S277893

In the
Supreme Court
of the
State of California

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

FOLLOWING CERTIFICATION ORDER BY THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 21-16093

AMICI CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF RESPONDENT VIGILANT INSURANCE COMPANY

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INTEREST OF *AMICI CURIAE*

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 63 percent of the U.S. property-casualty insurance market, and nearly 70 percent of California's commercial insurance market. APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

National Association of Mutual Insurance Companies ("NAMIC") consists of more than 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $357 billion in annual premiums and represent 69 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs, NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

Amici's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure. The issues that arise from COVID-19-related business income insurance claims will significantly impact Amici's members,

their policyholders, and the property insurance marketplace. Amici seek to fulfill the classic role of *amici curiae* by providing additional background, context, and perspective on the issues, and by citing additional authorities that might otherwise escape the Court's attention. Through their submission, Amici provide insight on the history and purpose of commercial property insurance, the nationwide authority supporting the insurer's position in this case, and how a ruling here will affect insurers, policyholders and the public.[1]

INTRODUCTION

The certified question before the Court turns on the meaning of "direct physical loss of or damage to" property under a commercial property policy. Specifically, the Court is asked to decide whether "the actual or potential presence of the COVID-19 virus on an insured's premises constitutes 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy." Amici submit that, consistent with longstanding insurance law in California (and elsewhere), and the overwhelming weight of authority construing the same policy language, the Court should answer the question in the negative: The presence of microscopic viral particles in the air and on surfaces does not constitute "direct physical loss of or damage to property."

Petitioner Another Planet Entertainment, LLC ("AP") seeks coverage for business operation losses under its commercial *property* insurance policy with Respondent Vigilant Insurance Company ("Vigilant"). Amici urge the Court to enforce the plain meaning of the

[1] No party or any counsel for a party in the pending appeal authorized the proposed amicus brief, in whole or in part, or made a monetary contribution intended to the fund the preparation or submission of the brief, other than the amici curiae or their members.

policy, as the overwhelming majority of state and federal appellate courts across the country have done in rejecting property coverage for pandemic-related business interruption losses.

First, enforcing the boundaries of property coverage is critical to California's insurance marketplace. Insurers calculate and pool the likelihood of physical loss or damage to property from risks such as fires, hail, lightning, riot, theft and vandalism, which unpredictably occur to different policyholders in different locations at different times. These risk pools are not structured to cover pandemic-caused economic losses, which could hit all or many members of a risk pool at virtually the same time. Imposing this type of risk on insurers in California would fundamentally distort the insurance mechanism to the detriment of insurers, policyholders, the public, and the courts.

Second, allegations of the "presence of virus particles" in insured property are insufficient to show physical loss or damage, as an overwhelming majority of courts have held. These allegations cannot establish that the virus "alter[s] the appearance, shape, color, structure, or other material dimension of the property." *E.g., Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 745 (S.C. 2022) (internal quotation marks and citation omitted). If the presence of the COVID-19 virus on an insured's premises were sufficient to constitute physical loss or physical damage, every hospital, doctor's office, and supermarket has been physically damaged virtually every day by viruses, both before and after the advent of COVID-19. That makes no sense. The presence of the coronavirus does not require repairing or replacing any property. *Id*. at 745-46. Common sense dictates that "[o]ne does not replace, rebuild or repair a countertop (or a doorknob or a floor)

because SARS-CoV-2 (or salmonella, MRSA or the flu virus) is present on the surface." *L&J Mattson's Co. v. Cincinnati Ins. Co.*, 536 F. Supp. 3d 307, 314-15 (N.D. Ill. 2021). AP's theory is further undermined by the continued existence of coronavirus in the ambient air and on surfaces of properties now that the risk to public health has subsided. If the presence of virus particles constituted "physical damage" during the pandemic, it would still do so now.

Third, AP's attempt to reframe the "physical loss of property" requirement to mean that coverage applies to economic losses precipitated by a "physical event" contravenes the plain language of the policy. The policy does not require that economic losses be caused by a "physical" event; the policy requires physical loss to the insured's *property*.

