No. 20-998

IN THE

Supreme Court of the United States

MAMA JO'S, INC., DBA BERRIES,
Petitioner,

v.

SPARTA INSURANCE CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

I. The importance of judicial oversight of the insurance industry.

Policyholders across the country—businesses and individuals alike—buy "all-risk" insurance policies for protection against unexpected disaster. Confidence that insurance will pay spurs growth of our economy and encourages people and businesses to take risks and pursue innovation. Insurance therefore is a crucial engine of the economy and, given its protective purpose, is imbued with a public purpose.[2]

At the same time, insurance is woven into the fabric of our economy through mandatory purchase requirements, personal and business risk management, and pricing of goods and services. Each jurisdiction regulates insurance contracts and transactions separately; yet most insurers operate across jurisdictions. Most insurers serve three masters—reinsurers, policyholders, and investors and shareholders—meeting their own revenue objectives, reasonable expectations of policyholders, *and* demands of their investors and shareholders.

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[1] Counsel of record for all parties received notice of *amicus curiae*'s intention to file this brief at least ten days before the due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 429-30 (1914) ("insurance is affected with a public interest"); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931); ("The business of insurance is … affected with a public interest….").

However, it is crucial that insurance fulfill its "dominant purpose of indemnity."[3]

Judicial oversight is essential to maintain the purpose and value of insurance in this complex system. Courts require insurance, the classic adhesion contract, to pay pursuant to the plain meaning of the policy language, and they put the burden on insurers, as the drafters of the boilerplate language, to show that theirs is the only reasonable interpretation of the contract terms. If it is not, the language is ambiguous as a matter of law and must be construed against the insurer as the drafter, and in favor of coverage.

II. The interest of United Policyholders.

Founded in 1991, United Policyholders ("UP") has served as a respected voice for the interests of consumers and policyholders across the country for 30 years. Individual policyholders routinely call upon UP for help after large-scale national disasters such as hurricanes in the Gulf and across the Eastern Seaboard; floods and windstorms in the Midwest; and wildfires in the West.

In 2020 and 2021, UP has assisted business owners whose operations have been impacted by COVID-19 and governmental orders. UP has educated policyholders on COVID-19 insurance issues and

[3] *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 419 (4th Cir. 2004); *Hancock Labs., Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 523 n.5 (9th Cir. 1985); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981); *see also* American Law Institute, Restatement of the Law, Liability Insurance § 2, cmt. c (2019) (insurance-policy interpretation helps "effect[] the dominant protective purpose of insurance").

maintains a library of resources at uphelp.org/COVID. UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, legislators, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work in three program areas: Roadmap to Recovery, Roadmap to Preparedness, and Advocacy and Action.

Public officials, regulators, legislators, academics, and journalists routinely seek UP's input on insurance and related legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and U.S. Treasury Department. UP has been an official consumer representative to the National Association of Insurance Commissioners ("NAIC") since 2009, monitoring policy language and claim practices and developing model laws and regulations.

UP has advocated the rights of policyholders and consumers across the country throughout the pandemic, addressing coverage related to COVID-19 and governmental orders.[4]

UP has filed amicus briefs in federal and state appellate courts across 42 states and in more than 450 cases. This Court and state supreme courts have cited

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[4] *See Special Session One: COVID-19: Lessons Learned*, NAIC (Aug. 10, 2020), https://tinyurl.com/yof29m5q, and https://tinyurl.com/7beh54o6 (speakers' biographies); Amy Bach, Co-Founder & Exec. Dir., UP, Business Interruption Policies and Claims, Presentation at NAIC Summer Nat'l Mtg. of Prop. & Cas. Ins. Comm. (Aug. 12, 2020), https://tinyurl.com/41lw1ek9; Amy Bach, Co-Founder & Exec. Dir., UP, COVID-19 Related Business Interruption Claims, Coverage Issues, Disputes and Litigation, NAIC Summer Nat'l Mtg. of Consumer Liaison Comm. (Aug. 14, 2020), https://tinyurl.com/b7xvqdfp.

