as "partial or total loss of or damage

to" property. [R. 1-2, PID 158 (emphasis added).] The policy also contemplates that the practice may be "totally suspended" or "partially suspended," and it enforces a proportional reduction in payments for the latter. [*Id.* at 155 (§6.b).] A court cannot construe "loss of" to mean "total loss" where the policy covers the "partial . . . loss of . . . property." [*Id.* at 158.]

In sum, Aspen's interpretation fails to give meaning to (1) the disjunctive "loss of or damage to;" (2) the period-of-restoration terms; and (3) the guarantee of coverage for "partial or total" losses. Judge Chang's and Dr. Kirsch's interpretation gives meaning to all three. Michigan law requires the court to adopt that reading. *Bosco*, 571 N.W.2d at 513.

III. *Universal Image* ignores the plain language of the policy and is error under Michigan law.

The district court cited *Universal Image Products, Inc.* v. *Federal Ins. Co.*, 475 F. App'x 569 (6th Cir. 2012), in support of its conclusion. The Court is not bound by *Universal Image*, an unpublished ruling, and should not follow it. The case is not comparable, disregards the text, and violates Circuit precedent.

A. *Universal Image* addressed a tenant who conceded the property was safe.

At the outset, *Universal Image* provides a poor comparison. The policyholder in that case conceded the premises were safe but left them anyway. 475 F. App'x at 571, 575. That is worlds apart from this case.

The *Universal Image* policyholder had been a tenant in an office building for twenty-two years. *Id.* at 569-70. After a heavy rainfall, employees noticed odors. *Id.* at 570. Two experts identified mold in the ventilation system and recommended it be shut down and repaired. *Id.* During that time, Universal had to work in a space that was not climate-controlled. *Id.*

Critically, no one forced the tenants to leave. *Id.* Universal assured its employees that the air quality was "acceptable" and posed "no health threat." *Id.* at 570-71. Soon afterward, however, Universal proclaimed that it was leaving. *Id.* at 571. Fourteen days after it told its employees the building was safe, it had moved out and submitted a claim to its insurer. *Id.*

The panel agreed Universal had "certainly suffered a large inconvenience." *Id.* at 575. But it declined to equate that with "physical

loss," which it construed as "tangible damage to physical property." *Id.* Nor was it convinced that the property was "rendered uninhabitable or substantially unusable." *Id.* Since the mold was only in the ventilation system (property of Universal's landlord), the panel reasoned there was no "tangible damage" to Universal's property. *Id.* at 573-74.

That standard is incorrect, but the case is unpersuasive anyway. Covid-19 does not cause a mere "inconvenience." It is, without question, a deadly physical peril. Nor did Dr. Kirsch suffer due to choices he made. Facing a pandemic that has killed over 500,000 Americans, Governor Whitmer ordered all nonessential businesses closed. [R. 18, PID 465.] This forceful dispossession caused Dr. Kirsch to lose his real property for two months. [*Id.*]

Citing *Universal Image* here overstates the holding from that case. There is no way to compare Dr. Kirsch to a policyholder who abandons property after conceding it was safe—and then tries to stick its insurer with the bill. A deadly pandemic is a very different beast.

B. *Universal Image* strayed from the textual analysis mandated by the Michigan Supreme Court.

Universal Image attempted to predict how the Michigan Supreme Court would interpret the phrase "physical loss or damage." 475 F. App'x at 573. No Michigan case had addressed that language. *Id.* In such situations, Michigan requires courts to start with the text. *Bosco*, 571 N.W.2d at 513. *Universal Image* started by ignoring the text. That led it to narrow the coverage grant from "physical loss" to words that the policy does not contain—"tangible damage." That was error.