Fourth, AP maligns a respected insurance treatise to advance its theory, and misstates pre-pandemic law on the key coverage issue here. In fact, Couch on Insurance correctly restates the law – courts have long held that coverage does not apply under commercial property policies in the absence of direct physical loss.

Fifth, AP cannot override the plain policy language by attempting to distract the Court from the core requirement of "direct physical loss or damage to property" by drawing on inapposite case law or pointing to the absence of a virus exclusion. California courts will not manufacture ambiguity where none exists.

Finally, the history and purpose of commercial property insurance policies support the nationwide authority and California precedent on the meaning of "physical loss" of property in commercial property insurance policies like the one issued by Vigilant. Commercial property policies provide important coverage for losses caused by perils such

as fire, wind, hail, and vandalism. They do not—and were never intended to—cover economic losses untethered to physical loss or physical damage.

ARGUMENT

I. FAILING TO ENFORCE THE BOUNDARIES OF PROPERTY COVERAGE WOULD HARM CALIFORNIA'S INSURANCE MARKETPLACE, TO THE DETRIMENT OF INSURERS, POLICYHOLDERS, THE PUBLIC, AND THE COURTS.

Were California to stretch the boundaries of property coverage to require payment of benefits for economic, operational losses unaccompanied by structural change to property, contrary to controlling appellate decisions in numerous other jurisdictions, a substantial detrimental impact on California policyholders and the California insurance marketplace would follow.

The fundamental concept of insurance is risk spreading. Insurers calculate and pool the likelihood of physical property damage from risks such as fires, hail and landslides, which unpredictably occur to different policyholders in different locations at different times. The risk of economic losses in a pandemic, which could hit all or many members of a risk pool at virtually the same time, is very different. To impose this type of risk on insurers like Vigilant would override the policy requirement of physical loss or physical damage and distort the insurance mechanism.

Analyses APCIA conducted in May 2020 estimated that California COVID-19-related business interruption losses for businesses with fewer than 250 employees and some business interruption coverage—should coverage be mandated—would range from $9.1 billion to $33.7 billion per month. By comparison, total monthly premiums for commercial

property policies written in California amount to only $480 million, of which business interruption premiums constitute a small fraction. Nationwide, small business losses from the COVID-19 pandemic have been estimated at between $255 billion and $431 billion *per month*.[2] By contrast, the total property casualty industry surplus, for companies of all sizes, is about $800 billion to protect auto, home, and business policyholders from all types of future insured losses.[3]

Insurers reserve these funds to pay insured losses caused by tornadoes, falling objects, windstorms and other daily events throughout the country.[4] The ability of insurers to honor their promises in policies covering such devastating and commonplace property perils would be dangerously undermined by a finding of coverage for losses attributable to the COVID-19 pandemic, which are untethered from the requisite tangible, structural alteration to property. The National Association of Insurance Commissioners ("NAIC") and rating agencies[5] have warned that requiring insurers to cover businesses' uninsured economic losses from the pandemic "would create substantial solvency risks for the

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

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, *Best's Commentary: Two Months of Retroactive Business Interruption Coverage Could Wipe Out Half of Insurers' Capital*, Business Wire (May 5, 2020, 11:07 AM), *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; *Credit FAQ: How COVID-19 Risks Factor Into U.S. Property/Casualty Ratings*, S&P Glob. Ratings (Apr. 27, 2020), *available at* https://www.spglobal.com/ratings/en/research/articles/200427-credit-faq-how-covid-19-risks-factor-into-u-s-property-casualty-ratings-11454312.

