IN THE SUPREME COURT OF THE STATE OF NEVADA

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.

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Case No.: 84986

Eighth Judicial District Court
Case No.: A-20-816628-B

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, 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 to enable the judges of this Court to evaluate possible disqualification or recusal.

JGB has no parent corporation.

The following law firms have appeared for JGB in the District Court or in this Court:

1. LEMONS, GRUNDY & EISENBERG;
2. WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP;
3. COHEN ZIFFER FRENCHMAN & MCKENNA LLP

Respectfully submitted,

Dated this 23rd day of September, 2022.

LEMONS, GRUNDY & EISENBERG

By: */s/ Robert L. Eisenberg, Esq.*

Attorney for Real Party in Interest

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I. SUMMARY OF ARGUMENT

The meaning of the phrase "direct physical loss or damage" in an "all-risks" property insurance policy is an important legal issue for this case and several others pending in Nevada state and federal courts. Based on how this phrase was understood and applied before the pandemic, this Court should hold that a policyholder could reasonably conclude that "direct physical loss or damage" exists when a deadly physical substance like SARS-CoV-2/COVID-19 *either* (1) is present on or around covered property, rendering it partially or wholly unusable, unsafe, or unfit for its intended purpose ("physical loss"), *or* (2) alters the surfaces or air of covered property ("damage"). However, even if the Court adopts a more restrictive view of this phrase, it should still deny the writ because the District Court correctly found that JGB presented sufficient evidence to allow a fact-finder to conclude that its property experienced "physical loss or damage" under any reasonable construction of those words.

JGB purchased from Starr the broadest form of first-party property insurance available in the marketplace to protect its business against "all-risks" of physical impacts. Unlike nearly 83% of the policies in COVID-19 claims across the country,

the Policy lacks the standard "absolute" virus exclusion.[1] For JGB, whose business depends on *groups of people congregating in public spaces*, the absence of the typical "absolute" virus exclusion was an essential upgrade. Starr, though, tries to engraft this exclusion into its Policy by urging the Court to greatly limit the scope of the broad "all-risks" coverage grant, and expand the scope of the pollution and contamination exclusion. Both defy this Court's principles of insurance policy interpretation.

Insurance policy terms must "be interpreted broadly, affording the greatest possible coverage to the insured." *Farmers Ins. Group. v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). The Policy covers "all risks of direct physical loss or damage," but does not define these terms. Starr posits that this phrase necessarily requires "physical alteration." Limiting coverage to "physical alteration," however, would not affect JGB's claim, since the District Court correctly found that JGB submitted sufficient evidence of "physical alteration." So Starr must go further. It next asks this Court to construe "physical alteration" to require "distinct,

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[1] In 2006, after the SARS outbreak, the insurance industry developed a virus exclusion stating, "there is no coverage for loss or damage caused by or resulting from any virus … that … is capable of inducing physical distress, illness or disease." Larry Podoshen, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria* 1 (ISO 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

demonstrable," "structural," "perceptible," and not "microscopic" or "ephemeral" damage.[2] Thus, through several interpretive leaps, relying on multiple adjectives not found in the Policy, Starr arrives at a special definition that would exclude property damage caused by COVID-19. Of course, nothing in the plain language of "physical loss or damage" requires JGB to prove any (much less all) of these descriptors to obtain coverage, nor are they incorporated as part of any dictionary definition of the terms "loss" or "damage." Indeed, the notion that something physical and microscopic (like SARS-CoV-2 particles) cannot alter property defies modern science, and would undermine long-recognized coverage for damage caused by similar substances like asbestos, chemical dust, bacteria, vapors, noxious odors, and fumes. It also would render a nullity the Policy's express exclusions for microscopic particles, such as radiation, fungi, or spores—a result Nevada law does not permit.

Moreover, given the disjunctive "or" language, the only reasonable interpretation of "loss or damage" is one that gives independent significance to each term. *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). Because any distinction between these terms would expose a huge flaw in Starr's argument, Starr simply ignores the difference and

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[2] Petition at 13-15, 17.

conflates "loss" within its newly minted definition of "damage." This too violates a fundamental canon of contract interpretation.

"Loss" is a distinct term that must be given separate meaning. Under standard dictionary definitions, "loss" includes being deprived of property by physical forces and conditions that render the property uninhabitable, unfit, or unusable.[3] Such "loss" is recoverable by itself, without need to show "damage." Because this interpretation is reasonable, it must control. *See Stonik*, 110 Nev. at 67, 867 P.2d at 391.

Applying these longstanding rules, every *Nevada state court* that has addressed this issue has disagreed with the insurers' attempt, post-pandemic, to rewrite the scope of "all-risks" policies, finding instead that COVID-19 may cause "physical loss or damage." The Nevada state courts are not alone. *See, e.g.*, *Huntington Ingalls v. Ace American Ins. Co.*, 2022 VT 45, No. 2021-173 (Vt., Sep. 23, 2022); *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 296 Cal.Rptr.3d 777 (Ct. App. 2022); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2022 WL 2154863 (La. Ct. App. June 15, 2022).