The panel rested almost all of its analysis on an inference from an unpublished state-court opinion—one that did not address the words "physical loss." 475 F. App'x at 573 (citing *Acorn Inv. Co.* v. *Mich. Basic Prop. Ins. Ass'n*, 2009 Mich. App. LEXIS 1892 (Sept. 15, 2009)).[9] *Acorn* was about the word "direct." *Id.* The panel conceded this, but still believed the case "provide[d] insight" into the different phrase "physical loss." *Id.*

[9] Although "an intermediate appellate court's judgment that announces a rule of law is a datum" in the *Erie* analysis, *Acorn* is neither. *Universal Image*, 475 F. App'x at 572-73 (quotations omitted). It did not render judgment on this issue; it construed "direct," not "physical loss." *Id.* Nor did *Acorn* announce a rule of law; it "is not precedentially binding under the rule of stare decisis." MICH. CT. R. 7.215(C). *Acorn* means little about Michigan law, if it means anything at all.

It reached this conclusion because *Acorn* cited a Texas case construing "physical loss" in the context of mold damage. *Id.* (citing *de Laurentis* v. *United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. Ct. App. 2005)).

That was an odd case to cite, because *de Laurentis* ruled for the policyholder. 162 S.W.3d at 723. It held that a "physical loss" is "simply one that relates to natural or material things" and does not require the structural alterations the insurer demanded. *Id.* (quotation omitted). Thus, although *de Laurentis* required "tangible damage," that test is less restrictive than it sounds, because the court held that mold (much like a virus) can cause damage. *Id.* at 724 ("The insurer's argument ignores the undeniable fact that mold can be damage.").

Universal Image imported the "tangible damage" rule, ignored the reasoning and holding behind it, and held for the insurer. 475 F. App'x at 573. That is an unpersuasive *Erie* analysis for a state that prides itself on fidelity to the text. *Wilkie* v. *Auto-Owners Ins. Co.*, 664 N.W.2d 776, 786-88 (Mich. 2003). The panel never explained why the Michigan Supreme Court would deny coverage by adding words (such as "tangible") that the insurer omitted from the policy and deleting others (such as "loss of") that the insurer used in the policy.

No principle of Michigan law allows a court to do that. *Id*. "And no clause in the federal Constitution purports to confer such a power upon the federal courts." *K.V.G. Properties*, 900 F.3d at 822. As a result, the Court needs to face what *Universal Image* neglected: the text of the policy.

The lack of specific precedent is not bothersome. "Well-settled principles of [policy] interpretation require one to first look to a [policy]'s plain language." *Wilkie*, 664 N.W.2d at 787 (quotations omitted). If it is ambiguous, "and one of those interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail." *Id.* at 786. That is the beginning and the end of the *Erie* analysis. It is how *Universal Image* should have proceeded, and it is how this Court should proceed here.

C. *Universal Image*'s "economic loss" rationale is wrong and foreclosed by Circuit precedent.

Universal Image also reasoned that the policy required "tangible damage" because it did not cover "economic" losses. 475 F. App'x at 573-74. That violates the plain language of the policy and Circuit precedent. *Am. Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957).

The policy in *Universal Image*, like Dr. Kirsch's policy, insured business income. *Universal Image Prods.* v. *Chubb Corp.*, 703 F. Supp. 2d 705, 710-11 (E.D. Mich. 2010). Lost income is an economic loss. But on appeal, the panel denied coverage by reasoning that the policyholder was not seeking coverage for "tangible, physical losses, but [for] economic losses." 475 F. App'x at 573.

That is not the law in this Circuit. 248 F.2d at 930-31. In *Alliance*, the Court held that a business-income policy responded after a medical-device factory was rendered unusable by radium contamination. *Id.* at 930. "It is apparent," the Court held, "that the matter involved is not compensation for destruction of physical property, but for the loss of gross earnings. . . ." *Id.*

Thus, *Universal Image* erred in barring economic losses under a business-income policy. When triggered, such policies "pay for the actual loss of [business] income you sustain" up to policy limits. [R. 1-2, PID 142, 158.] It blinks reality to argue that this does not cover "economic" losses. That is exactly what the coverage is for. *Ungarean*, slip op., at 13-14.

In sum, *Universal Image* does not answer the question the Court must address here. Instead, a plain-meaning analysis should compel the Court to reverse.

