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**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**Feb 09 2022**

**S.C. SUPREME COURT**

**CERTIFIED QUESTIONS FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA**

The Hon. Mary Geiger Lewis, United States District Court Judge

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Appellate Case No. 2021-001209  
District Court Case No. 3:20-cv-02275

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Sullivan Management, LLC,  
Plaintiff,

v.

Fireman's Fund Insurance Company,  
and Allianz Global Risks US  
Insurance Company,  
Defendants.

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**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY  
INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF  
MUTUAL INSURANCE COMPANIES, AND SOUTH CAROLINA  
INSURANCE ASSOCIATION IN SUPPORT OF DEFENDANTS**

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Harmon L. Cooper  
Crowell & Moring LLP  
1001 Pennsylvania Ave. NW  
Washington, DC 20004  
(202) 624-2500

*Counsel for Amici Curiae American Property Casualty  
Insurance Association, National Association of Mutual Insurance Companies,  
and South Carolina Insurance Association*

In support of their motion for leave to file an amicus curiae brief, American Property Casualty Insurance Association (“APCIA”), National Association of Mutual Insurance Companies (“NAMIC”), and South Carolina Insurance Association (“SCIA”) (collectively, “Amici”) respectfully submit this Memorandum, and state as follows:

1. APCIA is the primary national trade association for home, auto, and business insurers. On issues of importance to the property and casualty insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts, including this Court. This allows APCIA to share its broad national perspective with the judiciary on matters that shape and develop the law. APCIA’s interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

2. NAMIC is the largest property/casualty insurance trade group with a diverse membership of over 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner’s insurance market and 53 percent of the auto market. Through its advocacy programs, NAMIC promotes public policy solutions that benefit its member companies and the policyholders they serve

and foster greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

3. SCIA represents many of the leading property and casualty insurance companies that are writing business in the State. SCIA has 46 Members and Associates, collectively representing more than 65% of South Carolina's property and casualty market. SCIA serves as the voice for the property and casualty industry in South Carolina and promotes consumer awareness on issues of importance. SCIA focuses on coordinating the insurance industry's advocacy, communication, research, and education efforts. SCIA promotes a competitive environment while seeking to further the understanding of the property/casualty insurance industry to regulators, lawmakers, consumers, and other interested groups.

4. The issues presented in this and similar cases pending in courts throughout the country that arise from coronavirus-related business income insurance claims will have a significant impact on Amici's members, their policyholders, and the property insurance marketplace as a whole. Amici believe their unique local and national viewpoints will be useful to the Court in its analysis of the important issues before the Court.

5. Sullivan Management, LLC ("Sullivan") seeks coverage for economic losses it sustained when its restaurant dine-in services were halted under government orders issued to prevent the spread of COVID-19. Sullivan

also claims it is “more likely than not” the virus was present at its premises, but does not allege any physical harm to its property. Courts nationwide have rejected the unsubstantiated argument that “physical loss” means loss of use, and held that the plain meaning of direct physical loss or damage requires that loss or damage to property be both direct and *physical* in nature. In addressing these issues, Amici seek to fulfill the classic role of *amici curiae* by explaining the broader context in which the issues presented arise and consequences of potential outcomes, offering additional analytical approaches, and citing additional authority that might otherwise escape the Court’s attention. In their proposed amici curiae brief, Amici:

- explain how the history and purpose of commercial property insurance policies support finding that “direct physical loss or damage” to property requires permanent dispossession or physical alteration to the property;
- explain how imposing a new and retroactive extra-contractual risk on insurers would threaten insurer solvency and harm South Carolina’s insurance marketplace, thereby opening the floodgates to all manner of claims that these policies were never intended to cover;

- provide additional authority and analysis relating to why loss of or limitation on the use of property does not constitute “direct physical loss or damage” to property;
- demonstrate that Business Access and/or Civil Authority coverage is unavailable in the absence of “direct physical loss or damage” to property other than at an insured location; and
- explain how Sullivan’s alleged expenditures to mitigate COVID-19 do not qualify for Loss Avoidance or Mitigation Coverage because they were not incurred to avoid or mitigate “direct physical loss or damage” to property.

6. Amici respectfully submit that their participation should be permitted because the amicus curiae brief addresses significant arguments and authorities that may otherwise escape the Court’s attention in this important case.

7. Amici further submit that there will be no prejudice to the parties by allowing their proposed brief to be filed. There will be ample time for the parties and the Court to review the amicus curiae brief prior to argument.

WHEREFORE, Amici respectfully urge the Court to allow them to participate as amicus curiae, by allowing the filing of the amicus curiae brief submitted herewith.

Dated: February 9, 2022

Respectfully submitted,

By: */s/ Harmon L. Cooper*  
Harmon L. Cooper (Bar No. 73079)  
Crowell & Moring LLP  
1001 Pennsylvania Ave. NW  
Washington, DC 20004  
(202) 624-2500  
mcooper@crowell.com

*Counsel for Amici Curiae  
American Property Casualty Insurance  
Association, National Association of  
Mutual Insurance Companies, and South  
Carolina Insurance Association*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2022, a copy of the foregoing Motion for Leave to File Amicus Curiae Brief of American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and South Carolina Insurance Association in Support of Defendants, accompanying Memorandum in support thereof, and proposed Amicus Brief were sent by first class mail, postage prepaid to:

Justin O'Toole Lucey  
Anna McCann  
Sohayla R. Townes  
Justin O'Toole Lucey, P.A.  
415 Mill Street  
Mt. Pleasant, South Carolina 29464

*Attorneys for Plaintiff*

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D. Larry Kristinik  
A. Mattison Bogan  
Nelson Mullins Riley & Scarborough LLP  
1320 Main Street  
17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201

Brett Ingerman  
DLA Piper LLP (US)  
The Marbury Building  
6225 Smith Avenue  
Baltimore, Maryland 21209

Brett Solberg  
DLA Piper LLP (US)  
1000 Louisiana, Suite 2800  
Houston, Texas 77002

*Attorneys for Defendants*

/s/ Harmon L. Cooper  
Harmon L. Cooper