

SUPREME COURT OF NORTH CAROLINA
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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, )

From Durham County
No. COA 21-293

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

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

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

United Policyholders (“UP”) and National Independent Venue Association (“NIVA”) respectfully move this Honorable Court for leave to file the attached brief *amicus curiae* in support of Plaintiffs-Appellants North State Deli, LLC et al.

Pursuant to North Carolina Rule of Appellate Procedure 28.1(b)(2), UP and NIVA set forth here the nature of their interests, the issues of law their brief will address, their positions on those issues, and the reasons why they believe that an *amicus curiae* brief would be beneficial to the Court.

The proposed brief is filed contemporaneously with this motion.

#### **I. NATURE OF *AMICI'S* INTEREST**

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 insurance consumers when seeking a policy or pursuing an insurance claim for loss. UP routinely helps 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](https://uphelp.org/COVID).

In addition, UP assists 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).<sup>1</sup>

NIVA is a trade association formed in April 2020, with nearly 2,000 charter members from all 50 states. NIVA's members are independent performing arts

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<sup>1</sup> A list of 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>.

venues, both for- and non-profit, employing thousands of people. Nationally, through arts and culture organizations, including venues, NIVA members and the sector contributed over \$800 billion to the nation's GDP annually.<sup>2</sup> 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.<sup>3</sup> 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.C. Nov. 4, 2020).

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<sup>2</sup> 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 Jan. 2, 2024).

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

## II. **AMICI'S POSITION ON ISSUES OF LAW BEFORE THIS COURT AND REASONS WHY AMICI SHOULD BE HEARD**

*Amici*'s brief addresses the issue of whether coronavirus-related losses are insured under the language of The Cincinnati Insurance Company's insurance policy sold to Plaintiffs-Appellants. 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-Appellants 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.,*

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<sup>3</sup> See National Endowment for the Arts, *North Carolina Fact Sheet*, [https://www.arts.gov/sites/default/files/2020\\_StateFactSheet\\_NC.pdf](https://www.arts.gov/sites/default/files/2020_StateFactSheet_NC.pdf) (last visited

*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 move this Honorable Court to allow this motion for leave to file a brief *amicus curiae*.<sup>4</sup>

DATED: January 16, 2024

Respectfully submitted,

ROBINSON, BRADSHAW & HINSON, P.A.

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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.

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Jan. 2, 2024).

<sup>4</sup> The undersigned counsel are representing *amici* in this matter on a pro bono basis.

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

<p>Gagan Gupta (ggupta@paynterlaw.com) Stuart M. Paynter (stuart@paynterlaw.com) The Paynter Law Firm, PLLC 106 South Churton Street Hillsborough, NC 27278</p> <p><i>Counsel for Plaintiffs-Appellants</i></p>	<p>Jim W. Phillips, Jr. (jphillips@brookspierce.com) Gary S. Parsons (gparsons@brookspierce.com) Kimberly M. Marston (kmarston@brookspierce.com) BROOKS PIERCE MCLENDON HUMPHREY &amp; LEONARD, LLP P.O. Box 26000 Greensboro, NC 27420</p> <p><i>Counsel for Defendant-Appellees The Cincinnati Insurance Company and The Cincinnati Casualty Company</i></p>
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This 16th day of January, 2024.

Electronically submitted  
Richard C. Worf, Jr.