If an insurer wants to restrict "all-risks" coverage, it must impose limitations "clearly and distinctly." *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398,

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[3] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/loss (last visited Sep. 20, 2022).

329 P.3d 614, 616 (2014). Starr has known *for decades* of courts finding coverage triggered by "physical loss or damage" *without* structural alteration. Had Starr wanted to exclude losses that were, for example, "microscopic" or non-"structural," it should have defined "loss" and "damage" to include such restrictions.

Even assuming *arguendo* that "damage" somehow imposes a "physical alteration" limitation, the District Court correctly ruled JGB presented sufficient evidence to create a triable issue of fact whether SARS-CoV-2 "physically altered" covered property. 8PA1374-75. In opposing summary judgment, JGB presented *unrebutted* scientific evidence that (1) SARS-CoV-2 is a physical particle that deposits on property and lasts for days, (2) its viral particles remain harmful while suspended in air and on surfaces, (3) the particles can transmit from impacted property as fomites, and (4) COVID-19 was present and repeatedly reintroduced onto JGB's common areas and shops, physically altering the property, making it unsafe, and causing significant losses well after Governor Sisolak eased business restrictions. 4PA522-24. Thus, after reviewing JGB's unrebutted evidence, the District Court rightly found that JGB could prove "physical damage" at trial.

Disregarding the record evidence, Starr now relies on "facts" from other judicial opinions. But appellate review is confined to the record before this Court, and conclusory statements from other cases are not appropriate for judicial notice.

JGB's factual evidence prevents any ruling *as a matter of law* that COVID-19 cannot cause physical loss or damage.

Finally, Starr argues the "Pollution and Contamination Exclusion" should be read broadly to bar pandemic-related losses, even though that exclusion is far narrower than the "absolute" virus exclusion in most policies. Starr inverts the requirement that exclusions be read narrowly, and ignores this Court's holding that exclusions like Starr's are limited to traditional environmental pollution. *Casino W.*, 130 Nev. at 399-401, 329 P.3d at 616-618. Starr provided no evidence that "traditional environmental pollution" includes human transmission of communicable disease.

For these reasons, and those set forth below, the Court should deny Starr's Petition.

II. BACKGROUND

A. "All-Risks" Property Policies Are Intentionally Broad to Maximize Protection for Policyholders

The property insurance marketplace generally has two products: (1) "all-risks" policies—the broadest form of first-party coverage available, covering all risks except those specifically excluded; and (2) "named perils" policies—covering only enumerated causes (*e.g.*, fire, windstorm). All-risks policies insure risks that "are not normally contemplated," providing recovery for unique and unpredictable losses. *Fourth St. Place v. Travelers Indem. Co.*, 127 Nev. 957, 969,

270 P.3d 1235, 1243 (2011). Courts long ago reinforced that these broader policies insure *risks new and novel, and even those not visible without a microscop*e. *See id.* at 960, 270 P.3d at 1237; *Garvey v. State Farm Fire & Cas. Co.*, 257 Cal.Rptr. 292, 298 (Cal. 1989).

Therefore, "all-risks" policies not only cover obvious physical impacts like fires, but also loss or damage caused by bacteria, particles, vapors, odors, smoke and other molecular substances.[4] In contrast, "named peril" policies provide coverage only for those risks specifically identified. *See Jackson v. State Farm Fire & Cas. Co.*, 108 Nev. 504, 508 n.4, 835 P.2d 786, 789 n.4 (1992) (differentiating between "all-risk" property policies, where "the exclusions generally are the limitations on coverage," and "enumerated perils" policies that specifically identify coverage).[5]

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[4] *See, e.g.*, *Cooper v. Travelers Indem. Co. of Illinois*, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (E. coli bacteria); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (odor permeating property); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 2005 WL 600021 at *5 (N.Y. Sup. Ct. 2005) (noxious particles); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010) (invisible toxic gas)*; Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (en banc) (gasoline fumes); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (toxic ammonia vapors); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. App. 1993) (cooking methamphetamine).

[5] Since at least 1962, insurers have known that "tangible injury to the physical structure itself" is *not* a requirement of physical loss or damage. *See Hughes v. Potomac Ins. Co. of District of Columbia*, 18 Cal.Rptr.650, 655 (Ct. App. 1962) ("Despite the fact that a 'dwelling building' might be rendered completely useless

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B. Some Nevada Policyholders Paid Higher Premiums for "All-Risks" Policies without the "Absolute" Virus Exclusion

Because the "all-risks" coverage grant is open-ended, insurers carefully track developing events and case law, and from time-to-time, draft new exclusions that expressly limit coverage for certain perils. In 2006, responding to concerns over the SARS virus outbreak, the insurance industry (Insurance Services Offices ("ISO")) developed a broad provision which excludes "loss or damage caused by or resulting from any virus." *See supra* n.1. The industry's development and subsequent widespread use of this exclusion plainly shows that insurers recognized viruses could cause covered physical loss or damage. *See Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 49 Cal.Rptr.2d 567, 572-73 (Ct. App. 1996) (the "very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would otherwise exist"); *see also Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 486, 133 P.3d 251, 256 (2006) ("An exclusionary provision … preemptively excludes certain [perils] from coverage in an effort to minimize risk."). Indeed,

