Case No. 84986

In the Supreme Court 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.

District Court Case No. A-20-816628-B

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION

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INTRODUCTION

Starr recognizes that JGB and amici likely navigated myriad COVID-19-related difficulties during the global pandemic. But the pandemic's pall cannot obscure what is otherwise a straightforward answer to the question of coverage for JGB's claims under this specific policy (the Policy). This Court can reach that answer by simply reading the Policy, which only covers claims stemming from "*direct physical* loss or damage," and excludes those where the causal factor is a "virus." I PA 54; II PA 192, 197, 206, 210, 236 (emphasis added).

The strictly economic harms that JGB seeks coverage for here have no link to any "direct physical loss or damage," and in any case seek recovery for injuries stemming from the general impact of the COVID-19 *virus*. Accordingly, the Policy indisputably disallows JGB's claims as a matter of law. Indeed—with few, unavailing exceptions (on which JGB and amici repeatedly try to hang their hats)—every federal appellate court and nearly every state appellate court to address the question of coverage for like claims under like policies has held in accord. Because the district court's denial of summary judgment stands in direct

opposition to the language of the Policy and the weight of authority—and, respectfully, reflects manifest error—Starr petitions this Court for relief.

RESPONSE TO JGB'S STATEMENT OF FACTS

As discussed, this Court can decide Starr's petition entirely by reference to the Policy's terms. JGB's statement of "material" and "undisputed" "facts" is none of those: it is rife with argument and characterizations that, at best, obscure the straightforward legal question the petition presented. Real Party in Interest's Answer ("RPIA") 9-13; *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011) (noting that "[t]he interpretation of an insurance policy presents a legal question"). And the many amicus briefs in support of the RPIA further cloud this Court's view with facts not in this record. *See*, *e.g.*, Restaurant Law Center, Bloomin' Brands, Inc., Treasure Island, LLC, and Circus Circus LV, LP amicus brief (RLC Brief) at 15, n.6 (asking this Court to take judicial notice of facts outside the record). To bring its subject back to focus, Starr therefore incorporates its responses to all "factual" statements herein, where warranted and without conceding the truth of any such statements.

ARGUMENT

I.

THIS COURT SHOULD DETERMINE THIS PETITION ON ITS MERITS

Like Starr, JGB asks this Court to address the merits of this petition. RPIA 1. The parties obviously disagree on *how* this Court should rule. But the parties' alignment as to the need for this Court's early-stage involvement makes sense.

The issue is purely legal: the district court's order is clearly erroneous based on the unambiguous text of the Policy, the interpretation of which can be (and should have been) decided as a matter of law. *See Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 965, 339 P.3d 1281, 1284 (2014) (district court erred in sending coverage question to the jury); *Walker v. Second Jud. Dist. Ct.*, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020) (discussing limited availability of writ relief for discretionary decisions and drawing contrast with legal questions); *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017) (writ relief is available to correct "clear and indisputable" legal error). Moreover, the central issues here are pending in multiple state court actions that could result in inconsistent rulings. *Washoe Med. Ctr. v.*

Second Judicial Dist. Court, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006) (granting writ relief where "there is great potential for the district courts to inconsistently interpret this legal issue"). It is likewise a matter of great import to industries around the state, making early guidance on this issue of first impression crucial. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (granting writ relief where the petition "raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration").

II.

NEITHER COVID-19 NOR GOVERNMENTAL ORDERS CONSTITUTE "DIRECT PHYSICAL LOSS OR DAMAGE" AS THE POLICY REQUIRES

As Starr's petition explained, under the text of the Policy, JGB's claims fail as a matter of law. For claims to be covered, the Policy requires "direct physical loss or damage" to the insured property, and that the "direct physical loss or damage" cause the losses claimed. JGB's claim fails both. And JGB and amici's insistence that this Court instead deviate from the Policy's text, RPIA 13-17; Brief of Amicus Curiae Panda Restaurant Group, Inc. (Panda Brief) at 22, violates well-established

principles of interpretation. *Century Sur. Co. v. Casino West, Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014).

