IN THE INDIANA COURT OF APPEALS

CASE No. 21A-CP-02848

INDIANA REPERTORY THEATRE, Appellant, v. THE CINCINNATI CASUALTY COMPANY Appellees.	Appeal from the Marion County Superior Court D01 Trial Court Cause No. 49D01-2004-PL-013137 The Honorable Heather A. Welch, Judge

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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I. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

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

UP works to provide an 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. UP seeks to assist the Court on this issue of immense public importance by contextualizing the arguments and the current state of the law for this essential coverage, and for the existential risk threatening many business policyholders today as a result of the losses caused by the COVID-19 pandemic.

UP participated as an amicus in the first appeal in this case, *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 410 (Ind. Ct. App. 2022) ("*IRT I*"). This Court's opinion in *IRT I* adopted a "physical alteration, physical contamination, or physical destruction" test for "physical loss" under IRT's all-risk insurance policy. *Id.* at 410 (quoting *Oral Surgeons, P.C. v. Cincinnati Ins.* Co., 2 F.4th 1141, 1144 (8th Cir. 2021). This appeal involves the scope of the Court's holding in *IRT I* and whether it should favor coverage, consistent with Indiana law, where the facts may fall within the Court's definition of "physical loss."

In this brief, UP discusses the unique and broad structure of "all-risk" insurance policies like the one policyholder-Appellant Indiana Repertory Theatre ("IRT") purchased from its insurer-Appellee Cincinnati Casualty Company ("Cincinnati"). UP details the insurance industry's pre-COVID-19 knowledge. It describes numerous insurance industry documents demonstrating the reasonableness of IRT's interpretation that the presence of SARS-CoV-2 at the property constitutes a covered event under the policy. UP also addresses the unsubstantiated subtext running through the insurers' arguments in COVID-19 cases—that the industry will become insolvent if they must pay these claims, and so courts should not force them to do so. Finally, UP debunks any strict "physical alteration" standard from the non-binding insurance treatise on which Cincinnati and virtually every court deciding these issues in favor of insurers has relied, *Couch on Insurance 3d*. ("*Couch*").

II. SUMMARY OF THE ARGUMENT

Property insurance policies have long recognized that it is impossible to predict in advance every way in which a covered loss might occur. To accommodate this uncertainty, property insurance policies like the one Cincinnati issued to IRT are written on what is termed an "all-risk" basis, meaning they cover all risks of physical loss or damage that are not specifically excluded in the policy. Indiana law places the burden on insurance companies to clearly and unmistakably exclude any losses they want to exclude when issuing these "all-risk" policies. Any losses not so excluded, are covered. For over half a century, the majority rule across the country has been that

standard form all-risks policies are triggered where a physical substance renders property too dangerous for its intended use.

The insurance industry has acknowledged, both before and after the pandemic began, that losses caused by the presence of a virus are covered. Its present denials of coverage are inconsistent with these prior statements and actions. Under settled Indiana Supreme Court precedent, "[w]hen the insurance industry itself has offered differing interpretations of the same language, we must assume that the insured understood the coverage in the more expansive way." *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996). Such differing interpretations "demonstrate[ ] the presence of the ambiguity that requires this Court to construe the insurance policy in favor of the insured and against the insurer who drafted it." *Id.*

Construing the ambiguity in favor of IRT will not leave the insurance industry in financial ruin. Insurers have cried wolf many times before, but they remain large and profitable businesses, even after courts have ordered them to honor their coverage promises. Cincinnati, in particular, has experienced tremendous gains since the pandemic began. It is by no means at risk of insolvency.

Cincinnati, like other insurers and virtually every pro-insurer COVID coverage case, relies on *Couch*'s "distinct, demonstrable, physical alteration" test. Before *Couch*, no court—not one—had endorsed this standard, which the treatise incorrectly describes as the "widely held rule." *Couch*'s debunked test has regrettably taken the reigns of COVID-19 coverage litigation.

III. ARGUMENT

A. For more than half a century, courts agreed that the presence of dangerous physical substances on property triggered coverage.

IRT purchased an "all-risk" insurance policy from Cincinnati. As this Court has recognized, an all-risk policy "extends coverage to risks not generally covered under other insurance policies." *Associated Aviation Underwriters v. George Koch Sons, Inc.*, 712 N.E.2d 1071, 1073 (Ind. Ct. App. 1999). All-risk insurance policies "generally permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." *Id.* Cincinnati cannot reasonably dispute that it was aware that policyholders, courts, insurance companies, and insurance industry drafting organizations had—for decades—concluded that, in such all-risk policies, "physical loss or damage" included situations where property was rendered unfit or unsafe for its intended use, regardless of whether such property had suffered a physical "alteration." At a minimum, Cincinnati knew that its standard-form policy language was ambiguous.

The all-risk policy at issue before the Court provides coverage for "physical loss or damage" to property. Until the COVID-19 litigation, courts consistently found that policies requiring "physical loss" or "physical damage" covered events where physical substances were present on the property and made it too dangerous to continue use, regardless of whether the property had suffered some "physical alteration" or

"tangible damage." This understanding of the policy terms stretches back to the 1950s,[1] 1960s,[2] 1970s,[3] 1980s,[4] and 1990s.[5]

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[1] *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (applying Ohio law and finding that the policyholder, which manufactured instruments used in measuring radioactivity, had suffered property damage from a release of radon dust and gas which made the building unsafe to work in, and made it impossible to calibrate the instruments prior to sale because of the background radiation).

