Case No. S277893

IN THE
SUPREME COURT OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,
Plaintiff and Appellant,
v.
VIGILANT INSURANCE COMPANY,
Defendant and Respondent.

Request for Certification to Decide a Matter of California Law
Presented in a Matter Pending in the
U.S. Court of Appeals, Ninth Circuit
Case No. 21-16093

APPLICATION OF SAN MANUEL BAND OF MISSION INDIANS AND SAN MANUEL ENTERTAINMENT AUTHORITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER; PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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Pursuant to California Rules of Court, rule 8.520(f), the San Manuel Band of Mission Indians and San Manuel Entertainment Authority (collectively, "San Manuel" or "*Amicus*") respectfully request permission to file the attached *amicus* brief. Counsel for San Manuel are familiar with the questions involved and the scope of their presentation to this Court, and believe there is necessity for additional argument.

San Manuel's memorandum, attached to this application, directs this Court's attention to specific policy terms and legal issues that bear directly on whether Respondent Vigilant Insurance Company's ("Vigilant") property policy covers losses and damages caused by SARS-CoV-2 and/or COVID-19. This support is particularly important here, where insurance coverage issues potentially are implicated for other California policyholders, including San Manuel.

Interests of Proposed *Amicus Curiae*

San Manuel is a federally recognized Indian tribe located on the San Manuel Reservation near Highland, California. San Manuel exercises its inherent sovereign right of self-governance and provides essential services for its citizens by building infrastructure, maintaining civil services, and promoting social, economic and cultural development. As an exercise of its sovereignty, San Manuel owns and operates Yaamava' Resort &

Casino at San Manuel, formerly known as "San Manuel Casino," and other properties in San Bernardino County. San Manuel's properties in California have incurred substantial physical loss and damage caused by the SARS-CoV-2 virus and/or COVID-19, as well as losses from resulting suspensions and interruption of business activities. As a business owner and policyholder who purchased broad, "all-risks" property insurance policies, San Manuel takes a special interest in the interpretation of the phrase "direct physical loss or damage" in this appeal, as it has an insurance coverage lawsuit pending in the Superior Court of the State of California, San Bernardino County, pursuing coverage for its SARS-CoV-2/COVID-19 losses and damages.

San Manuel seeks to perform a valuable role for this Court by "broadening perspective on the issues raised by the parties." *Connerly v. State Personnel Bd.*, 37 Cal. 4th 1169, 1177 (2006) (*citing Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 405 fn. 14 (1992)). San Manuel's *amicus* brief supplements the efforts of counsel and ensures a complete presentation of difficult issues. Specifically, *Amicus* highlights additional policy provisions, authorities, and arguments in support of Appellant Another Planet Entertainment, LLC's ("Another Planet") request that the phrase "direct physical loss or damage" to property be interpreted broadly in favor of coverage and not limited to "structural," "demonstrable," "perceptible" or "non-microscopic" alterations.

Pursuant to Rule 8.520(f)(4) of the California Rules of Court, San Manuel represents that: (1) there is no party or any counsel for a party in the pending appeal who authored the

proposed *amicus* brief in whole or in part; (2) there is no party or any counsel for a party in the pending appeal who will be making a monetary contribution intended to fund the preparation or submission of the brief; and (3) San Manuel and its counsel are fully responsible for the preparation of this brief.

For the reasons stated above, San Manuel respectfully requests leave to file the attached *amicus* brief.

Dated: August 2, 2023

Respectfully Submitted,

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PROPOSED *AMICUS CURIAE* BRIEF OF SAN MANUEL BAND OF MISSION INDIANS AND SAN MANUEL ENTERTAINMENT AUTHORITY

I. INTRODUCTION

This case presents the most significant first-party insurance coverage issue confronted by this Court in many years. After decades of expansive interpretation by courts, the meaning of the phrase "direct physical loss or damage" in an "all-risks" policy has become a heavily disputed legal issue in the context of COVID-19. The decision here is of great importance to the California business community—including the gaming, hospitality, and entertainment industries which were upended by the COVID-19 pandemic while the insurance industry enjoyed colossal profits.