A. The Policy Requires a Tangible Alteration to the Insured Property that Causes Economic Loss

1. Every Clause Under Which JGB Seeks Recovery Requires "Direct Physical Loss or Damage"

As relevant here, the perils the Policy generally insures against are "risks of direct physical loss or damage to covered property." I PA 37 § 1 (the coverage clause). The Policy's business interruption clause likewise only covers business interruption losses "*caused by direct physical loss or damage* to real or personal property covered herein . . . *and arising from a peril insured against* . . . ." I PA 54 § 1 (emphases added). Thus, while JGB is not precise as to which of these it primarily invokes, *see* RPIA 10; I PA 9 (discussing multiple clauses), it is irrelevant: only "direct physical loss or damage" can trigger either.[1] I PA 37; 54.

[1] JGB references it taking preventative measures (e.g., enhanced cleaning and installation of protective barriers) and deems them "repairs." RPIA 12, 25. It is also not clear which clause JGB deems "repairs" to invoke, but "repairs" undertaken to comply with laws and regulations are excluded from coverage under the Policy. *See* I PA 42 § 7(e). JGB has not shown that its protective measures were responsive to the *actual presence* of COVID-19 rather than laws and regulations.

JGB obliquely suggests in its facts statement that it may avoid any limitations of these clauses and instead bootstrap coverage from the civil authority and ingress/egress clauses, because (according to JGB) these reach all instances where "physical loss or damage elsewhere" limits use of or access to the insured property. RPIA 10. But these clauses do not apply so broadly, or (to be clear) result in coverage here. Like the coverage and business interruption clauses noted above, the civil authority clause "start[s] [coverage] *at the time of physical loss or damage*," where an order of civil authority prohibits access to an insured property "as a direct result of damage to or destruction of property within one (1) statute mile of [the property] *by the peril(s) insured against*." I PA 55 (emphases added). Ingress/egress coverage likewise only applies to obstruction of physical access to the property "as *a direct result of loss or damage by a peril insured against* to property . . . within one (1) mile." I PA 81 (emphasis added). *See Reconstr. Orthopaedic Assocs. II, LLC v. Zurich Am. Ins. Co.*, 2022 WL 4586131, at *4 (E.D. Pa. Sept. 29, 2022) (providing that ingress/egress coverage is triggered by a "physical obstruction preventing access to" the insured location).

Thus, as the Policy text quoted above makes plain, regardless of which clause JGB relies upon, only "direct physical loss or damage" triggers coverage. Specifically, "direct physical loss or damage" to the insured property itself (under the coverage and business interruption clauses), or property within one statute mile (under the civil authority and ingress/egress clauses). JGB may not rewrite these requirements post hoc; respectfully, neither should this Court.

2. "Direct Physical Loss or Damage" Requires Tangible, Detrimental Alteration

JGB seems to correctly concede that the Policy's "direct physical . . . *damage*" language requires a tangible detrimental alteration to the property.[2] *See* RPIA at 14-15. *See Merriam-Webster's Dictionary* 314 (11th ed. 2014) (defining damage as "loss or harm resulting from injury to"); *see also* HARM, *Black's Law Dictionary* (11th ed. 2019) (defining harm as "material or tangible detriment"). JGB instead sets sights on the Policy's coverage for "direct physical loss" and business interruptions flowing therefrom. RPIA 3-4. Specifically, JGB and amici suggest that Starr conflates damages and loss; and, according to JGB, loss does not

[2] COVID-19 did not result in a tangible detrimental alteration to JGB's property, for the reasons discussed *infra* at II.A.3 & 4.

require a tangible detrimental alteration. RPIA 4; *see also* Amicus Brief for Caesars Entertainment, Inc., Golden Entertainment, Inc., Wynn Resorts, Limited, and Hilton Worldwide Holdings Inc. (Caesars Brief) at 12-13. But Starr fully acknowledges the distinction between a loss and damage. *Compare* LOSS, *Black's supra* (defining the noun form of loss as the fact of an insured's "failure to maintain possession of a thing"); *Merriam-Webster's supra* at 736 (defining the noun form of loss as the "fact of being unable to keep or maintain something") *with Merriam-Webster's supra* at 314. Damage is tangible harm to property; loss is a harm that results in permanent dispossession of the same.[3]