[2] *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962) (finding coverage when policyholder's home became perched on the edge of a cliff after a sudden landslide deprived it of lateral support and stability, was damaged because it became unsafe to live in and thus useless); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (finding "direct physical loss" where a church complied with fire department's order to close because gasoline vapors made "use of the building dangerous").

[3] *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (finding coverage for loss of business income where vibration of motor, without apparent damage, caused it to be shut down).

[4] *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (applying Mo. law) (finding Business-Income coverage where risk of collapse required abandonment of grocery store).

[5] In chronological order: *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Ct. C.P. 7. May 28, 1992) (finding coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (insurance company conceded methamphetamine fumes could cause "accidental direct physical loss"); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (costs of methamphetamine odor covered as direct physical loss or damage); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (oil fumes present in house after discovery of oil leak constituted physical damage to the house); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (direct physical loss or damage from presence of asbestos); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a "direct physical loss to the property"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (intermingling of a quarter pound of wood shavings in 80,000 pounds of almonds caused physical loss or damage to the almonds even though they were structurally unchanged); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *3-4 (Mass. Super. Aug. 12, 1998) (concluding that "direct physical

The loss-of-function cases continued to multiply in the mid-2000s[6] after the insurance industry paid claims from SARS-CoV-1. *See* Section III(B) *infra*. This case law motivated the insurance-industry drafting organization, on behalf of its members, to draft the Virus or Bacteria Exclusions in 2006.[7] On July 6, 2006, the

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loss or damage" was ambiguous and could mean either "only tangible damage to the structure of insured property" or "more than tangible damage to the structure of insured property," and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (citing liability insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage," defined under liability policies to be "physical injury to or destruction of tangible property," and finding that policyholder had established that the asbestos fiber contamination constituted property damage).

[6] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss to property"); *Schlamm Stone & Dolan LLP.* v. *Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. App. Div. 2005) (finding that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip op. at 6-8 (Ind. Super. Nov. 30, 2007) (finding that infestation of house with Brown Recluse Spiders constituted "sudden and accidental direct physical loss" to the house: "Case law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains"); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (finding, where the policyholder's heat treater for medical implants was contaminated by lead when a lead hammer was mistakenly left in it, this was "physical loss or damage": "There is no question that the physical transformation of the furnace which rendered it useless for processing medical devices, the use for which it was specially certified, reduced both the value of the furnace and [the policyholder's] ability to derive business income from the furnace. This reduction of value was caused by an incident that is fairly characterized as 'direct physical damage'").

[7] Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (Mar. 4, 2020) https://www.insurancejournal.com/news/international/2020/03/04/560126.htm.

Insurance Services Office ("ISO") submitted a circular announcing "the submission of form filings to address exclusion of loss due to disease-causing agents such as viruses and bacteria."[8] ISO's circular incorrectly stated that property policies had not historically been a source of cover for loss from "disease-causing agents."[9] Yet at the same time, ISO recognized that a policyholder could reasonably claim coverage for these losses under existing policies.

After the insurance industry drafted this exclusion, courts continued to rule for policyholders in circumstances where harmful substances rendered property

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8 Appellant's App. Vol. III p. 57.

9 *Id.* at p. 62.

dangerous, in cases that lacked virus exclusions.[10] This includes post-pandemic cases outside of those construing coverage for loss arising from the pandemic.[11]

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[10] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) ("In the context of this case, the electrical grid was 'physically damaged' because, due to a physical incident or series of incidents, the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity."); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *7 (E.D. Wis. Nov. 3, 2009) (finding "direct physical loss … or damage to" a building adjacent to a building which collapsed despite the fact that the collapse did not cause any noticeable damage to the policyholder's occupied space); *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (finding that house built with Chinese drywall which emitted toxic gases, causing the policyholder to move out, had suffered direct physical loss, despite the fact that it was "physically intact, functional and ha[d] no visible damage," noting the majority of cases nationwide find that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces"); *In re Chinese Mfd. Drywall*, 759 F. Supp. 2d 822, 831-32 (E.D. La. 2010) (finding that there "exists a covered physical loss" where "potentially injurious material" is "activated, for example by releases gases or fibers," and "that the presence of Chinese-manufactured drywall in a home constitutes a physical loss" because it "renders the [policyholders'] homes useless and/or uninhabitable"); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (applying Hawai'i law) (finding that intrusion of arsenic into roof caused "direct physical loss or damage" to the roof); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (concluding that "property can sustain physical loss or damage without experiencing structural alteration," that "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Mellin v. Northern Security Ins. Co.*, 115 A.3d 799, 806 (N.H. 2015) (holding that pervasive odor of cat urine was "physical loss" to condominium); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (March 6, 2017) (smoke from wildfires).

[11] In chronological order: *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) ("The more persuasive cases are those suggesting that loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the "physical loss or damage to" language in the Policy"); *Crisco v. Foremost Ins. Co.*, 505 F. Supp. 3d 993, 998 (N.D. Cal. 2020) (applying California law) (finding that when a fire destroyed

Thus, historically and through the present day (with the exception of COVID-19 lawsuits), courts have consistently held that such a dangerous hazard causes "physical loss" regardless of "physical alteration" or "tangible damage." A physical substance, physically present at the property, and creating a physical hazard, has always been sufficient. The SARS-CoV-2 virus is no different than those physical substances to have come before the courts for more than half a century. It is likewise sufficient to trigger coverage here.