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to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.").

when the industry adopted the absolute virus exclusion, it told regulators that virus-related property loss and damage could occur.[6]

Insurers thereafter commonly incorporated this "absolute" virus exclusion—reportedly in nearly 83% of the "all-risks" property policies sold in recent years.[7] In the vast majority of COVID-19 cases, insurers have *properly* relied on, and courts have enforced, this exclusion to deny coverage.[8]

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Policy

JGB purchased a broad policy to insure against "all risks of direct physical loss or damage to covered property except as [specifically] excluded." *See* 4PA560 at 564, 576 §1. The Policy is part of the small minority *lacking the "absolute" virus*

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[6] *See* ISO Explanatory Statement to Amendatory Endorsement – Exclusion of Loss Due to Virus or Bacteria at 1-2 ("When *disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property* (for example, the milk), cost of decontamination (for example, interior building surfaces), *and business interruption (time element) losses*.") (emphases added).

[7] *See* COVID-19 PROPERTY & CASUALTY INSURANCE BUSINESS INTERRUPTION DATA CALL PART 1 | PREMIUMS AND POLICY INFORMATION JUNE 2020, 4, https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf.

[8] Given this reality, which *Amicus Curiae* APCIA ignores, alarmist claims that finding coverage for COVID-19-induced business interruption losses "would create substantial solvency risks for the [insurance] sector" lack credibility. *See* APCIA at 9.

exclusion. *See* 1PA21-121. The only exclusion Starr invokes is for environmental and industrial pollution. *Id.* at 581 §7.b.

The Policy covers JGB's time element (*i.e.*, business interruption) losses "resulting from necessary interruption of [JGB's] NORMAL business operations caused by direct physical loss or damage to real or personal property covered herein[.]" The Policy also protects against Interruption by Civil or Military Authority and Ingress/Egress, insuring against loss occurring when, due to physical loss or damage elsewhere, access to JGB's property has been "prohibited" or "impaired." *Id.* at 591 §13(Z), 593 §1, 594 §7, 620 End't 14.

Additional provisions are relevant to evaluate Starr's alleged interpretation. The Policy uses the term "alteration" in several places. *See, e.g.*, 1PA67 ("[T]his POLICY is extended to cover: 1. direct physical loss or damage by a peril insured against to alterations, extensions, [or] renovations … while in the course of construction"). The Policy also excludes certain microscopic particles. *See id.* at 39-41 ("This POLICY does not insure against loss or damage caused by … nuclear radiation or radioactive contamination, … [m]old, … fungi [or] spores.").

B. The Closure Orders

In early 2020, there were many COVID-19 cases and deaths in Clark County. 5PA780-81 ¶12. Effective March 20, 2020, Governor Sisolak ordered commercial properties to close to "protect the health and safety of persons *and property*."

2PA279 (emphasis added); *contra* Petition at 24 (ignoring property protection). Subsequent orders stated that "the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time, renders some property unusable" and contributes to "*damage* [] *and property loss*." 4PA683 (emphasis added); *see* 5PA811, 30:18-25 (studies "have recovered SARS-Co-V-2 RNA from a variety of surfaces").

Starting on May 9, 2020, Governor Sisolak permitted certain retail establishments to reopen at 50% capacity, but most of the businesses in JGB's mall ("the Shops") could not at this time. *See* 4PA689-98; 6PA995-96, 156:21-157:3; *contra* Petition at 7. Some Shops opened much later, others opened and re-closed following COVID-19 onsite, and "some never reopened due to the presence of COVID." 3PA389 103:25-104:5; 5PA944-50.

C. COVID-19 Is a Physical, Noxious Substance

The evidence in this case established the physical nature of SARS-CoV-2, its ability to survive and transmit on JGB's property, its inability to be eradicated by routine cleaning alone, and its repeated reintroduction at the Shops, all of which caused JGB's losses. This included expert testimony that SARS-CoV-2 "physical particles" can fall onto surrounding surfaces within minutes, or "remain in the air for an extended period of time, depending on size and environmental conditions," and that those "virus particles … remain infectious," especially in commercial

venues. 5PA781 ¶14, 782-84 ¶¶15-19 , 784 ¶18-19, 788-89 ¶¶29-34, 789 ¶33, 5PA809 23:8-13. Additionally, SARS-CoV-2 persists "in a viable form for hours to days on common surfaces, including materials common in retail establishments" like the Shops, and the "presence of SARS-CoV-2 infected individuals in any setting can lead to rapid redepositing of virus on surfaces." 5PA782-83 ¶16, 788, ¶29. There was *no* evidence that "cleaning protocols alone are sufficient to contain transmission" of COVID-19. *Id.* at 798 ¶51, 783 ¶17.

Before Governor Sisolak's announcement, several tenants had already shuttered because of the presence of COVID-19.[9] There is also substantial evidence of the presence of COVID-19 on-site.[10] The unrebutted testimony is that "for most epidemiologic weeks from March 5, 2020 through September 2021, the chance that infected persons entered the Grand Bazaar Shops was 100%." 4PA525-26. JGB implemented extensive remediation and repairs in response to COVID-19 on the property. 3PA394, 125:14-21. Far from "prospective," the actual record shows these efforts were reactive and constant. 6PA1104, 1107, 1111.