UP amicus briefs. *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005).

III. United Policyholders' role as *amicus* here.

UP seeks to fulfill the classic role of an *amicus*, supplementing the efforts of the parties and their counsel and drawing the Court's attention to points that are core to UP's mission. That is an appropriate role for UP, as an *amicus* often can "focus the court's attention on the broad implications of various possible rulings." R.L. Stern *et al.*, Supreme Court Practice 570-71 (6th ed. 1986) (quoting B.J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)). UP does that here.

This *amicus* brief is intended to provide an added dimension to issues presented by the petition and to enhance the Court's understanding of these issues and how they impact policyholders.

INTRODUCTION

In the case below, Mama Jo's, Inc. ("Mama Jo's") sought to prove that construction dust and debris from road construction adjacent to Mama Jo's restaurant caused, over a two-year period, "direct physical loss of or damage" to property under the all-risk policy sold by Sparta Insurance Co. App.3a. The parties stipulated that construction dust and debris migrated onto Mama Jo's premises. Pet. at 3. The issue below was whether the dust and debris, which evidence showed contained Portland cement and other materials that inundated the property (App.39a), caused "direct physical loss of or damage to" covered property sufficient to trigger insurance coverage. Mama Jo's claimed essentially two forms of

loss or damage: (1) loss of or damage to the inside and outside of its open-air restaurant from two years of pervasive construction dust and debris, requiring not only heavy physical remediation but also repainting of damaged walls and of the parking-lot area; and (2) loss of or damage to mechanical and audio systems and the lighting in the outdoors portion of the restaurant. App.4a-6a; Pet. 3-4.

The district court dismissed the case at summary judgment, and the Eleventh Circuit affirmed. With only a superficial reference to Florida state law and with no express attempt to predict how Florida courts would rule on the question, the Eleventh Circuit held that Mama Jo's had not proved it suffered a "direct physical loss of or damage to property" sufficient to trigger coverage. It reached this conclusion because the Sixth Circuit, in an unpublished decision that was never cited by a Florida state court and that interpreted different policy language, had predicted that *Michigan law* would find no coverage for voluntary cleaning and moving costs where a tenant suffered no "direct physical loss or damage" to its property from mold, none of its property was actually damaged or lost, and the building was still inhabitable. App.21a. The Eleventh Circuit also upheld summary judgment finding no coverage for costs to repair or replace mechanical and audio systems and lighting—based on lack of admissible expert evidence. App.19a. Even though there was no dispute that dust and debris from the roadway construction had blanketed the restaurant, and even though all of Mama Jo's experts were qualified, the Eleventh Circuit held their opinions inadmissible because the experts had not categorically excluded

other sources of dust and had not conducted vigorous scientific testing.

Mama Jo's petitioned for a writ of certiorari. Because the Eleventh Circuit's errors are affecting coverage cases nationwide, leading district courts to short-circuit their duty to ascertain and apply state insurance-coverage law and leading those courts to usurp the role of the trier of fact by making factual determinations at the Rule 12(b)(6) motion to dismiss stage, *amicus* files this brief in support of Mama Jo's.

SUMMARY OF ARGUMENT

The issues that Mama Jo's raises in its petition present federal questions of national importance. The Eleventh Circuit below failed to adhere to two fundamental precepts of federal jurisprudence: the requirement that federal courts sitting in diversity apply the substantive law of the forum state and the right of civil litigants to a trial.

In its first error—the *Erie* error[5]—the Eleventh Circuit failed to make any genuine attempt to apply Florida policy-interpretation law and to predict how Florida courts would decide the coverage question. It ignored pertinent authority from Florida state courts and instead relied on federal authority and out-of-state cases.

In its second error—the *Daubert* error[6]—the Eleventh Circuit imposed the novel and erroneous requirements that causation experts categorically exclude all alternative causes and that they conduct

[5] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[6] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

strict scientific testing. This new standard usurps the role of the trier of fact.