B. The insurance industry similarly understood that all-risk policies cover pandemic risk, making IRT's interpretation of this policy language reasonable as a matter of law.

One subtext in the insurance industry's COVID-19 arguments is that they "never intended" to insure these risks because they are practically "uninsurable." But courts and the insurance industry itself have recognized that loss-of-function and pandemic-related losses are insurable.

At the outset, any argument that the policies were not "priced or designed" for pandemic risk should be a non-starter. These policies are not negotiated: "[W]e buy their forms or we do not buy insurance." *Kiger*, 662 N.E.2d at 947 (quotations omitted). Insurers set the terms and the premium rates unilaterally, with modest regulatory oversight. If their actuaries and underwriters fail to accurately match the policy *text* with the *risks* they wish to cover, then the insurer—not the public or

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utilities infrastructure, "the sewage, electricity, water, water gas did not physically run, as it previously had" in the mobile homes, and "[s]uch constitutes an insured physical loss under the policy").

individual policyholders—must bear the cost of that error. The Court's task is not to ask what the policy *should* cover; it is to determine what the policy language *reasonably does* cover. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470-71 (Ind. 1985) (barring the insurer, as a matter of law, from introducing extrinsic evidence of its "intent" in drafting a term, and instead construing the ambiguity in favor of coverage).

Even if one incorrectly assumes that insurers did not intend to cover pandemic-related or other loss-of-function losses, courts do not rewrite policies to correct underwriting or pricing errors that the insurers claim they missed. That is not the Court's job. The policy has been sold, the premium collected, and the risk has materialized. To change the policy terms now unfairly gives the insurer the chance to re-underwrite after the casualty event occurs—at which point, of course, it is not underwriting risk at all, but rather a windfall for the insurer. This is particularly true here, where the insurer—despite having form virus exclusions in its repertoire—deliberately chose not to include it in its IRT policy, when most of its competitors did so in their policies.[12] The only motive for this action was to help the insurer sell policies.

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[12] *Business Interruption/Businessowners' Policies*, National Association of Insurance Commissioners (last updated Jan. 19, 2022), *available at* https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm.

1. The insurance industry has admitted that the presence of a virus like SARS-CoV-2 is a covered event under standard form policy language.

As policyholders in other cases have shown, the insurance industry understood these policies covered virus-based losses in the absence of a virus exclusion. UP will present six different examples. First, the Commercial Lines Product Director at The Cincinnati Insurance Company—the same family of insurance companies as IRT's insurer—has admitted that the presence of COVID-19 on a premises constitutes property damages.[13] As stated in an email dated March 10, 2020:

> Once someone who is a carrier [of COVID-19] is on [a] premises, then I think, and Tore [Swanson, Cincinnati's Assistant Vice President and Property Claims Manager] agreed, that constitutes some type of property damage and Tore thought we would at least pay for clean-up/disinfectant costs (e.g. a student is diagnosed with the disease and we pay to disinfect the dorm room).

Second, Allianz Global Corporate & Specialty similarly conceded that a hotel room is too dangerous to use even days after it is cleaned.[14] There is a complete loss of use.

Third, prior to the instant pandemic, the insurance industry paid claims for losses caused by the first coronavirus outbreak, SARS-CoV-1. A 2003 Business

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[13] Amicus Queens Tower Restaurant Inc. dba Primavista Filing of Supplemental Authority Pursuant to S.Ct.Prac.R. 16,08 and, In the Alternative, Joint Motion to Admit Newly Discovered Evidence (Jan. 6, 2022) filed in *Neuro-Communication Services, Inc., et al. v. The Cincinnati Ins. Co., et al.*, Case No. 2021—130 (Ohio S. Ct.).

[14] "COVID-19 Coronavirus Risk Bulletin for Resuming Operations for Hospitality Following COVID-19," Allianz Global Corporate & Specialty, filed in *Circle Block Partners, LLC, et al. v. Fireman's Fund Ins. Co.*, No. 1:20-cv-02512, ECF 56-1, p. 3.

Insurance article confirmed that a company within American International Group Inc. ("AIG") paid millions of dollars to a hotel chain for cancellations and reduced food and beverage sales stemming from SARS-CoV-1.[15]

Fourth, consistent with the above, Factory Mutual Insurance Company ("FM"), one of the most sophisticated property insurers in the world, affirmatively argued that standard-form policies, like IRT's policy, were intended to cover risks arising from disease-causing agents. In *Factory Mutual Insurance Co. v. Federal Insurance Co.*, FM asserted that a mold infestation constituted "physical loss or damage" because it "destroy[ed] the aseptic environment and render[ed] [the pharmaceutical facility] unsafe for its intended use." No. 1:17-cv-00760 (D.N.M.), ECF #127 (Mot. in Limine No. 5 re Physical Loss or Damage), p. 3.

