

NORTH CAROLINA COURT OF APPEALS

NORTH STATE DELI, LLC d/b/a LUCKY'S)
DELICATESSEN, MOTHERS & SONS,)
LLC d/b/a MOTHERS & SONS)
TRATTORIA, MATEO TAPAS, L.L.C. d/b/a)
MATEO BAR DE TAPAS, SAINT JAMES)
SHELLFISH LLC d/b/a SAINT JAMES)
SEAFOOD, CALAMARI ENTERPRISES,)
INC. d/b/a PARIZADE, BIN 54, LLC d/b/a)
BIN 54, ARYA, INC. d/b/a CITY KITCHEN)
and VILLAGE BURGER, GRASSHOPPER)
LLC d/b/a NASHER CAFE, VERDE CAFE)
INCORPORATED d/b/a LOCAL 22,)
FLOGA, INC. d/b/a KIPOS GREEK)
TAVERNA, KUZINA, LLC d/b/a GOLDEN)
FLEECE, VIN ROUGE, INC. d/b/a VIN)
ROUGE, KIPOS ROSE GARDEN CLUB)
LLC d/b/a ROSEWATER, and GIRA SOLE,)
INC. d/b/a FARM TABLE and)
GATEHOUSE TAVERN,)

Plaintiffs-Appellees,)

v.)

THE CINCINNATI INSURANCE)
COMPANY; THE CINCINNATI)
CASUALTY COMPANY; MORRIS)
INSURANCE AGENCY INC.; and DOES 1)
THROUGH 20, INCLUSIVE,)

Defendants-Appellants)

MOTION OF UNITED POLICYHOLDERS AND NATIONAL INDEPENDENT
VENUE ASSOCIATION TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLEES

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, United Policyholders (“UP”) and National Independent Venue Association (“NIVA”) move the Court for leave to file an *amici curiae* brief in support of Plaintiffs-Appellees. The proposed brief is filed contemporaneously with this motion.

I. INTEREST OF *AMICI CURIAE*

UP is a respected national non-profit section 501(c)(3) organization and policyholder advocate. Founded in 1991, for three decades UP has operated as a dedicated information resource and voice for individual and commercial insurance consumers throughout the entire United States and has helped secure important trial and appellate victories for insurance policyholders. During this historic pandemic, UP’s commitment to defending and arguing for policyholders’ rights to insurance coverage for losses associated with COVID-19 has been and continues to be critically important.

UP assists purchasers of insurance when seeking a policy or pursuing a claim for loss. UP is routinely called upon to help individual policyholders in the wake of large-scale natural disasters such as floods, wildfires, hurricanes, and, now, a pandemic that has caused substantial economic losses to businesses across the nation. Since March 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been affected by COVID-19 and COVID-19-related public safety orders. UP is conducting educational workshops for businesses and trade associations and it maintains an online help library at uphelp.org/COVID.

In addition, UP engages with insurance regulators on an ongoing basis through the proceedings of the National Association of Insurance Commissioners, where UP has served as a consumer representative since 2009. UP gave three NAIC presentations in 2020 concerning coverage for business interruption losses related to COVID-19 and public safety orders. Grants, donations, and volunteers support UP's work.

Since 1991, UP has filed *amicus* briefs in federal and state appellate courts across 42 states and in more than 500 cases. UP's amicus briefs have been cited in the opinions of many state supreme courts, as well as the U.S. Supreme Court. *See, e.g., Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶ 53; *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 104 (2019); *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 (2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).¹

NIVA is a trade association formed in 2020 just prior to the pandemic, with nearly 2,000 charter members from all 50 states. NIVA's members are independent performing arts venues, both for- and non-profit, employing thousands of people. Nationally, through arts and culture organizations, including venues, NIVA

¹ A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in UP's online Amicus Project library at <https://www.uphelp.org./resources/amicus-briefs>.

members contributed over \$800 billion to the nation's GDP annually.² The cities in which NIVA members are located benefit from the cultural connection and from community fostered through independent performance venues.

The pandemic and related civil authority orders have devastated performing arts and cultural organizations, including NIVA's members, who rely on in-person performances for revenue. In North Carolina, 47.2 percent of adults attended live music, theater, or dance performances in 2019.³ Like the restaurant industry, the performing arts sector was completely shut down by the pandemic.