Federal courts nationwide are making these same errors in cases seeking coverage for losses arising from the COVID-19 pandemic. These courts are making critical coverage decisions—in the context of motions to dismiss—without making serious efforts to determine and apply the coverage law of their forum states and predict how those states' courts would decide the issue. Instead, despite sometimes acknowledging their duty to apply state law, these federal courts are nevertheless determining coverage by following federal courts in other jurisdictions that have made the same *Erie* error. This amounts to the development of a federal general common law of insurance coverage, a result outlawed since 1938 when *Erie* overruled *Swift v. Tyson*, 41 U.S. 1 (1842).

Federal courts are also usurping the role of the fact finder and inappropriately making factual determinations on motions to dismiss. Instead of applying the *Twombly-Iqbal* plausibility standard,[7] federal courts are routinely disregarding factual allegations that COVID-19 causes direct physical loss of and/or damage to the insureds' property. By making factual determinations different from the allegations in a complaint, these courts are commandeering the jury's role.

The Eleventh Circuit's decision is perpetuating and deepening these errors. Its decision has led many federal courts to neglect *Erie* on an issue that is preeminently one of state law and regulation, and

[7] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

also to bypass their fundamental duty to leave factual questions to the trier of fact. The result is certain to be hundreds of thousands of additional small-business failures, loss of jobs, and pain for families across the country.

ARGUMENT

I. This case raises issues of national importance for coverage of COVID-19 claims.

Policyholders nationwide, often small businesses, are being devastated by the COVID-19 pandemic. They are turning to their insurance policies, which contain boilerplate language the insurance industry drafted that is the same as or similar to the language at issue here. The construction of this language therefore raises questions of national importance.

Small businesses provide 60.6 million jobs in the United States—more than 47% of United States employees.[8] But the average small business has less than one month's cash on hand at any one time.[9] They have been disproportionately hurt by the pandemic.

Millions of these small businesses are among those who purchased insurance to protect against this type of catastrophe. Many, if not most, of these policies are "all risks" policies, which cover all risks except those specifically excluded. J.M. Draper, 30 A.L.R.5th 170 (originally published in 1995). Coverage varies and depends on the precise policy language, but a frequent

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[8] 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), https://tinyurl.com/13r7sqbs.

[9] A. Bartik *et al.*, *How Are Small Businesses Adjusting to COVID-19? Early Evidence from a Survey* (Harvard Law Sch. Working Paper Summary, 2020), https://tinyurl.com/5cc5mkly.

component of the coverage trigger is that there be "direct physical loss of or damage to Covered Property." *See, e.g.*, *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *1 (W.D. Mo. Sept. 21, 2020). This is the same language that determines coverage in this case.

II. State law requires detailed evaluation of policy language in the context of the entire policy and the factual details of the claim, but insurers have issued blind and blanket denials of coverage.

Whether an insurance policy covers a claim depends on (1) the policy language, (2) governing state law, and (3) the facts of the claim. However, since the beginning of the pandemic, insurers have issued blanket denials of coverage without regard for policy language and often without factual investigation.

A. The phrase "direct physical loss of or damage to" supports coverage of COVID-19 claims.

Before this pandemic, courts across the country construed the phrase "direct physical loss of or damage to" (and its permutations) to encompass more than structural injury to property and to include loss of use of covered property.[10] Much like the causative

[10] Mama Jo's notes a "circuit split" concerning how broadly to construe "physical loss and damage." Pet. at 10-19. In fact, the Third Circuit should be listed in the "favor policyholders" category. *See Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (presence of asbestos fibers rendered structure useless or uninhabitable and was "physical loss or damage").

agents in those cases, such as smoke from wildfires,[11] carbon monoxide,[12] ammonia vapors,[13] methamphetamine vapors,[14] bacteria,[15] mold,[16] asbestos,[17] and others,[18] COVID-19 is an agent that causes damage and loss of use of property. Indeed,

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[11] *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *9 (D. Or. June 7, 2016).