Fifth, as explained *supra*, ISO has acknowledged viruses might trigger coverage and said this was why a virus exclusion was necessary. *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.), ECF #36 (Second Am. Compl.), ¶36 (quoting ISO's justification for the virus exclusion, which was that "building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria" and that such contamination could trigger business-interruption coverage).

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[15] Souter, Gavin, "Hotel chain to get payout for SARS-related losses," Business Insurance (Nov. 2, 2003), available at https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses.

Sixth, some insurers have asked regulators if they could omit the virus exclusion (making it "optional" rather than "mandatory," as ISO proposed), in order to offer their customers broader coverage. *Id.* at ECF #36-2 (GNY[16] Explanatory Mem., Resp. to Obj. 1 Dated 4-30-2012). In its memorandum to New York regulators, GNY acknowledged that coverage exists for "this type of loss ('pandemic')" in the absence of a virus exclusion. *Id.* It told regulators that viruses and pandemics could result in potential covered losses in "Business Interruption/Time Element coverage segments." *Id.* GNY gave specific examples of diseases spreading in indoor, highly trafficked spaces (like restaurants or doctors' offices) that may create a covered loss. *Id.* It acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including losses "transmitted to third parties via ingestion," "direct contact to an insured's products," or "spread through the HVAC system" in a building—the last of which has, unfortunately, been proven true during the COVID-19 pandemic. *Id.* GNY downplayed the possibility that a virus "would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure," but it nonetheless admitted that it was deliberately insuring that kind of risk. *Id.*

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[16] Strathmore is GNY's successor-in-interest. In a COVID-19 suit against Strathmore, the policyholder offered this memorandum as evidence that the policy covered Covid-19 related losses. That case is currently on appeal in the First Circuit. *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.).

Crucially, GNY admitted what all standard-form property insurers knew: policyholders reasonably expect this coverage and would never willingly part with it. GNY said:

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible fortuitous occurrences and should be covered should such an event arise.

Id. (emphasis added).

2. Under Indiana law, when the insurance industry has offered differing interpretations of policy language, courts must assume the policyholder understood the language in the more expansive way.

These insurance industry examples illustrate the reasonableness of IRT's interpretation of the policy terms. The Indiana Supreme Court has twice examined similar materials when determining whether policy language is ambiguous. In *Kiger*, one issue the court analyzed was whether the phrase "sudden and accidental" within an exception to the policy's pollution exclusion precluded coverage for liability arising from the gradual release of gasoline. The insurer argued that the term "sudden" should be understood to have only a temporal meaning, namely "all at once." 662 N.E.2d at 947. The policyholder argued that it could mean "unexpected." *Id.*

To determine whether "sudden and accidental" was ambiguous, the Supreme Court considered insurance industry materials extrinsic to the policy. *Id.* at 948. Specifically, it relied upon the minutes of a March 1970 Industrial Rating Board ("IRB") General Liability Governing Committee meeting. *Id.* The IRB was an insurer

group which drafted and sponsored consideration of additions to the form terms used by insurers, much like the modern ISO.

The Supreme Court found that "[i]f one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity." *Id.* at 947. The court pointed out that the IRB minutes showed that some in the industry claimed the phrase "sudden and accidental" was "nothing more than a 'clarification' which made explicit the fact that the insurance did not cover those acts which are expected and intended." *Id.* This was at odds with the insurer's position in *Kiger*, which was that "sudden" was a new, temporal limitation on coverage, which would bar coverage for gradual contamination. *Id.* at 947.

The Supreme Court relied on the minutes, finding the policyholder's position reasonable and thus holding policy was ambiguous. *Id.* "That this interpretation was advanced [by the insurance industry] simply demonstrates the presence of the ambiguity that requires this Court to construe the insurance policy in favor of the insured and against the insurer who drafted it." *Id.* "When the insurance industry itself has offered differing interpretations of the same language, we must assume that the insured understood the coverage in the more expansive way." *Id.* (citing *Eli Lilly*, 482 N.E.2d 467).

The Supreme Court again relied upon materials extrinsic to the policy to demonstrate ambiguity in *Flexdar*. There, the policyholder argued that an endorsement in a policy sold after the policies at issue—an endorsement that identified specific substances as "pollutants"—demonstrated the ambiguity in the

pollution exclusion in the older policies at issue, which did not reference specific substances. *Flexdar*, 937 N.E.2d 1203, 1206 (Ind. Ct. App. 2010), *trans. granted, vacated*, *superseded by* 964 N.E.2d 845 (Ind. 2012). The Court of Appeals had held that such evidence should be stricken. *Id.* at 1208. The Supreme Court disagreed and explicitly relied on it in holding:

> By more careful drafting State Auto has the ability to resolve any question of ambiguity [in the 1997-2002 policies]. And in fact it has done so. In 2005 State Auto revised its policies to add an "Indiana Changes – Pollution Exclusion" endorsement. The language more specifically defined the term "pollutants"[.]

Flexdar, 964 N.E.2d at 851-52.

Like in *Kiger* and *Flexdar*, the insurance industry materials described in Section III(B)(1) demonstrate that IRT's interpretation of its policies—which contain no virus exclusion at all—is reasonable and that, at the very least, the policy is ambiguous. Ambiguous language must be construed in favor of coverage for IRT. *Kiger*, 662 N.E.2d at 947.