IV. Aspen's exclusions do not apply.

Aspen did not put a virus exclusion in its policy, even though they were readily available in the insurance industry. *See* NAIC, *supra*; [R. 18, PID 469.] Below, it contended (briefly) that two different exclusions applied. [R. 12, PID 283-84.] The district court did not rule on them, dismissing the case on "physical loss" alone. [R. 18, at 476-77.] Aspen's claims are meritless.

On the ordinance-or-law exclusion, Aspen argued that "the COVID-19 government shutdown orders constitute ordinances regulating the use of property." [R. 12, PID 284.] That's a giant stretch. An executive order is not an "ordinance" in common speech. *Ordinance*, BALLENTINE'S LAW DICTIONARY ("A local law of a municipal corporation, of a general and permanent nature."). The presence of "ordinance" alongside the word "law" confirms Aspen used the former in a legislative sense. [R. 1-2, PID 137.] Confirming this further is that the exclusion, viewed as a whole, is

directed at construction and zoning ordinances, not the emergency orders here. [*See id.*]

This Court recently shot down a similarly contorted argument—that "vandalism" included "arson." *Wells Fargo Bank, N.A.* v. *Allstate Ins. Co.,* 784 F. App'x 401, 404 (6th Cir. 2019). As Judge McKeague explained in rejecting the insurer's position, "we think one would describe arson as vandalism about as regularly as one would call murder a battery—which is to say almost never." *Id.*

So too here. No one, especially not "those steeped in legal parlance, like the lawyers who drafted this insurance contract," *id.*, says "ordinance or law" and means "emergency executive order." That is confirmed by broader terms for governmental coercion (like "civil authority") Aspen used elsewhere in the policy. [R. 1-2, PID 146.] Those "connotative clues" are dispositive; at the very least, they show that the exclusion is ambiguous. 784 F. App'x at 404-05 ("[A]mbiguity, remember, is all [the policyholder] must show to prevail.").

Aspen's reliance on the loss-of-use exclusion also fails. [R. 12, PID 283.] That exclusion applies to loss or damage "caused by or resulting from . . . delay, loss of use or loss of market." [R. 1-2, PID 151 (emphasis

added).] This is a "cause" exclusion; it applies where the "loss of or damage to" the property is caused by a "delay" or a "loss of use or loss of market." *Or. Shakespeare Ass'n*, 2016 U.S. Dist. LEXIS 74450, at *18. Examples might include a tomato vendor whose stock spoils because of a late delivery, or an obsolete product that rusts in the warehouse because there is no demand for it. In each instance, delay or loss of use/market causes a separate loss. The exclusion does not apply when "loss of use" is on the other side of the cause–effect equation.

The exclusion works that way on purpose. As Judge Polster observed in a separate case, reading this as a "loss" exclusion—rather than a "cause" exclusion, as the text requires—nullifies all business-income coverage. *Henderson Road*, 2021 U.S. Dist. LEXIS 9521, at *45-46. Business-income losses always involve inability to use business property to generate revenue, regardless of whether the loss is caused by a fire, a flood, or a pandemic. *Id.* Aspen's reading cannot be correct, as it renders an entire coverage form useless.

The loss-of-use exclusion also lacks a concurrent-causation clause. [R. 1-2, PID 151.] Such clauses make an exclusion apply "regardless of any other cause or event that contributes concurrently in any sequence"

to the loss. [*Id.* at 150.] Without such a clause, Aspen must show that "delay, loss of use or loss of market" is the sole or dominant cause of the loss. [*Id.* at 151.] It cannot do that; the pandemic and closure orders are the principal causes of the loss.

CONCLUSION

The Court should **REVERSE**.

Respectfully Submitted,

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Date: April 1, 2021

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/s/ *Christopher E. Kozak* /

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I certify that on April 1, 2021, I served a copy of the foregoing on all counsel of record using the Court's CM/ECF filing system. Parties can access this filing through the Court's system.

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