[12] *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998).

[13] *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014).

[14] *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1336 (Or. App. 1993); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445 (Or. App. 1992).

[15] *Motorists Mut. Ins. Co. v. Hardinger,* 131 F. App'x 823 (3d Cir. 2005).

[16] *Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643 (Del. 2008) (unpublished); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. CIV. 98-434-HU, 1999 WL 619100 (D. Or. Aug. 4, 1999).

[17] *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997).

[18] *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824-26 (3d Cir. 2005) (e. coli); *Metro. Lloyds Ins. Co. of Texas v. Werkstell*, No. 416CV00280ALMCAN, 2017 WL 2901700, at *9 (E.D. Tex. May 16, 2017) ("unbearable chemical odor"); *Widder v. Louisiana Citizens Prop. Ins. Corp.*, 82 So. 3d 294, 296 (La. App. 2011) (lead-paint dust); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (unpleasant odor); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (risk of collapse); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (drywall offgassing); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline fumes); *Murray v. State Farm Fire & Cas. Co.,* 203 W. Va. 477 (1998) (risk of rockslide).

hundreds of thousands of businesses have been deprived of the use of their properties because of COVID-19.

However, the virus also causes direct physical loss of and damage to property in other, invisible ways. Many of the governmental orders to control the pandemic expressly recognize this fact.[19] The virus spreads not just by human-to-human contact, but through objects, surfaces, and aerosols, and the virus remains infectious for days on surfaces.[20] The virus

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[19] *See, e.g.,* New York City Emergency Executive Order No. 100 (Mar. 16, 2020) ("the virus physically is causing property loss and damage"), https://tinyurl.com/1gjtvuxj; Public Order Under City of Los Angeles Emergency Authority, "SAFER AT HOME" (Revised Apr. 10, 2020) (COVID-19 "physically caus[es] property loss or damage due to its tendency to attach to surfaces for prolonged periods of time"), https://tinyurl.com/yf828hq3; Broward County, Florida Administrator's Emergency Order 20-03, "Directing Shelter-in-Place: Safer at Home Policy" (Mar. 26, 2020) ("this Emergency Order is necessary because … the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time"), https://tinyurl.com/3yubyevj; *see also* City of Miami Beach Declaration of a State of Emergency, Extended Through 11:59 P.M. on February 17, 2021 (Feb. 10, 2021), https://tinyurl.com/fmac6j69; Orange County, Florida Emergency Executive Order No. 2020-04 Regarding COVID-19 (Mar. 24, 2020), https://tinyurl.com/f1ltyzi3; West Virginia Executive Order No. 9-20 (Mar. 23, 2020), https://www.wvlegislature.gov/legisdocs/misc/Exec-Order-9-20-20200323.pdf; New Hampshire Emergency Order # 17 Pursuant to Executive Order 2020-04 (Mar. 26, 2020), https://tinyurl.com/p0goh1oe; Harris County Order of County Judge Lina Hidalgo, "Stay Home, Work Safe" (Mar. 24, 2020), https://tinyurl.com/5cawm2rd.

[20] *See* G. Kampf *et al.*, *Persistence of Coronaviruses on Inanimate Surfaces and Their Inactivation with Biocidal Agents*, J. Hosp. Infection (Jan. 31, 2020), https://tinyurl.com/3kztdcmn;

thereby physically transforms property (indoor air and surfaces) from a safe condition to a dangerous and potentially deadly condition. Cleaning and disinfecting are beside the point; the ubiquity of the virus means it is constantly re-introduced.

In 2006, the insurance industry policy-drafting arm created a virus-specific exclusion in the recognition that, without it, virus-caused loss or damage would be covered. Notably, many insurers elected not to use this exclusion in their policies, the result being that coverage for virus-associated loss or damage remained intact.

