Case No. 84986

In the Supreme Court of Nevada

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STARR SURPLUS LINES INSURANCE CO., Petitioner, *vs.* THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE MARK DENTON, District Judge Respondents, and JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.	District Court Case No. A-20-816628-B

On Petition for Writ of Mandamus or, in the Alternative, Prohibition

BRIEF OF *AMICUS CURIAE*
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
IN SUPPORT OF PETITIONER AND
IN SUPPORT OF GRANTING THE PETITION

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

American Property Casualty Insurance Association ("APCIA") is a not-for-profit 501(c)(6) corporation, has no parent corporation, and no publicly-held

corporation owns stock in APCIA. APCIA has one wholly-owned for-profit subsidiary, Independent Statistical Service, Inc.

The law firms who have appeared for APCIA in this case or are expected to appear in this Court are Christian Kravitz Dichter Johnson & Sluga and Robinson & Cole LLP.

/s/ Tyler Watson, Esq.
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IDENTITY OF *AMICUS CURIAE*, ITS INTERESTS IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. The issues in this and similar cases pending in courts throughout the country arising from coronavirus-related business income insurance claims have a significant impact on APCIA's members, their policyholders, and the property insurance marketplace. On July 29, 2022, this Court granted leave for APCIA to file an amicus brief.

SUMMARY OF ARGUMENT

APCIA explains: (1) how the history and purpose of commercial property insurance policies further support the position of Defendant-Petitioner Starr Surplus Lines Insurance Company ("Starr"); (2) how imposing a new and retroactive extra-contractual risk on insurers would harm Nevada's insurance marketplace; (3) how pre- and post-pandemic appellate case law nationwide on direct physical loss or damage support Starr's position; and (4) why factual evidence or expert testimony regarding the coronavirus is unnecessary to resolve the issues presented.[1]

[1] APCIA also agrees with Starr's position that the pollution and contamination exclusion in its policy precludes coverage, and that Plaintiff cannot satisfy the requirements for Civil Authority or Ingress/Egress coverage. To avoid duplicating Starr's briefing, APCIA does not address those issues herein.

I. THE HISTORY AND PURPOSE OF COMMERCIAL PROPERTY INSURANCE POLICIES SUPPORT GRANTING THE WRIT

Historically, property insurance insured against the risk of fire for ships, buildings, and some commercial property at a time when most of the structures in use were made of wood. *Couch on Insurance*, § 148:1 (3d ed. 2020). Over time, commercial property coverage expanded to include loss arising from other perils that physically harm property. "Even 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 Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 403 (6th Cir. 2021). Property insurance is fundamentally different from, for example, "[t]itle insurance, which relates to intangible rights rather than to the property itself." *Couch on Insurance*, § 148:1 (3d ed. 2020). "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 choose to add Business Income and Extra Expense coverage. This provides additional coverage for certain losses of business income and extra expenses when, for example, insured property is damaged by a fire, requiring the business to suspend operations. But 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). In other words, Plaintiff "bought a *property* insurance policy, not a *profit* insurance policy." *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 700 (6th Cir. 2022).

As the Ninth Circuit explained in a case involving Nevada law, "[d]espite [plaintiff's] allegation that the COVID-19 virus was present on its premises, it has not identified any direct physical damage to its property caused by the virus which led to the casino's closure," and that the plaintiff's "argument that the presence of the virus rendered its property uninhabitable improperly 'collapses coverage for 'direct physical loss' into 'loss of use' coverage.'" *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2022 WL 1125663, at *1-2 (9th Cir. Apr. 15, 2022) (per curiam; unpublished).

The California Court of Appeal, to which this Court often looks for guidance, has made clear that "[a]t this point, there is no real dispute" that "[u]nder California law, a business interruption policy that covers physical loss and damages does not provide coverage for losses incurred by reason of the COVID-19 pandemic." *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.*, 77 Cal. App. 5th 753, 760 (2022). As another California Court of Appeal explained, "the presence or potential presence of the virus does not constitute direct physical damage or loss." *United Talent Agency v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 838 (2022). This is because "the virus exists worldwide wherever infected people are present, it can be cleaned

from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks." *Id.* "Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space." *Id.*; *see also Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 704 (Cal. Ct. App. 2021) ("[T]he presence of COVID-19 on Plaintiff's property 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. Instead, all that is required for Plaintiff to return to full working order is for the [government orders and restrictions to be lifted].") (cleaned up).