C. The insurers' dire warnings of insolvency are overblown and have no place in a contract-interpretation case.

Around the country, insurers and their trade organizations have been filing *amicus* briefs warning that, if the courts force them to cover COVID-19 losses, it could drive the entire industry into insolvency. This concern is both overblown and inappropriate under the governing legal standard.

1. Insurers cry wolf.

The pandemic has imposed hardship and losses for a wide range of business concerns. Insurers, in effect, make the same argument: if we are affected by the

pandemic, as everyone else has been, then we, too, may go out of business. But where catastrophe affects multiple industries, insurance policies should not be interpreted with the thumb on the scale to benefit the insurer. Rather, insurance contracts should be interpreted according to long-standing precedent and rules of construction, and in accordance with public policy favoring the spread and transfer of risk through the purchase of insurance. *See Eli Lilly*, 482 N.E.2d at 470 (insurance policies "should be construed to further the policy's basic purpose of indemnity").

When insurers face loss on a massive scale, or when laws change that could lead to a proverbial avalanche of claims, insurance companies can be counted on to sound the alarm of industry-wide insolvency. Typically, this is paired with a claim that their insurance policies "never meant to cover that." The oft-predicted collapse, however, has never arrived, and for good reason—insurance companies are massively capitalized, and their risk is reinsured and hedged in multiple ways.

This game has been going on for decades. For example, insurers asserted that the liability from claims launched by the passage and enforcement of CERCLA would bankrupt them.[17] Yet, insurers survived. When the Indiana Supreme Court confronted the pollution exclusions in the 1990s, the industry again appeared and warned that it might go bankrupt unless the exclusions were given the sweeping

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[17] In testimony given before Congress in 1990, insurance industry representatives sounded the alarms, claiming that the cost of cleaning up even part of the pollution issues will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76.

construction they demanded. *See* Br. of the Ins. Institute of Ind., Inc., as *Amicus Curiae* in support of Appellant in *Am. States Ins. Co. v. Kiger*, No. 32C01-9206-CP-184, pp. 15-16; Br. of Alliance of Am. Insurers as *Amicus Curiae* in support of rehearing in *Kiger*, pp.1-2, 6-9. The Indiana Supreme Court rejected these arguments, found the exclusions ambiguous, construed them in favor of coverage, and denied rehearing. *Kiger*, 662 N.E.2d at 948-50. Yet, again, the insurers survived. Decades after *Kiger*, insurers are still selling liability insurance in Indiana, sometimes without the language *Kiger* required. *Flexdar*, 964 N.E.2d at 852.

To the knowledge of United Policyholders, no insurance company has entered insolvency due to the pandemic. Few other industries have been so fortunate.

2. Cincinnati's profits have increased substantially during the pandemic.

Insurers have done *very* well during the pandemic. The precipitous drop in claims (and claim payments) in the last two years have led to enormous windfalls for insurers. For example, Chubb Ltd.— the largest[18] property insurer in the world— reported net income of $1.19 billion in Q3 2020, up 9.4%, or $100 million, from the year before.[19] CNA Insurance similarly reported a $107 million increase in net income

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[18] L. Lazarony, *50 Largest Business Insurance Companies*, Forbes (Apr. 28, 2021), *available* at https://www.forbes.com/advisor/business-insurance/largest-business-insurance-companies/.

[19] C. Wilkinson, *Chubb reports gains in Q3 profit, net premium written*, Business Insurance (Oct. 8, 2020), *available at* https://www.businessinsurance.com/article/20201028/NEWS06/912337411?template=printart.

in the same period.[20] Berkley Insurance reported a massive 161% increase ($312.2 million) in Q4 2020.[21] Rather than pay the COVID-19 claims their policies cover, the insurers have been hoarding this surplus.

Cincinnati is no exception. In a March 2021 letter to shareholders, Cincinnati boasted that its shareholders' equity "rose to more than $10 billion at year-end 2020."[22] It increased shareholder dividends by 5%, net premiums written by 6%, and earned premiums by 7% in that year.[23] It closed out 2020—a year that was catastrophic for most businesses—by booking over $1.2 billion in income, after taxes and expenses.[24] This included $119 million in net underwriting profit from its Property & Casualty segment.[25]

Cincinnati's gains continued in 2021. In its March 2022 letter to shareholders, Cincinnati claimed its shareholders' equity increased to "more than $13 billion at

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[20] A. Childers, *CNA Reports Higher Net Income Despite Cat Losses*, Business Insurance (Nov. 2, 2020), *available at* https://www.businessinsurance.com/article/20201102/NEWS06/912337508?template=printart.

[21] J. Greenwald, *Berkley Reports 161% Jump in Profits*, Business Insurance (Jan. 26, 2021), *available at* https://www.businessinsurance.com/article/20210126/NEWS06/912339367/Berkley-reports-161-jump-in-profits.

[22] The Cincinnati Financial Corporation, *2021 Annual Letter to Shareholders*, at 1, 9 (Mar. 24, 2021), *available at* https://cincinnatifinancialcorporation.gcs-web.com/annual-reports.

[23] *Id.* at 1, 3.

[24] *Id.* at 9.