Importantly, there are permutations in policy language, some policies including the term "accidental" and some omitting "physical damage" or "loss of," among the differences. This underscores the importance of close analysis of policy language in light of the terms of the policy as a whole, state law, and

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M. Jayaweera *et al.*, *Transmission of COVID-19 Virus by Droplets and Aerosols: A Critical Review on the Unresolved Dichotomy*, Environ. Res. (June 13, 2020), https://tinyurl.com/nsk2qog2; Jianyun Lu *et al.*, *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 Emerging Infectious Diseases 7 (July 2020), https://tinyurl.com/o4v2unp9; M. Marques *et al.*, *Contamination of Inert Surfaces by SARS-CoV-2: Persistence, Stability and Infectivity. A Review*, Environ. Research Vo. 193, 110559 (Feb. 2021), https://tinyurl.com/49q2czo5; S.L. Miller *et al.*, *Transmission of SARS-CoV-2 by Inhalation of Respiratory Aerosol in the Skagit Valley Chorale Superspreading Event*, Indoor Air (Sept. 26, 2020), https://doi.org/10.1111/ina.12751; CDC, *"How COVID-19 Spreads"* (updated Oct. 28, 2020), https://tinyurl.com/5xods9ye (recognizing COVID-19 spreads through respiratory droplets and airborne transmission); WHO, *"Transmission of SARS-CoV-2: Implications for Infection Prevention and Precautions"* (July 9, 2020), https://tinyurl.com/1utzo2xa (same).

the facts of the claim. Numerous courts have done so, correctly holding that COVID-19 is capable of triggering coverage by causing direct physical loss of or damage to relevant property. *See, e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, slip op. at 4 (Nev. Dist. Ct. Dec. 1, 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, slip op. at 9 (Ohio Ct. Co. Pl. Nov. 17, 2020); *Blue Springs Dental Care,* 2020 WL 5637963 at *4; *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32 (Wash. Super. Ct. Nov. 23, 2020).

At the very least, these decisions, by respected judges across the country, show that the language is subject to more than one reasonable interpretation. As a result, it is ambiguous and coverage cannot be determined at the Rule 12(b)(6) stage; a factual record is needed.

B. Insurers have deployed an industry-wide strategy to deny coverage regardless of policy language, state law, or facts.

Insurers nationwide have issued blanket denials of coverage, regardless of policy language; state law; and the facts of specific claims, which they often refuse to investigate. These insurers invariably take the position that "direct physical loss of or damage to" property requires tangible, structural alteration of property in order to trigger coverage. *See, e.g., Studio 417*, 478 F. Supp. 3d at 801; *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-CV-2211-JAR-

GEB, 2020 WL 7078735, at *4 (D. Kan. Dec. 3, 2020); *Elegant Massage*, 2020 WL 7249624, at *7.

The Eleventh Circuit's decision below is front and center in the insurance industry's strategy, with courts across the country citing it in order to avoid analysis of the precise policy language and state law at issue, and to render factual determinations that are inappropriate on a motion to dismiss. *See infra* at 19.

III. The Eleventh Circuit erred in its application of *Erie* and *Daubert*.

The Eleventh Circuit misapplied *Erie* and *Daubert*.

A. The Eleventh Circuit failed to apply state law.

The Eleventh Circuit failed to apply *Erie*, thereby ignoring important rules of construction that Florida courts must apply and ignoring pertinent Florida precedent.

Erie is premised on the notion that a federal court sitting in diversity should reach the same result as would the forum state's courts. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* requires federal courts to look to a final decision of a state's highest court and, if none, then to predict how the state high court would decide the issue. However, an *Erie* prediction is not a shot in the dark. A "state is not without law save as its highest court has declared it"—"[t]here are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon

them." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). The *Erie* analysis therefore requires examination of high court and intermediate appellate court decisions, among other forum-state sources. *Id.*; *see Gooding v. Wilson*, 405 U.S. 518, 525 n.3 (1972); *Comm'r v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

Federal courts are bound to consider the numerous sources of state law thoroughly before turning for inspiration to decisions of other federal courts: they must do not what they think best but what the state supreme court would deem best. *See West*, 311 U.S. at 237. This methodology—scouring *state* sources for *state* high court intent—preserves *Erie*'s underlying objective that federal courts sitting in diversity operate as neutral forums that follow their forum states' laws.