The state supreme courts of Massachusetts, Iowa and Wisconsin have all addressed the same issue presented here and ruled unanimously in favor of the insurer as a matter of law. *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022) ("Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property."); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 554 (Iowa 2022) ("possibility of the COVID-19 virus being present" was "insufficient to trigger coverage … because there was no imminent physical threat to the insured's property"); *Colectivo Coffee*

Roasters, Inc. v. Soc'y Ins., 974 N.W.2d 442, 447 (Wis. 2022) ("As the overwhelming majority of the other courts that have addressed the same issue have concluded, the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property. … Rather, the danger of the virus is to people in close proximity to one another, not to the real property itself.") (cleaned up).

Numerous federal circuits applying the law of various states, along with state intermediate appellate courts in five jurisdictions have reached the same result.[2] "And it is quite unlikely that the 'average' [Nevadan] would interpret the phrase

[2] *See also, e.g.*, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022); *Uncork and Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933-34 (4th Cir. 2022); *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, 36 F.4th 656, 658 (5th Cir. 2022); *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 404 (6th Cir. 2022); *Dukes Clothing, LLC v. Cincinnati Ins. Co.*, 35 F.4th 1322, 1328 (11th Cir. 2022); *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, -- So. 3d --, 2022 WL 1481776, at *6 (Fla. Dist. Ct. App. May 11, 2022); *Sweet Berry Café, Inc. v. Society Ins., Inc.*, No. 2-21-0088, -- N.E.3d --, 2022 WL 780847, at *6, *11 (Ill. App. Ct. Mar. 15, 2022); *GPL Enterprise, LLC v. Certain Underwriters at Lloyd's*, 276 A.3d 75, 83-86 (Md. App. May 24, 2022); *AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 2254864, at *13 (N.J. App. Div. June 23, 2022); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 86 (N.Y. App. Div. 2022).

'direct physical loss' in an insurance policy differently from, say, the average Ohioan, New Yorker, or Iowan." *Estes*, 23 F.4th at 701.

II. IMPOSING A NEW AND RETROACTIVE EXTRA-CONTRACTUAL RISK ON INSURANCE CARRIERS WOULD THREATEN INSURER SOLVENCY AND HARM NEVADA'S INSURANCE MARKETPLACE

As the National Association of Insurance Commissioners ("NAIC") has explained, insurance cannot insure broadly against "a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period."[3] The insurance mechanism—pooling premiums from all policyholders at risk to create a fund to pay the limited group of policyholders that actually suffer a covered loss—does not function when widespread losses can hit all or a substantial majority of insureds at once. To the extent pandemic insurance was available before COVID-19, it was limited, expensive, and rarely purchased.[4] To convert Starr's policy retroactively into pandemic insurance would violate the plain language of their policies and fundamentally distort the insurance mechanism, as the Sixth Circuit explained:

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[3] *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMMISSIONERS (Mar. 25, 2020), https://campbell-bissell.com/wp-content/uploads/2020/04/NAIC-Statement-on-Congressional-Action-Relating-to-COVID-19.pdf).

[4] *See* "Wimbledon's pandemic insurance coverage results in $141M payout," *Property Casualty 360* (April 10, 2020) ("tennis tournament is set to receive around $141 million after paying for pandemic insurance coverage for nearly 20 years").

> 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.

Santo's, 15 F.4th at 407. The NAIC concluded that requiring insurers to cover businesses' uninsured economic losses from the pandemic "would create substantial solvency risks for the [insurance] sector." NAIC, *supra* note 3.

APCIA has estimated that Nevada COVID-19-related business interruption losses—should coverage be mandated—would range from $600 million to $2.3 billion *per month* for businesses with less than 250 employees. By comparison, total monthly premiums for commercial property policies written in Nevada amount to approximately $30 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. APCIA Releases Update to Business Interruption Analysis (Apr. 28, 2020), available at https://www.apci.org/media/news-releases/release/60522/. By contrast, the total property casualty industry surplus, for companies of all sizes, is about $800 billion. These funds are set aside to pay insured losses caused by windstorms, wildfires, and other daily events occurring throughout the country. 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 purely economic losses attributable to the COVID-19 pandemic.[5]

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. Solutions for the economic toll the coronavirus had on businesses should come from programs like these, not trying to shoehorn claims into insurance policies that do not cover them.