[insurance] sector[.]"[6]

Funding for businesses in duress should come, and has come, from government-backed pandemic recovery solutions, not efforts to force property insurers to pay for economic losses despite the contractual limitations of their obligations. Governmental relief efforts have provided trillions of dollars to businesses suffering setbacks from the pandemic through laws providing forgivable loans and other relief to American businesses.[7] AP has been included in these relief efforts, receiving a $864,783 loan in 2021 that was forgiven, along with its accrued interest.[8]

Solutions for the economic toll the coronavirus exacted on businesses must come from programs like these, not trying to shoehorn claims into insurance policies that do not cover them. Insurers set reserves for covered claims, and those funds must be reserved for covered events. Insurers play a vital role in helping individuals and businesses prepare for and recover from the potentially devastating effects of catastrophic events, such as landslides, storms, and wildfires. In 2022, these kinds of insurance payments in California,

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[6] NAIC, *NAIC Statement on Congressional Action Relating to COVID-19* (Mar. 25, 2020), *available at* https://campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf.

[7] *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020); Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146 (Mar. 6, 2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (Mar. 18, 2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (Mar. 11, 2021).

[8] ProPublica, Tracking PPP, Another Planet Entertainment LLC, *available at* https://projects.propublica.org/coronavirus/bailouts/loans/another-planet-entertainment-llc-2174638709 (last visited Aug. 1, 2023).

as measured by direct property and casualty incurred losses, totaled over $63 billion.[9] California's public policy interests, insurers, and policyholders are best served by enforcing insurance contract terms—such as the requirement of direct physical loss or damage—as written.

II. THE PRESENCE OF THE COVID-19 VIRUS DOES NOT CONSTITUTE "DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY."

The terms of Vigilant's policy are clear: it covers losses only when property suffers "direct physical loss or damage." It does not cover economic or operational losses when there has been no tangible, physical loss to the property. In an effort to shoehorn its claim into the policy, AP asks the Court to hold that the presence of the COVID-19 virus constitutes "direct physical loss or damage" to property, claiming the virus is "a physical substance with physical attributes" and "its manners of contamination and transmission all constitute a physical event or condition." AP Op. Br. at 41, 44. That microscopic virus particles have a "physical" nature is not in dispute. Nor is the fact that such particles become airborne or settle on surfaces and objects. But AP claims that "physical *damage*" occurs when virus particles "convert[] [the] surfaces and objects [on which it lands] to active fomites" by making those surfaces and objects "unsafe." *Id.* at 46-47. As Vigilant points out, a fomite is simply an object that may be contaminated with infectious agents. *See* Ins. Ans. Br. at 30 (citing *Fomite*, Merriam-Webster's Online Dictionary (2023)). Under AP's view of the world, "direct physical damage" occurs every time an infectious

[9] Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy*, https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/view-by-state/?state=California (last visited Aug. 1, 2023).

agent becomes airborne or lands on an object's surface. Under this approach, a cough or sneeze that releases infectious droplets in the air or on a surface is a physical alteration triggering coverage. Anyone with the common cold is at risk of perpetually causing physical damage to property unless wearing full-blown protective gear. That is an unworkable and unreasonable interpretation of physical loss or damage to property, and contrary to California law. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18-19 (1995).

Moreover, if AP's theory of what constitutes physical damage were correct, the continued presence of the COVID-19 virus continues to cause physical damage to property everywhere. If the COVID-19 virus is not triggering coverage throughout the world now as AP appears to concede (*see* AP Op. Br. at 56), then it was not doing so in March 2020 either. That the virus is less dangerous to humans on a societal level now because of increased immunities and vaccines has no bearing on whether the coronavirus causes direct physical loss or damage to *property*, which is what the policy requires.

Amici recognize the seriousness of COVID-19 and the challenges posed to businesses by the pandemic, and do not seek to minimize those challenges. But the economic losses incurred by businesses as a result of the COVID-19 pandemic do not trigger coverage for physical loss or physical damage as a matter of law, as courts nationwide have held. *See, e.g.*, *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 407 (6th Cir. 2021) (recognizing "singular challenges" facing businesses during pandemic and availability of state and federal aid, and explaining that insurance is "not a general safety net for all dangers," and "courts must honor" terms of policies).