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[3] *See Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, No. 2021-001209, ___ S.E.2d ___, 2022 WL 3221920, at *2 (S.C. Aug. 10, 2022) (answering certified question and agreeing that "direct physical loss or damage" requires a "physical alteration, destruction, or permanent dispossession of property" and rejecting argument that "the presence of COVID-19 and corresponding governing orders" constituted such loss or damage); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 294 (S.D. Miss. 2020) ("Giving separate effect to 'loss' and 'damage' in the phrase, 'direct physical loss of or damage,' only highlights the distinction between 'the permanent dispossession of' and 'damage.'"); *see also Ascent Hosp. Mgmt. Co., LLC v. Emps. Ins. Co. of Wausau*, 537 F. Supp. 3d 1282, 1287 (N.D. Ala. 2021), *aff'd*, 2022 WL 130722 (11th Cir. 2022) (interpreting "'damage' to be a lesser harm than 'loss,' which results in total ruin"); *Bel Air Auto Auction Inc. v. Great Northern Ins. Co.*, 534 F. Supp. 3d 492, 504 (D. Md. 2021) (asserting that courts have "overwhelming[ly] held that the phrase [direct physical loss of or damage to property] requires tangible, physical losses to property, or, at the very

Starr's point is different: what unites "loss or damage" in the relevant clauses is their preceding modifiers. First, in the coverage and business interruption clauses "physical" modifies the otherwise disparate nouns. (I PA 192.) Physical means "pertaining to real, tangible objects." PHYSICAL, *Black's supra*. Thus, to be covered under the Policy "[i]t is not merely a 'loss' that is required"; rather, "a tangible item [must be] missing." *Grech Motors, Inc. v. Travelers Prop. Casualty Co. of Am.*, 2022 WL 6685227 *3 (Cal. Ct. App. Oct. 11, 2022). Second, "direct" further modifies the phrase "physical loss or damage." II PA 192; *Apple Annie, LLC v. Or. Mut. Ins. Co.*, 298 Cal. Rptr. 3d 886, 892 (Ct. App. 2022). Direct means "immediate," DIRECT, *Black's supra*, as in "stemming immediately from a source, cause, or reason," *Merriam-Webster's supra* at 353. That is, the physical loss or damage must itself impact the

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least, permanent dispossession of the property rendered unfit or uninhabitable by physical forces"), *quoted approvingly in GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 276 A.3d 75, 84 (Md. Ct. Spec. App. 2022); *accord Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 520 F. Supp. 3d 1066, 1070 (N.D. Ill. 2021) (same), *aff'd*, 20 F.4th 303, 307 (7th Cir. 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) (COVID-19 orders did not cause "distinct, demonstrable, physical alteration of the property" or "permanent[] dispossess[ion] of its property" as required for "direct physical loss"); *cf.* Caesars Brief at 11 (noting that "'[l]oss" includes "the act of losing possession").)

insured property. *Holtzman Enterprises, Inc. v. Continental Casualty Co.*, 2021 WL 8153752, at *10 ("[W]hen read together, the plain, ordinary meanings of 'direct,' 'physical,' 'loss,' and 'damage' clearly indicate that coverage is triggered when an insured property experiences some kind of tangible, material destruction or deprivation in full, or tangible, material harm in part.").

These limiting modifiers make unavailing amici's calls to interpret the coverage and business interruption clauses "broadly" to not require tangible detrimental alteration for a "physical loss," Caesars Brief 12-13; that coverage clauses should be "interpreted broadly" does not mean *more broadly than unambiguously written*. *Cf. Powell*, 127 Nev. at 162, 252 P.3d at 672. Indeed, the Caesars Brief does not contest Starr's textual reading, instead jumping straight to "decades of pre-pandemic court decisions, Nevada's well-established canons of insurance policy interpretation, and recent COVID-19 court decisions" to support its argument that no tangible detrimental alteration is required for a physical loss. Caesars Brief at 9. JGB at least pays lip service to the primacy of the Policy's text, RPIA 13-15; but the reading JGB purports to glean from that text, RPIA 14, still impermissibly stretches it "beyond

its plain meaning and requires the Court to improperly read the word 'physical' out." *Holtzman Enterprises, Inc. v. Continental Casualty Co.*, 2021 WL 8153752, at *8.[4]