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[9] 5PA941, 950, 952; 3PA440 42:10-17; *id.* at 442 50:11-21, 459 119:16-120:6; *see also* 5PA954; 6PA1142.

[10] 6PA1070, 36:18-37:2, 1098-1100, 1102; 3PA392, 116:8-117:12; 5PA745, 751, 773, 816, 50:14-16, 950.

D. The District Court's Ruling

The District Court denied Starr's summary judgment motion, stating that the Court "is persuaded by JGB's evidence," which Starr "did not appear to refute," and was "not persuaded by Starr's contentions that there are no genuine factual issues" whether SARS-CoV-2 caused physical loss or damage "that would preclude coverage as a matter of law[.]" 8PA1374-75.

IV. REVIEW STANDARD

This Court may consider a petition for writ of mandamus or prohibition in circumstances of "strong necessity," such as "when an important issue of law needs clarification," or the petition presents "a question of first impression that arises with some frequency." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39-40, 175 P.3d 906, 908 (2008). Writ relief only issues where there is no factual dispute and summary judgment is clear, or to control a District Court's "arbitrary or capricious exercise of discretion." *Id.* at 39, 175 P.3d at 908.

V. ARGUMENT

A. "Physical Loss or Damage" Must Be Interpreted Broadly in Favor of Coverage

The Policy does not define key terms in the coverage grant—"physical," "loss," and "damage"—so they must be given their plain and ordinary meaning, typically found in a dictionary. *See Casino W.*, 130 Nev. at 398, 402-03, 329 P.3d at 616, 619. As this Court has counseled, insuring agreements must "be interpreted

broadly, affording the greatest possible coverage to the insured." *Stonik*, 110 Nev. at 67, 867 P.2d at 391. This is particularly true for "all-risks" policies, which "cover[] any and all risks except those explicitly limited or excluded by the terms of the policy." *Fourth St. Place*, 127 Nev. at 960, 270 P.3d at 1237. Moreover, different words in a policy must be given distinct meanings. *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013).

"Physical" means "of or relating to natural or material things."[11] Starr offered no evidence that SARS-CoV-2 is not a "physical" thing. "Loss" includes "the act of losing possession" or "the harm of privation resulting from loss or separation."[12] "Damage," in contrast, is defined as the "loss or harm resulting from injury to … property."[13] Unlike "damage," "physical loss" does not assume any injury (structural or otherwise) upon the property.[14] A policyholder could therefore

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[11] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/physical (last visited Sep. 20, 2022).

[12] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/loss (last visited Sep. 20, 2022).

[13] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/damage (last visited Sep. 20, 2022).

[14] While *one* definition of "loss" is "ruin" or "destruction," that it is not the *only* reasonable definition, and others cannot be discarded. *Nat'l Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc.*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984); *see also* Jeffrey W. Stempel & Erik S. Knutsen, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage*

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reasonably conclude that "physical loss or damage" exists where SARS-CoV-2 either: (1) is present on or around covered property, rendering it partially or fully uninhabitable, unusable or unsafe for its intended purposes; or (2) alters the surfaces or air of covered property. *Huntington*, 2022 VT 45, ¶¶26, 29-33.

Starr's proposed interpretation—"physical alteration," which it then limits to "distinct, demonstrable," "perceptible," non-"microscopic," "structural" alteration—does not appear in the Policy. Importantly, this construction also violates the rule that the disjunctive "or" *requires* giving the terms "loss" and "damage" independent meanings. *Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017). Contrary to Starr's effort to merge "loss" with its restrictive definition of "damage," "physical loss" does not assume any perceptible injury to property. It contemplates a dangerous condition linked to the physical property itself, including the structures *or air* within the property.[15] *See Huntington*, 2022 VT 45, ¶¶29, 33 ("[P]hysical loss" occurs where "property is not harmed but may not be used for some reason [such as] due to a health hazard.").

Denial in a Pandemic, 27 Conn. Ins. L.J. 185, 234 (2021) ("[O]ne might reasonably find a 'physical loss' when a policyholder is deprived of something material—such as use of one's business, especially if the loss takes place in an unanticipated manner through something like a pandemic that spurs government-ordered use of the business property.").

[15] Air is part of property. *See, e.g., Colfer v. Harmon*, 108 Nev. 363, 367, 832 P.2d 383, 386 (1992) (condominium owners own "the air space within the walls of their respective units").

Indeed, the insurance industry itself uses the phrase "physical loss or damage" to describe coverage for certain imperceptible injuries, including, for example, *data* and *media* in certain policies. *See, e.g.*, *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 682 (D. Md. 2020) (including "data" as covered property and recognizing "data and software…can experience 'direct physical loss or damage'"); *EMOI Services, LLC v. Owners Ins. Co.*, 180 N.E.3d 683, 693, 695 (Ohio Ct. App. 2021) (providing coverage "for direct physical loss of or damage to 'media,'" which encompassed software and data); *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, at *3 (D. Ariz. Apr. 18, 2000) (under an "all-risk" policy, "when a computer's data is unavailable, there is damage; when a computer's services are interrupted, there is damage"). Thus, Starr's contention that "physical loss or damage" can only refer to "non-microscopic," "structural" alteration is undermined by the *insurers' own use of those terms*.