Recognizing its unique perspective, other courts have welcomed NIVA's input, granting NIVA leave to serve as *amicus curiae* in other insurance coverage litigation involving the pandemic. *See, e.g., Nostalgic Partners LLC, et al. v. Philadelphia Indem. Ins. Co.*, No. 0-03346-AB, Dkt. No. 70 (E.D. Pa. Dec. 4, 2020); *Serendipitous, LLC et al. v. The Cincinnati Ins. Co.*, No. 20-00873-MHH, Dkt. No. 39 (N.D. Ala. Nov. 24, 2020); *Dakota Ventures et al. v. Oregon Mut. Ins. Co.*, No. 20-00630-HZ, Dkt. No. 53 (D. Or. Nov. 3, 2020); *Rose's 1 et al. v. Erie Ins. Exch.*, No. 20-0535 (D.D.C. Nov. 4, 2020).

In sum, *amici* have a significant interest in ensuring that the insurance policies at issue in this lawsuit are not rewritten to eviscerate coverage, which

² See National Endowment for the Arts, *During Economic Highs and Lows, the Arts Are Key Segment of U.S. Economy*, <https://www.arts.gov/news/2020/during-economic-highs-and-lows-arts-are-key-segment-us-economy> (last visited Nov. 29, 2021).

³ See National Endowment for the Arts, *North Carolina Fact Sheet*, https://www.arts.gov/sites/default/files/2020_StateFactSheet_NC.pdf (last visited Nov. 29, 2021).

would have a devastating impact on *amici*'s members and stakeholders, both inside and outside of the COVID-19 context.

II. ISSUES ADDRESSED IN UP AND NIVA'S *AMICI CURIAE* BRIEF

Amici's brief addresses the issue of whether coronavirus-related losses are insurable under the language of The Cincinnati Insurance Company's insurance policy sold to Plaintiffs-Appellees. In their brief, *amici* examine the history of the broad interpretation of "all risks" insurance policies and how courts have repeatedly found coverage under such policies without requiring a showing of tangible or physical alteration to property. *Amici* also examine the growing scientific evidence regarding COVID-19's physical presence and explain why a broad ruling that the COVID-19 virus could never cause physical loss or damage under the standard-form property policies like the ones Cincinnati sold to Plaintiffs-Appellees would go beyond the scope of the issue on appeal and be contrary to evidence that could be developed through discovery. *Amicus* support is especially vital here, because the issues implicated by this case are far-reaching and of critical importance as they may affect the insurance recoveries for businesses throughout North Carolina.

It bears adding that, while insurers are repeat players in coverage litigation, most policyholders are not. *See, e.g., Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing insurance companies as "institutional litigants"); *WRR Env't Servs., Inc. v. Admiral Ins. Co.*, No. 10-C-843, 2015 WL 998202, at *4 (E.D. Wis. Mar. 4, 2015) ("insurance companies are sophisticated repeat players in the legal system"). Thus, if *amici* were denied the

opportunity to present their arguments, from the perspective of a policyholder advocate steeped in insurance law, while the appellant insurance company retained its position as the only institutional litigant in this case, the Court would then be deprived of a symmetry of advocacy necessary for the fair and even-handed development of the law.

For the foregoing reasons, *amici* respectfully request leave to file the attached *amici curiae* brief.⁴

DATED: November 29, 2021

Respectfully submitted,

ROBINSON, BRADSHAW & HINSON, P.A.
Electronically submitted
Richard C. Worf, Jr.
N.C. Bar No. 37143
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
Telephone: (704) 377-2536
rworf@robinsonbradshaw.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

COVINGTON & BURLING LLP
Allison Hawkins
N.C. Bar No. 53490
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Telephone: (202) 662-6000
ahawkins@cov.com

⁴ The undersigned is representing *amici* in this matter on a pro bono basis.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing on counsel of record by depositing a copy, contained in a first-class mail postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

<p>Gagan Gupta Stuart M. Paynter The Paynter Law Firm, PLLC 106 South Churton Street Hillsborough, NC 27278</p> <p><i>Counsel for Plaintiffs-Appellees</i></p>	<p>Jim W. Phillips, Jr. Gary S. Parsons Kimberly M. Marston BROOKS PIERCE MCLENDON HUMPHREY & LEONARD, LLP P.O. Box 26000 Greensboro, NC 27420</p> <p><i>Counsel for Defendant-Appellants The Cincinnati Insurance Company and The Cincinnati Casualty Company</i></p>
<p>Kendra Stark GORDON & REES LLP 421 Fayetteville Street, Suite 330 Raleigh, NC 27601</p> <p><i>Counsel for Defendant Morris Insurance Agency Inc.</i></p>	<p>Roger A. Peters, II ROBINSON & COLE LLP One Financial Plaza, Suite 1430 Providence, RI 02903</p> <p><i>Counsel for Amicus parties American Property Casualty Insurance Association and National Association of Mutual Insurance Companies</i></p>

This 29th day of November, 2021.

Electronically submitted
Richard C. Worf, Jr.