3. JGB's Evidence Does Not Raise a Question of Fact Under This Reading of the Policy

JGB contends it has provided evidence that COVID-19 tangibly detrimentally altered the property, triggering coverage for injuries and business interruptions flowing from the same, as follows:

> (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….

RPIA 5, 22-25 (JGB's conclusions omitted). However, even if this Court accepts these as true, JGB still cannot survive summary judgment.

First, none of this demonstrates that the property was, itself, tangibly detrimentally altered by the virus; at most, JGB demonstrated

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[4] The Amicus Brief of United Policyholders (UP Brief) illustrates the sort of distinguishable detrimental physical alteration that could lay the groundwork for a claim of economic losses under a policy covering only "direct physical loss or damage," noting that janitorial service providers received insurance coverage for their business losses following *the destruction* of the World Trade Center. *See* UP Brief 2-3.

that the virus' presumed presence on its property posed a risk to *people*. *See* VIII PA 1374 (district court order noting that the limited factual points Starr did not refute are that that "COVID-19 likely existed on JGB's property, and that COVID-19 is transmissible to harm people"); *see also VIRUS,* Attorney's Dictionary of Medicine (2022) (noting that viruses "are capable of multiplying *only* in the living cells of some organism" (emphasis added)). The NSMA Brief's discussion of the serious health risks associated with COVID-19 infection is respectfully noted, but likewise legally irrelevant, as the maximum inference that can be made from its entire scientific discussion is the same.

Second, as discussed further *infra* at II.A.3, even if JGB had shown that the virus tangibly detrimentally altered its property, it did not (and cannot) show that any such alteration resulted in JGB's claimed economic losses, as opposed to governmental orders that operated independently of any specific alteration to JGB's property. *See, e.g.*, *Harvest Moon*, 522 F. Supp. 3d at 1132; *Inns*, 286 Cal. Rptr. 3d at 589-90 (reasoning that "the presence of COVID-19 on Plaintiff's property did not cause damage. . . . Instead, all that is required for Plaintiff to return to

full working order is for the [government orders and restrictions to be lifted]") (brackets in original; internal quotations omitted).

In sum, JGB has not and cannot demonstrate a question of material fact as to COVID-19 directly causing physical loss or damage to the insured property, which is required to survive summary judgment.

4. JGB's Economic Losses Lack a Causal Nexus To Direct Physical Loss or Damage to Property

In addition, as noted, the Policy limits coverage for business interruptions "*caused by direct physical loss or damage to real or personal property covered herein . . . and arising from a peril insured against . . . .*" I PA 54 (emphasis added). That is, JGB's economic losses must *bear a causal nexus* to the "direct physical loss or damage"—be "caused by" and "arising from" the same, *see* I PA 32 (defining "perils insured against" as "risks of direct physical loss or damage")—to implicate coverage. *Apple Annie, LLC v. Or. Mut. Ins. Co.*, 298 Cal. Rptr. 3d 886, 892 (Ct. App. 2022). To survive summary judgment, then, JGB must establish that "either 'direct physical . . . damage to' property at the premises, or 'direct physical loss of' property at the premises *caused its suspension of operation*." *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65, 72 (2022) (emphasis added); *see*, *e.g.*, *Inns-by-the-Sea v. Cal. Mut. Ins.*

Co, 286 Cal. Rptr. 3d 576 (Ct. App. 2021) (*Inns*); *Harvest Moon Distribs., LLC v. Southern-Owners Ins. Co.*, 522 F.Supp.3d 1127, 1132 (M.D. Fla. 2021) (dismissing complaint because "the market and the government's responses to the pandemic were the direct causes of [p]laintiff's loss," not COVID-19); *cf. Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, 33 F.4th 417, 423 (7th Cir. 2022) (noting that policy's use of the phrase "due to" "requires some degree of causation" that was not present); *Sanzo Enterprises, LLC v. Erie Ins. Exch.*, 182 N.E.3d 393, 406 (Ohio 2021) (applying "direct physical loss or damage" language and noting that courts "require a close causal nexus" in the Civil Authority context).