For example, the Louisiana Supreme Court held that "the plain, ordinary and generally prevailing meaning of 'direct physical loss of or damage to property' requires the insured's property sustain a physical, meaning tangible or corporeal, loss or damage" that "must also be direct, not indirect." *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 359 So. 3d 922, 926 (La. 2023). Applying that legal standard, the court concluded that "loss of use alone is not 'physical loss,'" and contamination of property with the coronavirus was not covered because giving the policy's words "their ordinary and generally prevailing meaning, [the policyholder] never had to repair, rebuild, or replace anything." *Id*. at 927. "A layperson would not say that cleaning or sterilizing tables, plates or silverware is a 'repair.'" *Id*. The insurance policy was "clear and must be enforced as written." *Id*. at 929. *See also Hartford Fire Ins. Co. v. Moda, LLC*, 288 A.3d 206, 212 (Conn. 2023) (affirming summary judgment ruling for insurer, explaining that "[c]ontamination with the SARS-CoV-2 virus, even if it could be proved, is not sufficient to establish that the [insured property was] physically lost or damaged"); *Ind. Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 203 N.E.3d 555, 557-59 (Ind. Ct. App. 2023), *transfer denied* (affirming summary judgment ruling for insurer because, assuming plaintiff's expert opinions were correct, there was no coverage "because the COVID virus did not physically alter the theatre or otherwise render it physically useless or uninhabitable").

Similarly, the Seventh Circuit decided a case in which the plaintiff's theory was that "virus particles physically attached to surfaces" at its hotel and an amicus further "asserted that the virus 'adsorbs' onto surfaces and materially alters them." *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1020 (7th Cir. 2022). Rejecting this theory

and affirming dismissal of the complaint, the Seventh Circuit explained that loss of use is not "direct physical loss," and with respect to "direct physical damage," "[i]n ordinary parlance, the term 'damage' connotes some kind of harm," and "[t]he fact that 'material matter' has been added to hotel surfaces does not mean Circle Block's property has been harmed." *Id.* at 1021-22. The Seventh Circuit "ha[d] a hard time imagining that a reasonably intelligent policyholder" would interpret "direct physical damage" to include, for example, "[a] sneeze that spreads cold virus particles[.]" *Id.* at 1023. And under the "period of restoration" provision, the plaintiff could not "explain how this addition of 'material matter' would 'require restoration or relocation.'" *Id.* (citation omitted). Even assuming that "cleaning efforts may be less effective in eradicating the virus than was previously understood," that would not constitute "repair or replacement." *Id.* at 1020 n.2. And "[w]hether a reasonable policyholder would understand the policy's [period of] restoration language to include a problem typically resolved through cleaning—as opposed to the more extensive remedial measures in cases involving termites or asbestos—is a legal question", not a factual issue. *Id.* The presence of the virus on property does nothing to the property itself that the common cold virus does not, or that requires repair or replacement of property (and it does not). "[T]he COVID-19 virus does not cause physical loss (or damage) in any plain or ordinary sense." *Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, 33 F.4th 417, 421-22 (7th Cir. 2022).

The Massachusetts Supreme Judicial Court likewise held that the presence of a virus "does not amount to loss or damage to the property" as a matter of law because it "does not physically alter or affect property." *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d

1266, 1276 (Mass. 2022); *see also United Talent Agency v. Vigilant Ins. Co.*, 77 Cal.App.5th 821, 833 (2022) (virus "can carry great risk to people but no risk at all to a physical structure"). As the Second Circuit explained, a virus does not "physically alter" property within the meaning of an insurance policy. *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022); *see also Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933 (4th Cir. 2022) (similar holding as a matter of law by the Fourth Circuit). Moreover, "no property needed to be repaired or replaced" due to the alleged presence of the COVID-19 virus. *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 193 N.E.3d 962, 974 (Ill. App. Ct. 2022).