The broader text and context of the Policy also counsel against Starr's interpretation. *See Fourth St. Place*, 127 Nev. at 966, 270 P.3d at 1241 (looking to policy's context to determine meaning of terms, including "alteration"). The Policy frequently uses the word "alteration," but not in the coverage grant, which instead ties its "all-risks" coverage to "loss or damage." *See supra* §III.A. These are different words with different meanings, and each must be given effect. *Bielar*, 129

Nev. at 465, 306 P.3d at 364. When Starr used the term "alteration" in the Policy, it referred to something the *policyholder* intentionally does to property. *See supra* §III.A. "Physical loss or damage," by contrast, refers to a non-inevitable event outside the policyholder's control, no matter how that phrase is defined. *See Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 967, 339 P.3d 1281, 1286 (2014) ("[P]hysical loss or damage" to property "must be occasioned by a fortuitous, noninevitable, and nonintentional event."). If Starr intended "physical loss or damage" to mean structural "alteration," it would have used that term.

JGB's interpretation of "physical loss or damage" is appropriate considering an insured's perspective. *Fourth St. Place*, 127 Nev. at 963, 270 P.3d at 1239 (courts "interpret an insurance policy to effectuate the reasonable expectations of the insured"). The hospitality industry is the lifeblood of Nevada's economy. The industry's *entire business model* depends on attracting guests to congregate in its spaces. Thus, Nevada policyholders would reasonably expect an "all-risk" policy to cover, *at a minimum*, losses resulting from a dangerous physical substance that made it unsafe, potentially deadly, to visit and congregate at the property. *See Casino W.*, 130 Nev. at 399-401, 329 P.3d at 616-18 (analyzing reasonableness of insured's policy interpretation to determine its meaning).

B. Nevada Law Belies Starr's Position That "Physical Loss or Damage" Requires "Structural Alteration"

Starr inaccurately contends that Nevada law requires a perceptible, non-microscopic, structural change to property to show "physical loss or damage." Petition at 13, 14. As support, Starr cites three decisions by a *federal* district court purportedly relying on *Fiscus* and *Coast Converters*. *Id*. But these two cases do not even mention "structural," "perceptible," non-"microscopic," or "alteration," much less hold they are prerequisites to coverage. Rather, in both, "loss" or "damage" was undisputed. *See Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 373-74, 725 P.2d 234, 235-36 (1986) (undisputed flooding loss; question was whether an exclusion applied); *Coast Converters*, 130 Nev. at 968-69, 339 P.3d at 1286-87 (undisputed damage to machinery and plastic bags; question was what kind of property plastic bags constituted).

Notably, the Nevada *state* district courts have not embraced Starr's interpretation under similar policies. *E.g.*, *Nevada Property 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B, *3 (Nev. Dist. Ct. Clark Cty. Aug. 16, 2021) (SARS-CoV-2 can constitute physical loss or damage because affected property is "no

longer safe and habitable for normal use"). The basket of cases involving "all-risks" policies without a virus exclusion are proceeding through discovery.[16]

Finding no support in Nevada law for its interpretations, Starr pivots to California. Petition at 13-14, 16. But the case Starr cites, *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal.Rptr.3d 576, 591 (Ct. App. 2021), recognized that "[t]he majority of cases appear to support the position that physical damage to the property is *not* necessary, at least where the building in question has been rendered unusable by physical forces." *Id.* at 588 (emphasis added). Because "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force," *Inns* recognized that the presence of a virus in "a structure that seriously impairs or destroys its function may qualify as direct physical loss." *Id.* *Inns* also explained that physical loss or damage can occur when the presence of "an invisible airborne agent" (like COVID-19) causes "a policyholder to suspend operations," and "requir[es] the entire facility to be thoroughly sanitized and remain empty for a period." *Id.* at 590. *Inns* acknowledged the long line of pre-pandemic authority holding "physical loss or damage" can include the presence of bacteria, vapors, obnoxious odors, fumes, and similar substances. *Id*.

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[16] Indeed, all but one of the Nevada state cases Starr cites remain pending, and most are in discovery. Petition at vii n.1.

Moreover, after Starr filed its Petition, *Marina* unequivocally rejected Starr's argument that SARS-CoV-2 can never cause "physical loss or damage" to property. *See* 296 Cal.Rptr.3d at 787-88 (an insured "unquestionably" alleges "physical loss or damage" by alleging the virus was on-site and altered property).[17]

In reality, Starr's construction of "physical alteration" is a legal myth that traces its origin to a single treatise, *Couch on Insurance*, which wrongly declared it to be the "widely held" view. *See* Richard P. Lewis, et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort Trial & Ins. Prac. L.J. 621, 622 (2021). When published, *Couch* did not cite a single case that had applied this standard, because "distinct, demonstrable, physical alteration" had never been a prerequisite to property coverage. *Id.* at 624-32 (collecting cases).[18] But as COVID-related cases were brought across the country, insurers asserted—and courts uncritically accepted—that the *Couch* myth somehow reflected a "widely held majority view," upending decades of contrary precedent. This Court should reject the *Couch* standard as an incorrect statement of law, just as its principal author now

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[17] The insurer argued the presence of COVID-19 on property cannot constitute "physical loss or damage" as matter of law. The court rejected that argument. *Id.* at 780, 792.