[25] *Id.* at 10.

year-end 2021."[26] Shareholder dividends increased by 9.5%, net premiums written by 12%, and earned premiums by 8% in 2021.[27] Its net income more than doubled from the year before to *$2.9 billion*.[28] In the last 5 years, Cincinnati made significantly more money in 2021 than it did in every other year.[29] It maintains A-range financial strength ratings from all four major ratings organizations.[30] Cincinnati is not in danger of insolvency, in any sense of the word, if the Court enforces the promise it made to IRT.

On top of all of this, virtually all insurers *increased* rates on consumers in 2020 and 2021, across all lines of business. The Arthur J. Gallagher Co., a large broker in Chicago, reported that 89% of its clients saw a rate increase for their property insurance— the "highest number recorded since the early 2000s."[31] From April through June 2020, property insurance rates spiked 22%, despite the insurers refusal to pay COVID-19 claims and despite the historically low rate of insurance claims in

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[26] The Cincinnati Financial Corporation, *2022 Annual Letter to Shareholders*, at 1, 9 (Mar. 24, 2022), *available at* https://cincinnatifinancialcorporation.gcs-web.com/annual-reports.

[27] *Id.* at 1, 9.

[28] *Id.* at 10.

[29] *Id.* at 10.

[30] The Cincinnati Financial Corporation, *2021 Annual Report on Form 10-K*, at 9 (Feb. 24, 2021), *available at* https://cincinnatifinancialcorporation.gcs-web.com/annual-reports.

[31] M. Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020), *available at* https://www.businessinsurance.com/article/20201026/NEWS06/912337341/Most-policyholders-see-rates-hikes-across-multiple-lines-Arthur-J-Gallagher-Re.

general.[32] Insurers ratcheted up prices again between July and September, with a total increase of 24% for commercial property coverage.[33] From October to December 2020, property insurance premiums increased—again—by 20%.[34] And in late 2020, insurers told consumers to expect increases of between 15% to 25% for property insurance in 2021—again, despite their refusal to pay any COVID-19 claims.[35]

3. The insurance industry will not collapse if Cincinnati honors its coverage promises to IRT.

The sources the industry has cited to support its doomsday predictions are not persuasive. All of them were generated in response to legislative proposals that would have required coverage for *all* COVID-19 claims, regardless of policy language or the presence of exclusions.[36] Proposals to mandate coverage "despite any specific policy

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[32] M. Lerner, *U.S. Commercial Property Pricing up 22% in Q2*, Business Insurance (Aug. 10, 2020), *available at* https://www.businessinsurance.com/article/20200810/NEWS06/912336034/US-commercial-property-pricing-up-22-in-Q2-Global-Insurance-Market-Index-Marsh-.

[33] C. Wilkinson, *Insurance Prices Increased Sharply in Third Quarter*, Business Insurance (Nov. 5, 2020), *available at* https://www.businessinsurance.com/article/20201005/NEWS06/912337014?template=printart.

[34] M. Lerner, *Global Prices Rise 22% in Q4: Marsh*, Business Insurance (Feb. 4, 2021), *available at* https://www.businessinsurance.com/article/20210204/NEWS06/912339588/Global-prices-rise-22-in-Q4-Marsh-Global-Insurance-Market-Index-.

[35] J. Greenwald, *Continued Rate Increases Expected: Willis*, Business Insurance (Nov. 19, 2020), *available at* https://www.businessinsurance.com/article/20201119/NEWS06/912337904?template=printart.

[36] *NAIC Statement on Congressional Action Relating to Covid-19*, Nat'l Ass'n of Ins. Comm'rs (Mar. 25, 2020), *available at* https://campbell-bissell.com/wp-

exclusions" was what prompted warnings that two months of business interruption payments could "wipe out half of insurers' capital,"[37] or that paying on their contracts would "dwarf the premiums for all relevant commercial property risks."[38] The aim was to persuade Congress and state legislatures *not* to exercise their policymaking authority to override all policy terms, exclusions and all.

Nothing like that is happening here. Fully 83% of business-interruption policies issued to small businesses in the United States have some sort of virus, pandemic, or communicable disease exclusion.[39] IRT is one of the 17% of policyholders that lack *any* such exclusion.

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content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf.

[37] *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, Business Wire, ¶2 (May 5, 2020), *available at* https://www.businesswire.com/news/home/20200505005723/en/Best%E2%80%99s-Commentary-Two-Months-of-Retroactive-Business-Interruption-Coverage-Could-Wipe-Out-Half-of-Insurers%E2%80%99-Capital. Insurers sometimes cite videos to establish this fact, but they are linked to this Business Wire article and stand for the same proposition—retroactive, legislatively mandated coverage despite policy language.

[38] E. Gilligan, *APCIA Releases Update to Business Interruption Analysis*, APCIA (Apr. 28, 2020), *available at* https://www.apci.org/media/news-releases/release/60522/.

[39] *Business Interruption/Businessowners' Policies*, National Association of Insurance Commissioners (last updated Dec. 19, 2020), *available at* https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm.

Enforcing Cincinnati's obligations under *this* contract creates no prospect of widespread insolvency,[40] and the Court can address the scope of policies with a virus exclusion, along with any attendant economic concerns, if they come before it. Payouts to policyholders like IRT might reduce Cincinnati's shareholders' dividends, but that is not a basis to override Indiana's well-settled principles of insurance law.