People who are diagnosed with COVID-19 are instructed to stay home so they do not infect others. They are not instructed to replace the drywall or doorknobs or furniture in their homes, or even to replace their own clothing. *See L&J Mattson's Co.*, 536 F. Supp. 3d at 314-15 ("One does not replace, rebuild or repair a countertop (or a doorknob or a floor) because SARS-CoV-2 (or salmonella, MRSA or the flu virus) is present on the surface."). AP's theory that an ordinary purchaser of insurance would reasonably understand "direct physical damage" to occur every time a virus-infected person coughs or sneezes and droplets land on the facility's surfaces is untenable. It is simply not a reasonable or credible interpretation of the phrase "direct physical loss of or damage to" property.

III. AP'S "LOSS OF USE" ARGUMENT ALSO FAILS BECAUSE A PHYSICAL ALTERATION TO PROPERTY MUST OCCUR FOR A CLAIM TO BE COVERED.

AP's further argument that a "loss of use" constitutes a "physical loss" when it involves a so-called "physical event" cannot be reconciled with the plain language of the policy. For coverage to apply, there must be a "physical loss… of *property*."[10] A physical event – for example, a snowstorm – does not *ipso facto* create a "physical loss of property," even if the insured premises is closed until access roads are plowed. *See, e.g., Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp*., 486 S.E.2d 249, 251-52 (N.C. Ct. App. 1997). If there is no resulting physical loss or damage to the property itself (*i.e.*, the snow simply melts, with no physical alteration to the property), there is no "physical loss." *See also* Ins. Ans. Br. at 46-48.

To urge coverage, AP relies on a handful of cases involving property permeated with substances such as asbestos or cat urine, nearly all of which have been persuasively distinguished by various recent COVID-19 decisions. As other courts cogently explained in addressing the line of cases AP cites, "the presence of COVID-19 . . . did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property." *First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co.*, No. 21-cv-00344, 2021 WL

[10] *E.g.*, *Roundin3rd Sports Bar LLC v. Hartford*, No. 20-cv-05159, 2021 WL 647379, at *4 (C.D. Cal. Jan. 14, 2021) ("California law clearly establishes that, absent a physical alteration to the covered property, an insured cannot recover for temporary impairment to economically valuable use of that property."). *See also Starlight Cinemas, Inc. v. Mass. Bay Ins. Co.*, 91 Cal.App.5th 24, 35 (2023); *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.*, 77 Cal.App.5th 753, 758-59 (2022).

3109724, at *4 (W.D. Wash. July 22, 2021), *aff'd*, No. 21-35637, 2023 WL 3562997 (9th Cir. May 19, 2023); *see also Tom's Urb. Master LLC v. Fed. Ins. Co.*, No. 20-cv-03407, 2022 WL 974654, at *5 (D. Colo. Mar. 31, 2022); *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 204 (Conn. 2023). Here, as in the case of business operations being interrupted due to a snowstorm where the snow eventually simply melts away, there is no physical loss or damage to property.

IV. COUCH ON INSURANCE CORRECTLY RESTATES THE LAW OF OVER 200 COURTS NATIONWIDE.

To challenge the conclusions of hundreds of judges across the country on the direct physical loss or damage issue, AP next attacks a leading insurance law treatise, Couch on Insurance. AP asserts that Couch improperly coined a phrase to describe what generally constitutes "physical loss" and "physical damage" to property—*i.e.*, "distinct, demonstrable, physical alteration of the property." *See* AP Op. Br. at 71. This is what treatises often do—examine how courts have decided individual cases and suggest a legal standard that courts might find helpful. Sometimes courts adopt a catchphrase from a treatise, and other times they reject it.

According to a Westlaw search, 269 courts since 1999 have cited, and many have adopted, the "distinct, demonstrable, physical alteration of the property" phrase from Couch as a shorthand reference for what "direct physical loss of or damage to property" typically involves. *See, e.g.*, *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235-36 (3d Cir. 2002) ("In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its

structure.") (citation omitted); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) ("[T]he term 'physical loss' requires a distinct and demonstrable alteration of the insured property."); *NMA Invs. LLC v. Fid. & Guar. Ins. Co.*, 627 F. Supp. 3d 993, 998 (D. Minn. 2022) ("Any other interpretation of the policy language 'would render the word "physical" meaningless.'") (citation omitted).