[18] *See also* Stempel, *supra* n.15, at 241-49 (discussing the "long list of cases" finding coverage where the peril did "not permanently affect or even alter in any way the physical property insured").

concedes. *Id.* at 632 (quoting *Couch* author's admission that for physical loss or damage, "courts are not looking for physical alteration, but for loss of use"). In any event, *Couch* itself recognizes "physical loss or damage" is broader than just "physical alteration." *See* 10A Couch on Ins. §148:46 (recognizing coverage for physical loss or damage "despite the lack of physical alteration of the property, on the theory [of] uninhabitability of the property").[19]

Coverage under "all-risks" policies is not, however, without bounds. Courts have properly declined coverage for "physical loss or damage" when (a) the property at issue was intangible and therefore not susceptible to *physical* loss or damage (*e.g.*, leaked trade secrets), or (b) the claim presented *internal* property defects, rather than property lost by an external peril (*e.g.*, construction code violations; faulty workmanship; bad title).[20] In contrast, the covered property here and SARS-CoV-2

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[19] Notably, the more restrictive *Couch* standard has not been applied recently outside the COVID-19 context, effectively creating a COVID-19-specific rule limiting coverage and converting, overnight, policyholders' "all-risks" policies into named peril policies. *See Crisco v. Foremost Ins. Co. Grand Rapids, Michigan*, 505 F. Supp. 3d 993, 999 (N.D. Cal. 2020) (finding coverage for physical loss or damage without physical alteration); *James W. Fowler Co. v. QBE Ins. Corp.*, 474 F. Supp. 3d 1149, 1153-54 (D. Or. 2020) (same).

[20] *See, e.g., Simon Mktg., Inc. v. Gulf Ins. Co.*, 57 Cal.Rptr.3d 49, 53-54 (Ct. App. 2007); *U.S. Gypsum Co. v. Ins. Co. of N. Am.*, 813 F.2d 856 (7th Cir. 1987); *Pirie v. Fed. Ins. Co.*, 696 N.E.2d 553, 555 (Mass. App. Ct. 1998); *State Farm Fire & Cas. Co. v. Superior Court*, 264 Cal.Rptr. 269, 270-74 (Ct. App. 1989).

are undeniably physical, and JGB's loss of use of its property is tethered to the intrusion of that external, physical peril.

C. JGB Provided Substantial Evidence That SARS-CoV-2 Physically Altered Covered Property

There is no reasonable dispute that JGB presented evidence that would satisfy the proper definition of "physical loss." *See supra* §§III.B.-C. But even if "physical loss or damage" means "physical alteration," writ relief cannot issue because "alteration" must still be defined broadly, in favor of coverage, and no dictionary includes Starr's requirements of "structural," or non-"microscopic." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011); *see also Huntington*, 2022 VT 45, ¶26 ("[P]hysical alteration need not necessarily be visible; alterations at the microscopic level may meet this threshold."). On the contrary, "alteration" means simply "the result of changing something."[21] Indeed, Starr's own authority recognizes that "physical alteration" "could include damage that is not structural, but instead is caused by a noxious substance or an odor." *Inns-by-the-Sea*, 286 Cal.Rptr.3d at 592 n.19.

On summary judgment, the evidence and all reasonable inferences must be viewed most favorably to the nonmoving party. *Wood v. Safeway*, 121 Nev. 724,

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[21] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/alteration (last visited Sep. 20, 2022).

729, 121 P.3d 1026, 1029 (2005). The District Court found that JGB presented persuasive evidence—sufficient to preclude summary judgment—that COVID-19 existed on-site. 8PA1382-83. Applying *Starr's own term*, the court ruled that, given the evidence, Starr had not met its burden to prove SARS-CoV-2 does not physically alter property, and a factual issue remained for the jury. *Id*. Accepting Starr's argument would require this Court to assess and reject that robust evidentiary record—including complex scientific evidence. As the District Court recognized, weighing this evidence is the factfinder's role. It is not a matter for this Court via a writ.[22]

Starr, however, seeks to rehash these factual disputes, contending SARS-CoV-2 cannot physically alter property because it is temporary, dissipates on its own, and may simply be wiped off surfaces. *See* Petition at 15, 18. But Starr offered no evidence to support its contentions, and its "facts" are not in the record. Instead, Starr recasts as "facts" statements from federal court decisions that made improper judicial determinations of complex issues of virology and other scientific questions at the pleading stage, despite ample contrary peer-reviewed scientific

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[22] Like the District Court, a Texas court recently denied insurers summary judgment, ruling whether the presence of COVID-19 caused physical loss or damage to property was a fact question. Following trial, the jury agreed with the policyholder that it did. *See Baylor College of Medicine v. XL Ins. Am., Inc.*, No. 2020-53316-A (Tex. Dist. Ct. Harris Cty. Aug. 31, 2022).

studies and government statements about COVID-19. *Id*. Absent judicial notice, which Starr has not requested, those "facts" are not part of the record in this Court and may not be considered.[23]

In fact, courts often find physical loss or damage even where noxious substances dissipate naturally without remediation or can be cleaned away (like mold). *See, e.g., Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *3, 5 (D. Or. June 7, 2016) (finding physical loss or damage for outdoor theater forced to cancel performances until smoke-filled air naturally dissipated); *Prudential Prop. & Cas. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (property "rendered uninhabitable by mold" constitutes "direct physical loss").