In *Inns*, a California court upheld the denial of coverage for business losses stemming from COVID-19 closures under a similar policy, because it required that business interruption loss "*must be caused by* direct physical loss of or damage to" property. 286 Cal. Rptr. 3d at 581-82, 589-90. That court reasoned that the closures occurred because "the COVID-19 virus was present *throughout* [surrounding] Counties, not because of any particular presence of the virus on [the insured] premises. *Id.* True, as JGB notes, the *Inns* court discussed a hypothetical that might result in a different holding: "It could be a

different story if a business—which could have otherwise been operating—had to shut down because of the presence of [COVID-19] within the facility." *Id.* at 590 (quoting *Another Planet Entertainment, LLC v. Vigilant Ins. Co.* (N.D.Cal., Feb. 25, 2021, No. 20-cv-07476-VC) 2021 WL 774141, at p. *2). But that hypothetical claim is unavailing for JGB.

Contrary to JGB's statement of "facts," RPIA 11-12, the record is bereft of support for the proposition that the *actual presence* of COVID-19 on the property affected its closure, reopening, or subsequent enhanced cleaning procedures and protective measures.[5] Instead, JGB's claimed economic losses are due to the general impact of the pandemic and closure orders, not the specific presence of the virus at the property. Put differently, JGB's "facilities would have . . . remained shut regardless of whether the virus was present [there]." *Inns*, 286 Cal. Rptr. 3d at 590 (quoting *Another Planet Entertainment*, 2021 WL 774141, at *2). In addition to the tangible alteration that "physical" requires, then, JGB must show a "direct" causal nexus between COVID-19 and its injuries to

[5] Note that, even if JGB had shown causation its claims fail for lack of a tangible detrimental alteration to the property, *see infra* at II.A.5.

recover for business interruption losses to survive summary judgment;[6] it has not and cannot.

5. The Great Weight of Authority Supports This Reading

Given the unambiguous effect of the "direct" and "physical" modifiers in the coverage clause, I PA 32, and the "resulting directly" requirement in the business interruption clause, I PA 49, it makes sense that other appellate courts interpreting similar policies have almost unanimously held that such language limits the insured party to coverage for harms caused by either a "physical alteration" or actual dispossession of the property, as a matter of law, and that economic harms generally stemming from COVID-19-related closures do not fall thereunder. *See Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1019 (7th Cir. 2022) (collecting cases in the COVID-19-

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[6] Amici argue what JGB does not: that the COVID-19 virus caused "direct physical . . . damage" to JGB's property within the meaning of the Policy. *See* Brief of Amicus Curiae Boyd Gaming Corporation (Boyd Brief) at 4-8; Nevada State Medical Association amicus brief (NSMA Brief) at 6-8; RLC Brief at 14-20. Like JGB's argument that the virus caused "direct physical loss," this is contrary to the weight of authority *supra* at n.2 and *infra* II.A.5. And even if this Court were to take the opposite view, Starr would *still* be entitled to summary judgment because JGB cannot show that any theoretical "physical . . . damage" COVID-19 caused "result[ed] directly" in the economic losses claimed. *See supra* II.A.4.

closure context and noting that "temporary denial of a plaintiff's preferred use of its property, absent some physical alteration, does not fall within the plain meaning of 'direct physical loss or damage'"); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358 (11th Cir. 2022) (collecting cases and noting that "every federal and state appellate court that has decided the meaning of 'physical loss of or damage to' property (or similar language) in the context of the COVID-19 pandemic has come to the same conclusion and held that some tangible alteration of the property is required").