Appellate decisions affirming dismissals of COVID-19-related business interruption cases have likewise found the phrase helpful. *See, e.g.*, *PHI Grp., Inc. v. Zurich Am. Ins. Co.*, 58 F.4th 838, 842 (5th Cir. 2023) ("The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state—for example, the car was undamaged before the collision dented the bumper.") (citation omitted); *see also Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52, 61 (D.C. 2023). AP's attacks are not only incorrect, but they are irrelevant after hundreds of courts have adopted Couch's proposed standard over several decades. In an effort to bolster their position, policyholder lawyers have even published a law journal article attacking Couch. *See* AP Br. at 72-73.

This Court should disregard this last-ditch attempt to turn the clock back 25 years and rewrite decades of insurance law. AP simply tries to craft a new interpretation of settled policy language that could encompass the COVID-19 pandemic. As courts have routinely recognized, AP's proposed standard reads the word "physical" out of the policy. Property can lose its usefulness or function when nothing "direct" or "physical" happens to it—just think of all the video rental stores that became obsolete because of technological advances. Likewise, property can become unsafe for its intended use with no "direct" or "physical"

impact on it. For instance, an engineer might determine a building is unsafe because it is poorly constructed or a machine might be considered unsafe because of a software error. AP's proposed standard violates California law because it conflicts with the ordinary, plain meaning of direct "physical loss" or "physical damage" to property, the linchpin of the insuring agreement of the Vigilant policy.

V. AP CANNOT ALTER OR OVERRIDE THE POLICY BY ATTEMPTING TO DISTRACT THE COURT FROM THE CORE REQUIREMENT OF DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY.

AP attempts to divert the Court from the plain policy language requiring "direct physical loss or damage to property" by pointing to inapposite general liability policy cases and the absence of a virus exclusion in the Vigilant policy. Those arguments are unavailing.

In interpreting insurance contracts, courts apply the policy's terms their "ordinary and popular sense." *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). "Courts will not strain to create an ambiguity where none exists." *Waller*, 11 Cal.4th at 18-19. An insured's "reasonable expectations" do not come into play in the absence of ambiguity. *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal.4th 495, 501 (2005). Terms are interpreted "in context," "giv[ing] effect to every part" of the policy, with "each clause helping to interpret the other." *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1265 (1992); Cal. Civ. Code § 1641. "[P]roperty insurance is insurance of *property*," and "[g]iven this premise, the threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal.App.4th 616, 622-23 (2007); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal.App.5th 33, 38 (2018) ("The self-evident point is that property

insurance is insurance of *property*."). If, as is the case here, the policy language is unambiguous, it governs. *See Palmer*, 21 Cal.4th at 1115.

AP inaptly cites language and case law from commercial general liability ("CGL") policies in an attempt to escape the plain language of the commercial property policies at issue. AP Op. Br. at 49. It urges that because third party claims alleging environmental contamination qualify as property damage under a CGL policy, "contamination" by the COVID-19 virus must constitute "direct physical damage" under a commercial property policy. *Id*. at 49-50. But unlike the situation where an insured under a CGL policy faces liability because soil or groundwater was altered by toxic pollutants it discharged, requiring remediation and environmental cleanup efforts, in this case AP cannot show its property was materially altered at all.

AP also seeks to divert the Court's analysis by pointing to the absence of a virus exclusion. But when, as here, a loss falls outside a policy's coverage grant, the presence or absence of any policy exclusion is irrelevant. *See, e.g.*, *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 71 Cal.App.5th 688, 709 (2021) ("Under California law, '[c]overage is defined in the first instance by the insuring clause, and when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded.'") (citations omitted); *Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co.*, No. 08 Civ. 10518, 2012 WL 13070116, at *8 (S.D.N.Y. Oct. 26, 2012) (professional liability policy does not cover breach of contract claim even without an express exclusion because there is no "wrongful act" and no "loss" to trigger coverage) (citing 23 *Appleman on Insurance 2d* § 146.6[I], 120-21 (Holmes ed. 2003) (footnote omitted)); *Sanzi v. Shetty*,

864 A.2d 614, 620-21 (R.I. 2005) ("The simple fact that later policies provide a specific exclusion does not mandate the inclusion of that coverage in the earlier policies."); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 410 (D. Conn. 2002) ("The mere absence of specific exclusions, standing alone, does not create coverage where it otherwise does not exist under the express terms of the policy."); *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996) ("the absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage for liability for the kind of occurrence or injury alleged by the claimant against the insured").