Marina recently admonished another insurer trying the same tactic, holding that even assuming "surface cleaning [were] the only remediation necessary to restore contaminated property to its original, safe-for-use condition," that would not negate that property damage had occurred, but would simply be a measure of benefits owed under the policy. 296 Cal.Rptr.3d at 787, 790. And even if surfaces

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[23] Even if Starr had requested judicial notice, a court cannot take judicial notice of "the truth of the facts recited" in judicial opinions in other cases. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *In re Amerco Derivative Litig.*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 222 n.9 (2011).

could be "wiped" clean and rendered temporarily safe, that would not address deadly virus-laden air circulating through the property. *Id*.

Starr and APCIA contend COVID-19 does not involve "repair" as stated in the "PERIOD OF INDEMNITY," but that is merely a loss calculation provision—*it is not a coverage grant*. *Id.* at 790. Moreover, "repair" is undefined in the Policy; its ordinary meaning includes "to restore to a sound or healthy state; RENEW; to make good: compensate for: REMEDY."[24]

JGB presented ample, unrebutted fact and expert testimony showing it undertook extensive physical remediation efforts, not just "surface cleaning," as "repairs" to restore the Shops to their pre-COVID state. *Supra* §III.C. Even Starr's own expert recognized that cleaning is "repair," confirming the virus physically damaged covered property. *See* 7PA1170, 102:25-103:16, 103:24-104:14.

D. Starr's Non-Binding Authorities Involve Different Policy Language and Factual Allegations

Starr and APCIA dedicate multiple pages to cases from other states and federal courts—that do not follow Nevada's interpretive principles—in the hope that this Court will blindly follow an alleged herd. But nearly all cases cited by Starr and

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[24] MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com /dictionary/repair (last visited Sept. 20, 2022); *see also See Cajun Conti*, 2022 WL 2154863, at *16 (defining "repair" the same way and finding "cleaning" COVID-19 constituted "repair" under period of restoration).

APCIA involved policies that either included the commonplace "absolute" virus exclusion or did not provide "all-risks" coverage, or complaints that did not allege SARS-CoV-2 was present on or physically altered insured property.[25] Courts dismissed these cases, reasoning either that the "absolute" virus exclusion controlled, or coverage under "physical loss or damage policies" is not triggered by government orders alone. *See, e.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021).

In stark contrast, the District Court denied Starr summary judgment, based on JGB's different allegations, actual evidence, and arguments: (1) JGB offered substantial evidence that SARS-CoV-2 was physically present in the air and on and around JGB's property causing physical loss and/or damage; (2) JGB also offered evidence of its business losses because of that undisputed presence (and of physical repairs and mitigation to make the property usable again); and (3) the Policy's pollution and contamination exclusion was *not* the "absolute" virus exclusion and did not unambiguously apply to COVID-19. *See* 8PA1381-83, 3PA394, 4PA542-44.

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[25] Petition at 14-20; APCIA at 4-8, 10-16.

E. The Policy's Additional Civil Authority and Ingress/Egress Coverages Also Apply

To establish coverage under the Policy's Civil Authority insuring agreement, the Policy requires that (1) JGB suffer business interruption resulting from physical loss or damage to property within one mile of the Shops, and (2) "access" to the property was "specifically prohibited by order of civil … authority." 4PA594 §7.[26] By the start of the pandemic and throughout JGB's losses, individuals carrying SARS-CoV-2 were indisputably within one mile of the Shops, rendering common surfaces and the air unsafe, and physically altering property. *Supra* §§III.B-C. Those characteristics constitute loss or damage to property. *See supra* §V.A-C.

Moreover, the Governor's orders prohibited access to the Shops as a "direct" result of the "*damage* [] *and property loss*" caused by SARS-CoV-2 in Nevada (including Las Vegas), rendering "some property unusable." *See supra* §II.B; *contra County of Clark v. Factory Mut. Ins. Co.*, 2005 WL 6720917, at *1, 3, 5 (D. Nev. Mar. 28, 2005) (denying coverage where damage occurred in New York, Virginia, and Pennsylvania, not within 1,000 feet of insured Nevada property). The Policy does not require construction of "physical barriers" to prevent access, and it is

[26] Similarly, Ingress/Egress coverage requires that loss or damage within one mile of "impaired" property prevent ingress or egress to the Shops. 4PA620. For the same reasons as Civil Authority, JGB easily satisfies this minimal coverage threshold.

irrelevant that select restaurant tenants were partially operational—the coverage requires only specific, not total, prohibition of access to property. 3PA384, 85:5-13; *contra* Petition at 23. The District Court properly denied summary judgment on these coverages.