This is not what happened here. The Eleventh Circuit did not engage in any serious *Erie* analysis when it concluded that an "item or structure that merely needs to be cleaned" does not give rise to direct physical loss to property. It cited two Florida cases, from which it drew conclusions about what key policy terms, including "loss," "direct" and "physical" mean. App.20a. This analysis was deficient for three main reasons.

First, the Eleventh Circuit erroneously equated "loss" with "damage." To be sure, the court did cite two Florida cases, but each addresses policy language, and facts, not at issue here. The policy language at issue in both cases specifically required "physical loss," with the insurer agreeing to pay for "direct loss to property … only if that loss is a physical loss." The first rejected coverage under that language and the facts at issue. *Vazquez v. Citizens Prop. Ins. Corp.*,

304 So. 3d 1280, 1284 (Fla. Dist. Ct. App. 2020) (rejecting coverage to replace non-damaged cabinets to match replacements for damaged cabinets). The other upheld coverage. *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017) (upholding coverage for failure of drain pipe to perform its function). Mama Jo's policy is materially broader, covering "loss of" property, not just "loss," and also "damage to" property—critically different language. Florida law requires that "loss of" in these policies mean something different from "damage." *Foremost Ins. Co. v. Medders*, 399 So. 2d 128, 130 (Fla. Dist. Ct. App. 1981). By equating "loss of" with "damage," the Eleventh Circuit violated the Florida legal principles that policy terms not be rendered superfluous and that words in a policy be construed in context, not in isolation. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000).

Second, even if "direct physical loss of or damage to" required that the loss of or damage to property be "actual" (as the Eleventh Circuit stated despite the policy not so requiring), a significant mental leap is needed to conclude that coverage does not apply to items that "merely need[] to be cleaned." The court filled this gap not with Florida law and the policy analysis that Florida law requires, but with federal precedent and decisions from other states. App.21a.

Third, the Eleventh Circuit ignored pertinent Florida precedent requiring that the phrase "direct physical loss of or damage to" be given a broad construction. *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995). In *Azalea*, a policy covered "direct physical loss of or damage to" certain property—the same policy language issued to Mama Jo's. The question was whether the policy

covered loss of or damage to the facility resulting when a chemical killed the bacterial colony in a sewage-treatment plant. The appellate court reversed the trial court, holding that, by adhering to the interior of the facility and destroying the bacterial colony that was an integral part of the facility, the chemical caused direct damage to the plant. *Id.* Structural damage was not required. It was "common sense" that the policy not be construed to deny coverage for a structure "rendered completely useless." *Id.* This was so even though all that was necessary was that the plant be cleaned so it could be reseeded. *Id.*; *see Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003) (*Azalea* shows that, "under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property").[21]

In this way, the Eleventh Circuit's result was driven not by Florida law but by federal precedent, in contravention of *Erie*.

B. The Eleventh Circuit erred in its application of *Daubert*.

Daubert assigned the federal courts a gatekeeper role regarding expert evidence. The Eleventh Circuit has made it a usurping role. In two ways, the Eleventh Circuit overextended *Daubert*. *First*, the Eleventh Circuit required Mama Jo's to exclude every

[21] This construction is supported by Florida policy-interpretation principles that the Eleventh Circuit ignored or failed to apply. Policies are construed liberally in favor of the insured; every provision should be given meaning; and where language is susceptible of more than one reasonable interpretation, it is construed in favor of coverage. *Washington Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948, 950 (Fla. 2013).

possible cause of the loss of or damage to property aside from the road construction. *Second*, the court required vigorous laboratory testing that was incongruous with the scope of the experts' opinions.