AP also misconstrues statements discussing the exclusion as purporting to acknowledge coverage here. *See* AP Reply Br. at 19-20. But the ISO language merely states that, in the absence of a virus exclusion, replacement and decontamination costs and business interruption coverage may apply *when there is physical damage or loss to property* that triggers coverage. *See Inns-by-the-Sea*, 71 Cal.App.5th at 710 (rejecting argument that the ISO virus exclusion reflects the industry's acknowledgement of coverage). Of course, in this case, there is no direct physical loss or damage to property in the first place.

VI. ENFORCING THE PHYSICAL LOSS OR DAMAGE REQUIREMENT IS CONSISTENT WITH THE HISTORY OF PROPERTY COVERAGE.

The "physical loss or damage requirement" reflects the history and purpose of commercial property insurance. Historically, property insurance insured against the risk of fire for ships, buildings, and some commercial property when most structures were made

of wood.[11] Over time, commercial property coverage expanded to include loss arising from other property-damaging perils, such as windstorms, hail, vandalism and malicious mischief. As the U.S. Court of Appeals for the Sixth Circuit has explained, "[e]ven when called 'all-risk' policies, as these policies sometimes are, they still cover only risks that lead to tangible 'physical' loss or damages, say by fire, water, wind, freezing and overheating, or vandalism." *Santo's*, 15 F.4th at 403; *see also, e.g.*, *Garvey v. State Farm Fire & Cas. Co*., 48 Cal. 3d 395, 408 (1989) ("all risk" policy must be enforced according to its terms or it "would become an 'all loss' policy"). Open peril policies, sometimes called "all risk" policies, first developed out of marine insurance that covered "all losses occasioned by perils of the sea." In property policies, such coverage has long been "limited to fortuitous physical loss from external causes." John Henry Magee & Oscar N. Serbein, *Property & Liability Insurance* 61-62 (1967). This type of insurance covers property, such as an insured's building or its business personal property (*e.g.*, equipment, furniture), against risks of direct physical loss or damage, such as a fire, windstorm, or theft. *See Uncork & Create*, 27 F.4th at 931 n.6 (rejecting argument that an "all-risk" policy "necessarily covers any type of loss for any reason unless included as a stated exclusion," explaining that only particular causes of loss are covered, which are typically defined as risks of direct physical loss). Property insurance is fundamentally different from, for example, "[t]itle insurance, which relates to intangible rights rather than to the property

[11] 10A *Couch on Insurance* § 148:1 (3d ed. 2023); *see also* Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 11:418 (2021) (explaining how property insurance developed in London after the Great Fire of 1666).

itself." 10A *Couch on Insurance*, § 148:1. "The imperative of a 'direct physical loss' or 'direct physical damage' . . . is the North Star of [a] property insurance policy from start to finish." *Santo's*, 15 F.4th at 402.

When purchasing property insurance, a business can add Business Income and Extra Expense coverage. This coverage is for "risks that arise secondarily to damage or loss of property" and provides additional coverage when insured property is damaged by a fire, for instance, requiring the business to suspend operations.[12] In that case, certain losses of business income and extra expenses (such as renting a temporary office), occurring during the "period of restoration" while the property damage is being repaired, would be covered, subject to the policy's terms, and only if those losses were caused by direct physical loss of or damage to the insured property.

These additional coverages are another layer, secondary to and dependent on direct physical loss of or damage to property at the insured premises requiring repair or replacement. *Santo's*, 15 F.4th at 400. The insured's "*operations* are not what is insured—the building and the personal property in or on the building are." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 296 (S.D. Miss. 2020). "Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' to their property—that is, the building and its contents." *Id*. at 294 n.9.