III. PRE- AND POST-PANDEMIC CASELAW ON "DIRECT PHYSICAL LOSS" DOES NOT SUPPORT THE TRIAL COURT'S ORDER

Contrary to the trial court's decision here, which is an outlier, both before and after the pandemic, an overwhelming consensus of trial and appellate courts across the country have held that there was no coverage as a matter of law where the policyholder claimed an economic loss and no property was physically damaged or physically lost (such as a theft or total loss).

In *Port Auth. of N.Y. & N.J. v. Affiliated MF Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit, applying both New York and New Jersey law, explained

[5] Any suggestion that the insurance industry profited from the pandemic is flatly untrue. Rather, industry data reflects that insurers' net income *declined* by approximately 27% in the first nine months of 2020 as compared with the prior year, and "[i]nsurers' overall profitability as measured by their annualized rate of return on average policyholders' surplus fell to 5.5% from 8.3% a year earlier." Spector and Gordon, Property/Casualty Insurance Results: Nine-Months 2020, available at: https://www.verisk.com/siteassets/media/downloads/insuranceresultsreport2020q3.pdf. Overall, the industry's underwriting gain declined by 94%. *Id.*

that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Id.* at 235. The court held, in the context of asbestos, that "[t]he mere presence of asbestos, or the general threat of future damage from that presence, lacks the distinct and demonstrable character necessary for first-party insurance coverage." *Id.* Rather, for coverage to apply, a *physical* impact on the property would have to be "*comparable to that of fire, water or smoke* on a structure's use and function." *Id.* at 236 (emphasis added); *see also Verveine*, 184 N.E.3d at 1275-76 (distinguishing pre-COVID-19 cases involving "saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution"); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020) ("an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'").

State appellate courts reached similar results before the pandemic. In *Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002), for example, the insured theatre was required to close when an exterior elevator being used in the construction of a nearby building collapsed into the street. *Id.* at 3. The New York Appellate Division rejected the trial court's conclusion that "loss of" property included mere "loss of use of" property, explaining that "loss of" would "refer to the theft or misplacement of theatre property that is neither damaged nor destroyed." *Id.* at 7. The court further noted that under the policy the measure of

recovery would be limited to the time reasonably necessary to "rebuild, repair, or replace" the lost or damaged property, further demonstrating "that coverage is limited to instances where the insured's property suffered direct physical damage." *Id.* at 7-8 (emphasis removed); *see also 10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216, 220-21 (2d Cir. 2021) (Second Circuit found *Roundabout Theatre* applicable to COVID-19 context, affirming dismissal of complaint); *Consol. Rest. Operations*, 205 A.D.3d at 86 (New York Appellate Division reached same result); *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486 S.E.2d 249, 251 (N.C. App. 1997) (finding no "physical loss" sufficient to trigger business interruption coverage where customers could not access car dealership due to heavy snowstorm); *North State Deli, LLC v. Cincinnati Ins. Co.*, No. COA21-293, -- S.E.2d --, 2022 WL 2432157, at *2 (N.C. Ct. App. July 5, 2022) (COVID-19 case reaching same result).

California appellate decisions reached similar results. In *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010), a company that performed MRI scans had to shut down its MRI machine so that the building housing it could be repaired. *Id.* at 772. When the company turned the machine back on, it did not work properly and took months to be repaired. *Id.* The court of appeal held that the insurer correctly denied the claim because the insurance policy covered only "direct physical loss," and there had been no "distinct,

demonstrable, [or] physical alteration of the MRI machine." *Id.* at 778–79; *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 890-92 (9th Cir. 2021) (Ninth Circuit applied *MRI Healthcare* to COVID-19 context, affirming dismissal of complaint); *Musso & Frank Grill*, 77 Cal. App. 5th at 760 (California Court of Appeal reached same result); *United Talent Agency*, 77 Cal. App. 5th at 838 (same).