And, while the question of whether COVID-19-related injuries *specifically* qualify as "direct physical loss or damage" is of first impression in this state, controlling Nevada precedent already signals that this Court will have to answer in the negative.[7] *Farmers Home Mut. Ins. Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986); *Fed. Ins. Co.*, 130 Nev. 960, 339 P.3d 1281; *see also Levy Ad Grp., Inc. v. Chubb Corp.*, 519

[7]JGB suggests a pattern of lower court authority to the contrary, RPIA 18, but cites only one case where a Nevada state district court allowed a similar action to proceed to trial. *Nevada Property 1 LLC v. Factory Mut. Ins. Co.*, No. A-21-831049-B (Nev. Dist. Ct. Aug. 16, 2021). That outlier is in the early stages and, obviously, not controlling, but supports the need for writ relief here.

F. Supp. 3d 832, 836 & n.30 (2021) (citing both *Farmers Home* and *Federal* in support of the view that this Court "has generally cabined claims for coverage under similar policies to plaintiffs who allege . . . physical change to a property, actually altering its functionality or use").

JGB and amici deem all this law—what they concede is a "herd" of decisions supporting Starr's reading—to be wrong. RLC Brief at 13. JGB and amici even take aim at the leading treatise on insurance law for supposedly setting courts wrong-footed for the past three decades. RPIA 20; RLC Brief 5-13. But that *Couch* disagrees with JGB's anti-textual "reading" of the Policy does not make *Couch* wrong; instead, the paucity of cases adopting JGB's position counsels inversely. In any event, given the text of the Policy and the ample authority already discussed, the solitary academic article cited by JGB and the RLC Brief in support of their attack on *Couch* only injects an illusion of disagreement where none actually exists.[8] *Apple Annie, LLC v. Oregon Mut. Ins. Co.*, 298 Cal. Rptr. 3d 886, 897 (2022), *review filed* (Oct. 11, 2022) (rejecting same attacks on

[8] This is a matter of reading similar policy language. Amici's suggestions that the authority Starr discusses and/or Starr's understanding of "direct physical loss or damage" are somehow based on policy considerations are misguided. *See* Boyd Brief 10-15; *see also* UP Brief at 12-14.

Couch because "any analytical flaws . . . have become largely academic in light of the now-existing wall of precedent" holding the same); *see United Talent Agency*, 293 Cal. Rptr. 3d at 74 (rejecting same attacks on *Couch*).

B. The Limited Contrary Cases Are Unavailing

JGB relies on three contrary cases, none of which is persuasive here. *See,* RPIA at 4. In *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Company*, the insured alleged it had "dispose[d] of property damaged by COVID-19," and the policy in question *expressly covered* damage resulting from a "communicable disease event." 296 Cal. Rptr. 3d 777; 780, 782-84, 788 (Ct. App. 2022). JGB does not similarly allege such disposal and damage and, for all the reasons already stated, the Policy's language is meaningfully different.

Huntington Ingalls v. ACE American Insurance Company, from which several amici also selectively quote, expressly does not decide the central issue here. 2022 WL 4396475 *13 (Vt. Sept. 23, 2022) (emphasizing the opinion "does not state that [measures to combat COVID on insured property that resulted in its inefficient use are] 'direct physical loss or damage to property' . . . [and] merely conclude[s] that

insured has alleged enough to survive a Rule 12(c) motion under our extremely liberal pleading standards").

This leaves only *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2022 WL 2154863 (La. Ct. App. June 15, 2022), which garnered "a mere plurality of a very fractured panel" (*Exceptional Dental of La., LLC v. Bankers Ins. Co.*, 2022 WL 4774645, at *5 (E.D. La. Oct. 3, 2022)), and which the Louisiana Supreme Court recently agreed to review (2022 WL 17101711 (La. Nov. 22, 2022)). That outlier being too weak to attract a majority of the court from which it came, this Court should not follow it. *See also Dickie Brennan & Co., L.L.C. v. Zurich Am. Ins. Co.,* 2022 U.S. App. LEXIS 21185, at *5 n.1 (5th Cir. Aug. 1, 2022) (declining to follow *Cajun Conti*).