The prospect that losses might exceed premiums collected is inherent in the nature of insurance. Insurers charge premiums with the hope, backed by actuaries, that loss payments will be *less* than premiums collected. Policyholders pay those premiums for security that if their losses exceed those premium payments, their

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[40] Some quick, back-of-the-napkin math—using the industry's own numbers—illustrates why this is correct. APCIA (an association of property & casualty insurers) estimated in April 2020 that "closure losses for small businesses . . . are between $225 billion and $431 billion per month." *Gilligan*, supra note 38. It also estimated that insurers collect approximately $4.5 billion per month in premiums on the relevant policy lines. *Id.* But cut out the 83% of policies with a virus exclusion, for example, and those numbers become much smaller: $38 billion to $73 billion. Add to that point that business-income coverages virtually always impose fixed, monetary "limits of liability," (IRT's limit, for example, is $1.4 million), the numbers get smaller because the insurer's obligations will not continue indefinitely. And add further that the industry is arguing that government relief through the CARES and HEROES Act should be offset against insurance recovery, and their contributions become smaller still.

The same is true in Cincinnati's specific context. Cincinnati has $13 billion in shareholders' equity (i.e., equity after all operating expenses). *2022 Annual Letter*, *supra* note 26, at 1, 9. It comprises 1.22% of the total insurance market. Lazarony, *supra* note 18. Its share of the payments can be estimated at $463 million per month on the low end ($38 billion *x* 0.0122) and $890 million on the high end ($72 billion *x* 0.0122). On these numbers, it would take between 11 and 21 months of continuous payments to *all* policyholders to exhaust Cincinnati's *shareholders equity alone* and actually eat into its assets—and that assumes Cincinnati loses on every other issue: it cannot get an offset, it cannot get reinsurance, it refuses to settle claims, and it has no fixed limits of insurance. In short, Cincinnati is in no danger of going broke.

insurer will cover the excess. Insurers sell a lot of policies to spread the risk and offset those areas where their claim payments exceed their premiums collected. If insurers could avoid paying losses anytime losses exceed the premiums collected on any particular risk, insurance would cease to be a valuable product.

The industry will be fine if it must pay COVID-19 claims. It enjoyed substantial windfalls in 2020 and 2021 while much of the rest of the economy suffered. And, it is hedging future exposure with drastic premium increases. This is becoming a pattern with property insurers: "[I]ndustry data demonstrates that insurers have significantly and methodically decreased their financial responsibility for [catastrophic] events in recent years and shifted much of this risk to consumers and taxpayers." J. ROBERT HUNTER, THE INSURANCE INDUSTRY'S INCREDIBLE DISAPPEARING WEATHER CATASTROPHE RISK: HOW INSURERS HAVE SHIFTED RISK AND COSTS ASSOCIATED WITH WEATHER CATASTROPHES TO CONSUMERS AND TAXPAYERS, AT p. 1 (Consumer Federation of Am., Feb. 17, 2012).

In sum, despite insurers' ominous warnings, there is no financial crisis awaiting insurers if they must provide coverage for COVID-19 business interruption claims. Virtually all insurance companies have reinsurance, spreading the risk they face over a wide range of pools of assets. Elected legislatures have the province to assist industries that are failing due to catastrophic losses. Indeed, both Congress and the General Assembly have acted to help industries pummeled with losses from COVID-19. Those bodies—not this one—are tasked with making policy choices in that regard, and that is where those decisions should rightfully remain.

D. Cincinnati's Reliance on *Couch* to Support a Strict Physical Alteration Requirement Is Unpersuasive.

Cincinnati cited Section 148:46 of *Couch*[41] in support of its argument that "direct physical loss requires some physical alteration to property before coverage is available." The vast majority of cases denying coverage for pandemic related losses and on which Cincinnati relies also cite *Couch* for this proposition.[42] In *IRT I*, this Court cited Couch for the proposition that the term "physical loss" "exclude[s] alleged losses that are intangible or incorporeal" (180 N.E.3d at 410 n. 10), but the Court did not apply any strict definition of "physical loss" such that it would include only "structural alteration" of property.

Any reliance on *Couch* for a strict "structural" or similar definition of "physical loss" would be misplaced. This Court should not be misguided by *Couch*'s incorrect summation of a non-existent "majority rule" that "direct physical loss" requires a "distinct, demonstrable, physical alteration." That statement is contradicted by nearly four decades of precedent before *Couch* was first published in 1995, and by more than two decades of precedent after. Further, the lead *Couch* author has since written an article and another treatise applying a **different** standard of law to the terms "physical loss or damage." This Court should similarly recognize the fallacy of the *Couch* "distinct, demonstrable, physical alteration" test and reject its application here.

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41 10A Steven Plitt, et al., Couch on Insurance 3d § 148:46.

42 For those that do not directly cite *Couch*, virtually every one relies on a case that cites *Couch's* myth.

In 1995, *Couch* added a new section, § 148.46, titled "Generally; 'Physical' loss or damage." This section proclaimed an alleged "widely held" rule that coverage should not apply unless the policyholder showed "a distinct, demonstrable, physical alteration" of the property. However, *not one case* prior to 1995 cited or referenced this requirement. Instead, this interpretation appears to have been based on just one federal case, *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990). Even if one federal case could possibly create a "widely held" rule, the *Benjamin Franklin* court **never** stated that there must be "a distinct, demonstrable, physical alteration" of property to trigger coverage. In any event, the Oregon Court of Appeals subsequently rejected *Benjamin Franklin* in *Farmers Insurance Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993). Inexplicably, *Trutanich* was decided two years *before Couch* was published, but *Couch* chose to cite the overruled *Benjamin Franklin* case and ignored *Trutanich*.