1. The Eleventh Circuit faulted Mama Jo's for failing to exclude every other possible cause of damage apart from the road construction. App.15a-18a. Nothing in *Daubert* requires an expert to categorically exclude all other possible causes, nor do other circuits impose such an onerous requirement. *E.g., Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 563 (8th Cir. 2014) ("[W]e have consistently ruled that experts are not required to rule out all possible causes when performing the differential etiology analysis."); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 470 (6th Cir. 2004) (same); *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996) (same). If the Eleventh Circuit's standard were to stand, there would be no need for a *Daubert* gatekeeper because the gate would be firmly locked. There does not appear to be any indication of any other source of the severe dust accumulation Mama Jo's experienced. And if there were, *Daubert* itself presents the solution: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. By affirming the categorical exclusion of the evidence, the Eleventh Circuit usurped this role, assigned to the fact finder.

2. The Eleventh Circuit insisted on vigorous laboratory testing and faulted Mama Jo's experts for performing only visual and tactile inspections. App.15a-18a. These were matters for the fact finder, not the gatekeeper. This Court has never required

strict "scientific foundations" for expert testimony, permitting that evidence to be based on personal knowledge and experience as long as it assists the trier of fact. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). The district court deemed each expert qualified to offer his opinion. Each expert used his knowledge, gained from substantial experience in his field, to formulate his opinion. *Daubert* required no more. *See Correa v. Cruisers, a Div. of KCS Int'l, Inc.*, 298 F.3d 13, 26 (1st Cir. 2002) (approving visual inspection as appropriate for mechanic to diagnose engine problem).

The persuasiveness of the experts' opinions was for the fact finder. The Eleventh Circuit erred by arrogating this role to itself.

IV. The Eleventh Circuit's errors are being applied nationwide.

The Eleventh Circuit's erroneous decision has exacerbated errors in COVID-19 coverage cases nationwide.

A. Federal courts are backsliding into a federal general common law of insurance coverage.

Federal courts faced with COVID-19 coverage claims are making the same *Erie* error as the Eleventh Circuit. In decision after decision, federal courts are making no real effort to apply the state standards on policy interpretation or to predict how the state high court, applying such standards, would interpret the relevant policy language. Instead, finding no binding authority by the states' highest courts on the precise question, they immediately have turned to federal decisions from other jurisdictions,

many of which have made the same error. The result is a self-perpetuating series of cases that deny coverage for COVID-19 claims based on federal courts' preferences. This is no different from the regime of *Swift v. Tyson*, 41 U.S. 1 (1842), into which federal courts are backsliding. They are creating a federal general common law of insurance coverage, specifically business-income coverage, exactly what *Erie* forbids.

The errors are manifest. Where *Erie* sought to ensure that no party would obtain an advantage in substantive law in a federal court sitting in diversity, being in federal court has inured to the distinct benefit of one party in many cases: the insurance company. The trends have seen insurers fare better in federal courts and worse in state courts.[22] The reason

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[22] *Compare causes favoring policyholders*, *e.g.*, *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, No. 2020CV00815, 2021 WL 506266, at *2 (Ohio Com. Pl. Feb. 9, 2021); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's, London,* No. 20STCV17169, (Cal. Super. Ct. Feb. 4, 2021)*; Goodwill Indus. of Orange Cnty. v. Philadelphia Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Cherokee Nation v. Lexington Ins. Co.*, No. CV-2020-150, 2021 WL 506271 (Okla. Dist. Ct. Jan. 14, 2021); *JGB*, No. A-20-816628-B; *Perry St.*, No. 20-2-02212-32; *with causes favoring insurance companies*, *e.g.*, *Roy H. Johnson, DDS v. Hartford Fire Ins. Co.*, No. 1:20-cv-02000, 2020 WL 2392784 (N.D. Ga. May 8, 2020); *Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579 (S.D. Ala. Dec. 30, 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 1:20-CV-01192, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020); *10012 Holdings, Inc. v. Sentinel Ins. Co.,* No. 20 CIV. 4471 (LGS), 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, No. 1:20-CV-665-RP, 2020 WL

for this, *amicus* believes, is exactly that these federal courts are disregarding *Erie*'s instruction to apply the law of the forum state and predict, through all available sources, how that forum state would resolve the issue. They are simply citing themselves.