Business interruption coverage helps businesses recover when they cannot operate because property has been physically lost or damaged by a covered cause of loss.

[12] 10A *Couch on Insurance* § 148:1.

Underscoring that "there must be some physicality to the loss or damage of property", one court explained that "[p]roperty that has suffered physical loss or physical damage requires restoration." *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021). Thus, "[t]he policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage." *Id.* (citations omitted). Risks of nonphysical harm and its consequences, such as business income losses caused by governmental regulatory actions unrelated to physical harm to property, are outside the boundaries of property coverage. *LexFit, LLC v. W. Bend Mut. Ins. Co.*, 543 F. Supp. 3d 528, 533 (E.D. Ky. 2021) ("loss of income does not constitute 'direct physical loss'"). Thus, coverage for purely economic losses in a pandemic like COVID-19 does not exist under the plain language of property policies such as Vigilant's.

As explained in Section III above, AP's efforts to reframe its purely economic losses as being physical nature through its allegations about the COVID-19 virus's supposed effect on surfaces are unavailing. In other words, no amount of artful pleading or clever argument can convert claims for purely economic losses into claims for physical loss or physical damage to covered property insured by a *property* insurance policy. "[T]here must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction." *Oral Surgeons*, 2 F.4th at 1144 (citations omitted). Nearly 900 courts nationwide, including twelve state supreme courts, agree: COVID-19-related claims for business income losses do not meet the requirement for physical loss of

or damage to property under insurance policies like this one.[13]

As the Sixth Circuit wrote in rejecting claims for business interruption losses suffered during the COVID-19 pandemic:

> Staying in business through a once-in-a-century pandemic (let us hope) that has prompted all kinds of new government regulations, including prohibitions on many in-person services, has to be trying.
>
> . . .
>
> That leaves a hard reality about insurance. It is not a general safety net for all dangers. . . . Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it. Efforts to push coverage beyond its terms creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for. That is why courts must honor the coverage the parties did—and did not—provide for in their written contracts of insurance.

Santo's, 15 F.4th at 407.

California construes insurance contracts in context. Commercial property policies

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[13] *See, e.g.*, *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29 (1st Cir. 2022); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131 (3d Cir. 2023); *Uncork & Create*, 27 F.4th 926; *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *Santo's*, 15 F.4th 398; *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons*, 2 F.4th 1141; *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Gilreath Fam. & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021); *Conn. Dermatology Grp.*, 288 A.3d 187; *Rose's 1, LLC*, 290 A.3d 52; *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545 (Iowa 2022); *Cajun Conti*, 359 So. 3d 922; *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044 (Md. 2022); *Verveine Corp.*, 184 N.E.3d 1266; *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, No. 2022-0155, -- A.3d --, 2023 WL 3357980 (N.H. May 11, 2023); *Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co.*, No. 2021-0130, 2022 WL 17573883 (Ohio Dec. 12, 2022); *Cherokee Nation v. Lexington Ins. Co.*, 521 P.3d 1261 (Okla. 2022), *reh'g denied*; *Sullivan Mgmt.*, 879 S.E.2d 742; *Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co*., No. 211074, 2022 WL 1124493 (Va. Apr. 14, 2022); *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525 (Wash. 2022) (en banc); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022).

do not provide coverage for every economic misfortune a business might encounter. AP appeals to the Court in its role "at the vanguard of modern insurance law" to turn away from the fundamental principles of contract interpretation. The Court should decline that invitation and reaffirm the plain meaning of the Vigilant policy.

CONCLUSION

For the above reasons, Amici urge the Court to answer the certified question in the negative.

DATED: August 2, 2023

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

Pursuant to the California Rules of Court, I hereby certify that this application contains 6384 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using EFS/True Filing, which will send notification of such filing to all registered participants.

Carol E. Romo

STATE OF CALIFORNIA
Supreme Court of California

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