C. The "Context" JGB Cites Is Irrelevant

JGB also references decisions addressing how the phrase "physical loss or damage" may relate to computer data—without discussing the language of the relevant policies—and suggests that they represent an "insurance industry" position with unclear relevance here. RPIA 16. But even assuming that harm to electronic materials could invoke coverage

under other policies, in other cases, it does not impact the textual analysis above or this Policy's applicability to these claims.

JGB further takes the Policy's use of the word "alteration" elsewhere and sets up a strawman, positing that "direct physical loss or damage" cannot require an "alteration" because it seems to be "something the *policyholder* intentionally does to the property." RPIA 17. This misses the point: to be covered under the Policy, a tangible detrimental change to the property must directly cause the insured's business interruption loss. To the extent Starr uses the term "alteration" elsewhere to describe a tangible change to property, Starr does so according to the term's general definition: "to make different without changing into something else." *Merriam-Webster's supra* at 35. While not dispositive of the question at hand, Starr's use of the term "alteration" in this briefing is consistent with its use in the Policy; JGB's attempt to manufacture some conflict is neither supported by legal authority nor the Policy itself.

III.

COURTS ARE UNANIMOUS IN APPLYING EXCLUSIONS EXPRESSLY LISTING "VIRUS" TO COVID-19-RELATED CLAIMS

Even if JGB could initially establish coverage under the Policy, the Exclusion applies, such that summary judgment for Starr was warranted. II PA 197, 206. The Exclusion forecloses coverage for otherwise recoverable injuries that result from pollution and contaminants, expressly including those resulting from a "virus." A virus is "[a] class of very small infecting agents which cause . . . disease[ ]." VIRUS, Attorney's Dictionary of Medicine (2022). Only amicus Boyd Gaming suggests that COVID-19 does not fall under this definition, Boyd Brief at 4, JGB and other amici seem to recognize that there is no reasonable dispute that COVID-19 is a virus. *See* CORONAVIRUS, Attorney's Dictionary of Medicine ("A lipid-enveloped *virus* with crown-like spikes on its surface."); *see id.* (defining COVID-19 as "[i]llness caused by infection with SARS-CoV-2, a type of coronavirus"); *see also* NSMA Brief at 3 (noting that COVID-19 is caused by a virus). In any case, JGB does not press any such argument. *See* RPIA at 11-12.

Instead, JGB and amici argue against "a literal application of [the Exclusion]," Panda Brief at 22, and ask this Court to rewrite it by

omitting the term "virus." This is not how textual analysis works. Indeed, the one ruling that accepted JGB's position, *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 6091224, (N.J. Super. Dec. 22, 2021)—on which JGB heavily relied below—is now overturned. *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 2254864, at *14 (N.J. Ct. App. June 23, 2022) ("Unquestionably, [the exclusion] would encompass the COVID-19 virus.").[9]

Where a policy term is unambiguous, this Court "interpret[s] it according to the plain meaning of its terms." *Casino West*, 130 Nev. at 398, 329 P.3d at 616. Thus, other courts uniformly interpret contamination exclusions defined to include a "virus" as encompassing COVID-19, and therefore to foreclose pandemic-related claims like JGB's. Many reject the very same arguments JGB makes here. RPIA 28-30; *see, e.g. Westport*, 2022 WL 2303763, at *6 (Conn. Super. Ct. June 27, 2022) (rejecting the "environmental pollution" argument); *Palomar Health v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 3006356, at *1 (9th Cir. July 28, 2022); *Froedtert Health Inc. v. Factory Mut. Ins. Co.*, 2022 WL

[9]Contrary to JGB's assertion, the district court withheld ruling on the Exclusion's scope. VIII PA 1383. Starr submits it was error to allow the case to proceed past summary judgment without ruling on the Exclusion.