Erie, together with the federalism and jurisprudential wisdom it embodies, requires federal courts to engage in the effort of applying forum-state law and predicting how the forum state would resolve the coverage issue. That is not occurring across the country in many federal courts.

B. The Eleventh Circuit's decision is deepening this dangerous trend, which is amplified by the *Daubert* error.

Federal courts across the country are relying on the decision below, with its *Erie* and *Daubert* errors, to deflect analysis of state law, factual allegations, and policy language. By citing to the decision below, these courts skirt over analysis of state law, offering little but the most languid nod to governing substantive law and the policy analysis it requires.[23] The Eleventh Circuit's faulty *Daubert* analysis only reinforces these

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7351246 (W.D. Tex. Dec. 14, 2020); *T&E Chicago LLC v. Cincinnati Ins. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, No. 1:20-cv-23245, 2020 WL 7062449 (S.D. Fla. Nov. 17, 2020).

[23] *See, e.g.*, *KD Unlimited Inc. v. Owners Ins. Co.*, No. 1:20-CV-2163-TWT, 2021 WL 81660 (N.D. Ga. Jan. 5, 2021); *Atma Beauty, Inc. v. HDI Glob. Specialty SE*, No. 1:20-CV-21745, 2020 WL 7770398 (S.D. Fla. Dec. 30, 2020); *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's, London*, No. 1:20-CV-21827, 2020 WL 7699672 (S.D. Fla. Dec. 28, 2020); *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's, London*, No. 8:20-CV-1605-T-30AEP, 2020 WL 5791583 (M.D. Fla. Sept. 28, 2020).

courts' errors in finding facts at the motion to dismiss stage in plain contravention of the plausibility standard of *Iqbal*, 556 U.S. at 678.[24]

This is not right. Policyholders deserve to have their claims assayed under the respective state's law, not some self-propagating federal general common law disembodied from state doctrine. Federal courts must respect—and apply—the proper standard, as *Erie* directs. A motion to dismiss is *not* the stage to make factual determinations. Policyholders deserve the opportunity to present evidence to support their factual allegations, not have those allegations brushed aside by a court's inappropriate factual findings.

CONCLUSION

The Eleventh Circuit's decision reflects fundamental errors, first in its failure to make a genuine attempt to predict state law and second in its

[24] *See, e.g.*, *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, No. 8:20-CV-2481-VMC-SPF, 2021 WL 268478 (M.D. Fla. Jan. 27, 2021) (dismissing notwithstanding allegations that virus caused damage by physically altering property and impairing functionality of property); *Karmel Davis & Assocs. v. Hartford Fin'l Svcs. Grp., Inc.*, No. 1:20-CV-02181-WMR, 2021 WL 420372 (N.D. Ga. Jan. 26, 2021) (dismissing on grounds that ability to clean virus means no physical change to property); *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.*, No. 3:20-CV-01129-H-MDD, 2021 WL 242979 (S.D. Cal. Jan. 22, 2021) (dismissing because ability to clean means no direct physical loss or damage); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-CV-23661, 2021 WL 86777 (S.D. Fla. Jan. 11, 2021) (dismissing despite allegation that virus caused distinct alteration of property that could not be corrected by disinfection); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 20-CV-754V(SR), 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020) (dismissing on grounds that ability to clean surfaces means no direct physical loss).

overreach under *Daubert*. This Court can correct these errors by granting the petition for certiorari, summarily reversing the decision below, and remanding for further proceedings.

Respectfully submitted.

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