Couch acknowledged that "physical loss or damage" does not always require "physical alteration," but it cited only one case in support, *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 62 (Colo. 1968), suggesting that this standard was the minority rule. It was certainly not. It had been adopted by at least 13 courts and was the majority rule. Loose leaf updates exclusively added cases citing *Couch*'s misleading test.[43] The updates did not add *any* cases that relied on the true majority

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[43] These cases include: *Rankin v. USAA Cas. Ins. Co.*, 271 F. Supp. 3d 1218, 1220 (D. Colo. 2017); *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 524 F. Supp. 3d 762, 765 (S.D. Ohio), *aff'd*, 17 F.4th 645 (6th Cir. 2021); *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 826 (E.D. La. 2010); *Newman Myers*

view supporting coverage for loss of use. Even as recent as the December 2021 update, *Couch* still cited only *Western Fire* as supporting this view. It omitted at least five decisions from 1996-1999 that supported coverage for such claims, eleven such decisions between 2000-2005, eight between 2007-2010, and five more between 2011-2016.[44]

The lead author of *Couch*, Steven Plitt, has since published a contrary rule. In 2013, Mr. Plitt published an article titled *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration.*[45] That article discussed recent case law, concluding that the "modern trend" is that "courts are not looking for physical alteration, but for loss of use."[46] Mr. Plitt's November 2021 update in another treatise provided a more balanced, and detailed, analysis of the applicable case law. That update concluded that, "[i]t is difficult to distill a general rule" from the relevant cases.[47] These more recent statements cannot be reconciled

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Kreines Gross Harris, P.C. v. Great N. Ins. Co., 17 F. Supp. 3d 323 (S.D.N.Y. 2014); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 115 Cal. Rptr. 3d 27 (2010).

[44] *See* Richard P. Lewis, *et al.*, "Couch's 'Physical Alteration' Fallacy: Its Origins and Consequences," 56 Tort Trial & Ins. Practice L.J. 621, 628-29 (Fall 2021).

[45] Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims Journal, available at https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm.

[46] *Id.*

[47] John K. DiMugno, Steven Plitt, & Dennis Ji Wall, CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS §§ 8.06 (Thomson West, Nov. 2021).

with the so-called "widely held rule" that *Couch* has set forth for more than two decades, and that insurers and courts still cite.

Couch's "majority rule" fallacy also conflicts with other major insurance treatises. Allan Windt's *Insurance Claims & Disputes* (6th ed. 2013) stated: "[W]hen an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object."[48] Mr. Windt then cited the cases, which *Couch* continues to ignore, finding coverage for these types of losses.[49]

Appleman's *Insurance Law and Practice*,[50] citing *Western Fire*, concluded that "[t]he courts have construed the scope of what constitutes 'physical loss or damage' liberally," while still recognizing that some losses (such as a withdrawn warranty) were not "physical." When that version of the well-known *Appleman* insurance treatise was discontinued in 2012,[51] the "Old *Appleman*" recognized all, or nearly all, of the seminal decisions on "physical loss" that *Couch* ignored. Those cases include dispossession of property, "unusable or uninhabitable" property, and contamination.

The 1999 update to another treatise by Peter J. Kalis reaches the same conclusion. Mr. Kalis explained that "direct" and "physical" loss or damage is the

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48 3 Allan D. Windt, "Insurance Claims & Disputes" § 11:41 (6th ed. 2013).

49 *Id.*

50 5f-142f Appleman on Insurance Law & Practice Archive § 3092 (2nd 2011).

51 The widely used treatise *Insurance Law and Practice* was discontinued in 2012 and proceeded in an edition called "New Appleman."

coverage trigger for property insurance. He correctly summarized the law then by saying that disputes over these words "generally have been resolved in favor of coverage."[52]

Despite this consistency in numerous respected insurance treatises, other than *Couch*, courts rejecting coverage in COVID-19 cases have repeatedly cited *Couch* when adopting its erroneous test, or cited decisions by courts citing it, or simply stated the erroneous test itself as it were a common understanding (like the trial court below). The *Couch* test is wrong, however, and it has always been wrong. *Couch* itself is simply a non-binding legal treatise that seized on a single district court case that had since been overruled. *Couch* then used that bad law to argue that such a rule was "widely held." Insurers have in turn used *Couch* to mislead courts on the state of the law, which is particularly indefensible considering the statements from Couch's lead author correcting his original misstatement.

Given the number of claims for pandemic related losses the past two years, the number of cases relying on *Couch*'s fallacy has snowballed. This Court should not be deceived.

IV. CONCLUSION

The trial court's summary judgment for Cincinnati should be reversed.

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[52] Kalis, et al. POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE § 13.04 (Aspen L. & Bus., Supp. 1999).

Respectfully submitted,

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/s/ Charles P. Edwards

CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on April 20, 2021, the foregoing Brief of United Policyholders as *Amicus Curiae* in Support of Appellant and Reversal was electronically filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record as follows:

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