3213270, at *4 (E.D. Wis. Aug. 9, 2022) (rejecting insured's argument that presence of exclusion means loss is otherwise covered); *W. Union Co. v. Ace Am. Ins. Co.*, 2022 WL 3643764, at *6 (D. Colo. Aug. 24, 2022); *Out W. Rest. Grp., Inc. v. Affiliated FM Ins. Co.*, 2022 WL 4007998, at *2 (9th Cir. 2022) (rejecting both the "traditional industrial contaminant" and the "failure to include the standard virus" arguments); *Greenwood Racing Inc. v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 4133295, at *5 (E.D. Pa. Sept. 12, 2022); *The One Grp. Hosp., Inc. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 4594491, at *7-9 (W.D. Mo. Sept. 29, 2022).[10]

A. JGB Overreads *Casino West*

JGB and amici attempt to steer this court away from this case law by overreading *Casino West* to mandate that the Exclusion only forecloses coverage for losses caused by a virus "present through an environmental

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[10] *See also Carilion Clinic v. Am. Guar. & Liab. Ins. Co.,* 583 F. Supp. 3d 715, 734 (W.D. Va. 2022) (contamination exclusion "unambiguously excludes coverage"); *Clinic v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 773207 *6 (D. Mont., Feb. 22, 2022) (same); *Boscov's Department Store, Inc. v. Am. Guar. & Liab. Ins. Co.*, 546 F.Supp.3d 354, 369 (E.D. Pa. 2021) (definition of contamination "is unambiguous and certainly applies to COVID-19"); *Lindenwood Female College v. Zurich Am. Ins. Co.,* 569 F.Supp.3d 970 (E.D. Mo., 2021) (same); *Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.,* 2021 WL 1016113 (D. N.J., March 17, 2021) (contamination exclusion "clearly and explicitly excludes coverage"). This list is far from all-inclusive.

pollution event—e.g., when a wastewater treatment plant releases virus-containing waste into the water supply." RPIA 28-29; Panda Brief at 14-15. In *Casino West* this Court determined that an "absolute pollution exclusion"—defined to encompass "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste"—did not exclude coverage for deaths caused by carbon monoxide. 130 Nev. at 399, 329 P.3d at 616. But this Court so ruled because the *Casino West* exclusion was ambiguous, "broad enough [to] be read to include items such as soap, shampoo, rubbing alcohol, and bleach . . . ." *Id.* at 400-01, 329 P.3d at 617-18. Accordingly, this Court credited the policyholder's stated expectation that the exclusion only applied to "traditional environmental pollution." *Id.*

The Exclusion here is not similarly ambiguous. To the contrary, the meaning of the term "virus" is plain and limited, and it encompasses COVID-19. Accordingly, though the Caesars and Panda briefs center their attention on the reasonable expectations of policyholders, Caesars Brief at 9-11; Panda Brief at 3-5, that doctrine is unavailing. *Farmers Ins. Exch. v. Young*, 108 Nev. 328, 334, 832 P.2d 376, 379 (1992) (noting that the doctrine only applies where policy language is ambiguous); *cf.*

Casino West, 130 Nev., at 398, 329 P.3d at 616. And in all events, it is far from unexpected that a "Pollution and Contamination Exclusion Clause" *that defines contamination to include viruses* would exclude "loss or damage caused by or resulting from" a virus.

Courts that have applied similar exclusions to similar claims *under Nevada law* have thus distinguished *Casino West*. *See Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-CV-1470, 2021 WL 4260785, at *3-4 (D. Colo. Sept. 17, 2021) (applying Nevada law and enforcing a similar exclusion as to COVID-19); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021), *aff'd*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022) (same).

B. The ISO's Form Language Does Not Control Here

JGB and amici also discuss the scope of what they dub the "all-virus" or "absolute virus" exclusion form language, proffered by an industry advisory group (Insurance Services Office or ISO). RPIA 2, n.1 (citing to an ISO circular); UP Brief 4-12. But whether and which other insurers may have adopted this ISO form language is immaterial. Likewise, amici's assertions as to what the "insurance industry" supposedly knew because the ISO drafted this form language are without

bearing. *See* UP Brief at 6-7. The unambiguous language of the Policy controls: Starr did not need to adopt the ISO's form language exclusion, because the Exclusion's definition already reached losses stemming from contamination by "any . . . virus." I PA 51.

CONCLUSION

For all these reasons, this Court should grant the petition and direct the district court to enter summary judgment in Starr's favor.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 365 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5788 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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