Well-reasoned decisions across the country have consistently held—both before and after COVID-19—that the "direct physical loss" requirement is not satisfied where there was no physical harm to property or physical dispossession of property (such as by theft). Consistent with the pre-pandemic decisions, as set forth above, federal and state appellate courts have held, with near unanimity, that there is no coverage for losses similar to those claimed by Plaintiff here.[6]

[6] Out of more than 100 appellate decisions nationwide, only two decisions have ruled in favor of policyholders. In *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2021-0343, 2022 WL 2154863 (La. App. June 15, 2022) (motion for rehearing or rehearing en banc pending), a 3-2 decision by an intermediate appellate court in Louisiana, a poorly-reasoned plurality opinion acknowledged that "[i]t is unclear what would constitute 'repair' in light of a viral outbreak." *Id.* at *7. A strong dissent would have upheld the trial court's judgment in favor of the insurer, consistent with Fifth Circuit decisions. *See, e.g., Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252, 259–60 (5th Cir. 2022) (affirming dismissal of similar case under Louisiana law). In *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.*, No. B316501, 2022 WL 2711886 (Cal. Ct. App. July 13, 2022), a panel of the California Court of Appeal, in disagreeing with another district of that court, focused on the state's liberal pleading standard, which the court asserted required it to accept what it repeatedly characterized as "improbable" allegations, such as that property was physically altered by the virus and the policyholder was "required to dispose of property damaged by COVID-19." *Id.* at

This Court should follow the overwhelming authority supporting reversal of the trial court's order and entry of summary judgment in favor of Starr.

IV. FACTUAL FINDINGS ARE NOT NECESSARY TO RESOLVE THE ISSUES

Citing the fact that "COVID-19 is transmissible to harm people," the trial court concluded that "whether COVID-19, or the virus that causes it, does or does not physically alter property in order to trigger one or more coverages under the Policy is a matter of fact to be determined at trial." 8 PA 1374-1375. There is no need for a trial because, as *hundreds* of courts have correctly concluded over the last two years, including dozens of appellate courts, the issues presented are straightforward questions of contract interpretation. This Court can decide whether the claimed presence of the COVID-19 virus on the insured premises constituted direct physical loss or damage to property based on the plain, ordinary meaning of the policy language, the surrounding context, the undisputed facts, common sense, and the overwhelming, extensive recent appellate precedent nationwide.

As the Massachusetts Supreme Judicial Court held as a matter of law, 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*, 184 N.E.3d at 1276; *see also United Talent Agency*, 77 Cal. App. 5th at 833 (virus "can carry

*3, *8-10. The court strongly hinted that the insurer likely would be entitled to summary judgment.

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*, 2022 WL 258569, at *2; *see also Uncork and Create*, 27 F.4th at 933. Moreover, "no property needed to be repaired or replaced" due to the alleged presence of the COVID-19 virus. *Sweet Berry Café*, 2022 WL 780847, at *8. 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. v. Cincinnati Ins. Co.*, 536 F. Supp. 3d 307, 314-15 (N.D. Ill. 2021) ("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."). "[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).

Plaintiff's legal theory is also completely inconsistent with the undisputed fact that Plaintiff's premises (and many others) have remained *open* through the Delta and Omicron waves of the pandemic. *AC Ocean*, 2022 WL 2254864, at *13 (noting that casino "resumed all activities at its premises when government orders allowed it do so, even while the COVID-19 virus was still circulating"). "[T]he presence of the virus does not render a property useless or uninhabitable, even though it may

affect how people interact with and within a particular space." *United Talent Agency*, 77 Cal. App. 5th at 838.

If the outlandish theory of coverage proposed by Plaintiff were adopted, 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. *Connecticut Children's Med. Ctr. v. Cont'l Cas. Co.*, 2022 WL 168786, at *5 (D. Conn. Jan. 19, 2022) (noting absurdity of theory that virus damages property when applied to medical facility).

CONCLUSION

APCIA respectfully urges the Court to grant the writ and direct the district court to enter summary judgment in favor of Starr.

Dated: August 4, 2022

Respectfully submitted,

/s/ Tyler Watson

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NRAP 32(A)(9) CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Amicus Curiae complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Brief of Amicus Curiae has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-point Times New Roman typeface. I further certify that this Brief complies with the type-volume limitation under NRAP 29(e) as it contains 3,492 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: August 4, 2022 */s/ Tyler Watson*

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 4th day of August, 2022, the foregoing Brief of Amicus Curiae American Property Casualty Insurance Association was e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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