F. Starr's "Pollution and Contamination Exclusion" Does Not Unambiguously Apply to JGB's Losses

To eliminate coverage under an exclusion, Starr must both "draft the exclusion in 'obvious and unambiguous language,'" and "demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision." *Casino W.*, 130 Nev. at 398-99, 329 P.3d at 616. For three reasons, the "Pollution and Contamination Exclusion" ("Exclusion") cannot be reasonably read to extend to COVID-19 and instead is limited to traditional environmental or industrial pollution and contamination.

First, the Exclusion's use of "virus" must be read in conjunction with its surrounding words "soot," "fumes," "acids," "alkalis," "chemicals," "waste," and "hazardous substances" commonly found in environmental statutes. *See Fourth St. Place*, 127 Nev. 957 at 966, 270 P.3d at 1241 (the Court "ascertain[s] the meaning of terms in the Policy by referencing the terms with which they are associated"). As reflected in these terms and reinforced by the second clause for a pollutant's "release, discharge, dispersal, migration or seepage" (environmental terms of art historically used in pollution exclusions), the Exclusion refers only to those instances where a

virus would be present through an environmental pollution event—*e.g.*, when a wastewater treatment plant releases virus-containing waste into the water supply. *Casino W.*, 130 Nev. at 400-01, 329 P. 3d at 617-18.[27]

Second, an exclusory definition is fatally overbroad when it includes phrasing (like Starr's) such as "any solid, liquid, gaseous or thermal irritant or contaminant." *Id.* at 399, 329 P.3d at 616 (pollution and contamination exclusion did not apply to carbon monoxide, even though it plainly fell within the definition of "irritant or contaminant"). Such exclusions "only apply to traditional environmental pollution"; otherwise, "[t]aken at face value, the policy's definition of a pollutant is broad enough … to include items such as soap, shampoo, rubbing alcohol, and bleach" which "would undoubtedly be absurd and contrary to any reasonable policyholder's expectations." *Id.* at 400, 329 P.3d at 617.[28] To overcome that limitation, "an insurer must plainly state that the exclusion is not limited to traditional environmental pollution." *Id.*; *see also id.* at 400-01, 329 P.3d at 617-18 (discussing exclusion's drafting history and purpose). Starr's Exclusion does not include such a plain

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[27] *See also* Stempel, *supra* n.15, at 231 n.84 ("[I]t is absurdist textual literalism to argue that infection of premises by a virus … is 'pollution' as the term is ordinarily understood.").

[28] *Casino West* is particularly relevant to first-party "all-risks" policies since coverage is defined by reference to the exclusions—if not expressly excluded, coverage exists. *Supra* §II.A; *Villa Los Alamos Homeowners Ass'n. v. State Farm Gen. Ins. Co.*, 130 Cal.Rptr.3d 374, 382-83 (Ct. App. 2011) (applying same rule as *Casino West* to first-party all-risk policy).

statement, and the record has substantial evidence that the COVID-19 virus is not a traditional pollutant.

Third, Starr's Exclusion is far narrower than the "absolute" virus exclusion. *See Marina*, 296 Cal.Rptr.3d at 791-92 (despite including the word "virus," "mortality and disease" exclusion did not apply to COVID-19 claim).[29] Starr used other ISO forms in the Policy, but JGB purchased an "all-risks" policy without ISO's "absolute" virus exclusion. "[A]n insurer's failure to use restrictive language to exclude specified types of liability infers that the parties intended not to so limit coverage." *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 327, 184 P.3d 390, 395 (2008). Had Starr wanted to exclude loss or damage resulting from a virus separate from environmental pollution, it would have included the "absolute" virus exclusion.

Starr provides no evidence that an unprecedented pandemic constitutes "traditional environmental pollution." Thus, the District Court correctly denied Starr

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[29] Starr's federal court citations analyzing pollution and contamination exclusions are unavailing. Certain courts failed to apply *Casino West* in summarily concluding that the pollutant-contamination exclusion precluded coverage. *See Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021); *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 2021 WL 4260785, *3 (D. Colo. Sept. 17, 2021). Further, a Louisiana state appellate court recently rejected *Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.*, 2021 WL 5415846, *10 (E.D. La. Nov. 19, 2021). *See Cajun Conti*, 2022 WL 2154863, at *8.

summary judgment because Starr could not prove the absence of genuine issues regarding its application. 8PA1382-83. At a minimum, JGB's reading of the Exclusion is reasonable and it offered facts demonstrating the Exclusion does not apply. Accordingly, the Exclusion provides no basis for writ relief.

VI. CONCLUSION

For these reasons, the Court should deny Starr's Petition.

Dated this 23rd day of September, 2022.

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CERTIFICATION OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a), including the typeface and type style requirements, because this answer has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style. This answer complies with NRAP 21(d), because it consists of 6,864 words.

2. I also hereby certify that I have read this answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that, to the best of my information, this answer complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by appropriate references to 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 23, 2022

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid, via U.S. mail to:

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