Amicus, like Another Planet, is among the small minority of policyholders that purchased best-in-class "all-risks" policies, *without an "absolute" virus exclusion*. Because entertainment and gaming and hospitality companies like Another Planet and *Amicus* depend on people congregating indoors in large groups on their properties, an essential feature of their "all-risks" policies was coverage for business income losses when any physical peril renders property unusable or unsafe. While no one could have foreseen the scope of the COVID-19 pandemic, this was precisely the ***type*** of unexpected physical peril causing "business interruption" losses for which *Amicus* purchased insurance and expected coverage. That expectation was reasonable. Sixty years of precedent and this Court's established canons of insurance

policy interpretation, together with multiple California appellate decisions over the last six-plus decades, confirm that a policy covering all risks of "direct physical loss or damage," without an "absolute" virus exclusion, covers losses when a deadly physical substance like SARS-CoV-2 is present on or around property, rendering it partially or wholly unusable, unsafe, or unfit for its intended purpose ("physical loss"), ***or*** alters the surfaces or air of property ("physical damage").

Vigilant's burdens here are high: it must prove (1) *Amicus*/Another Planet's interpretation of the phrase "physical loss or damage" is unreasonable; (2) Vigilant's interpretation—requiring non-"microscopic," "permanent," "structural alteration," "tangible physical change," or "complete dispossession" as a prerequisite to coverage—is the only reasonable one; and (3) any provisions limiting coverage do so with obvious and unambiguous language. *E.g.*, *Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1204 (2004); *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 655 (2003). Vigilant cannot clear *any* of these hurdles, much less all of them.

Vigilant itself uses the phrase "direct physical loss or damage" to extend coverage to intangible injuries and property. For example, the Policy provides coverage for "direct physical loss or damage" to "electronic data," defined by Vigilant as "software, data, or other information that is in electronic form." *See* 3-E.R.-501–04, 570. Electronic data and information are not considered "tangible," yet Vigilant recognizes such property may incur "direct physical loss or damage" all the same. Elsewhere,

the Policy recognizes physical loss or damage for imperceptible injuries, including, for example, those resulting from microorganisms or gases. *See, e.g.*, 3-E.R.-456–57, 465–66, 472–73 (recognizing physical loss or damage caused by "fungus" and "pollutants"); *id.* at 582 (defining "pollutant" to include any "gaseous . . . irritant or contaminant"). Thus, even a cursory reading of Vigilant's own Policy belies its contention that the terms "direct" and "physical" "limit[] coverage to losses to property that are tangible." *See, e.g.*, Vigilant Answering Brief at 48 n.11.

Additionally, in California, the insurance industry had notice since at least 1962 that property rendered uninhabitable and unusable by a physical peril constitutes "physical loss" that triggers coverage; non-microscopic, structural "alteration" is not required. *See Hughes v. Potomac Inc. Co. of D.C.*, 199 Cal. App. 2d 239, 242–43, 248–49 (1962). Even earlier, since at least 1957, courts across the country consistently have held that property rendered unusable by a physical substance, *without* any accompanying "structural alteration," constitutes covered "direct physical loss or damage" to property (*e.g.*, unpleasant odors, noxious particles, carbon monoxide, ammonia, and gasoline fumes). Thus, if Vigilant wanted to exclude loss or damage caused by a virus, or for all microscopic perils, it could have (and should have) expressly adopted such clear exclusions. Instead, Vigilant sold broad, expansive coverage to entertainment companies like *Amicus* and Another Planet at very high premiums. Another Planet reasonably relied on Vigilant's chosen

policy language (and what it chose not to include) and well-established definitions of "physical loss or damage" in seeking coverage for its losses caused by COVID-19. Coverage is now due.

While many courts in the COVID-19 context, especially in the federal system, discarded both voluminous pre-COVID-19 precedent and established rules of insurance policy interpretation at the behest of the insurance industry, several notable courts have rejected Vigilant's asserted interpretation. For example, the Court of Appeal held recently that "'direct physical loss' can include loss of use, ***even if the subject property is not physically altered or damaged***." *Coast Rest. Grp., Inc. v. Amguard Ins. Co.*, 90 Cal. App. 5th 332, 342 (2023), *review denied* (June 28, 2023) (emphasis added). To be sure, "physical alteration to covered property" also "trigger[s] coverage under a 'physical loss or damage' insuring provision," but it is not a prerequisite. *Id.* at 340, 343; *see also Shusha, Inc. v. Century-National Ins. Co.*, 87 Cal. App. 5th 250, 264–66 (2022), *review granted* (Apr. 19, 2023) (allegations that SARS-CoV-2 "adheres to, attaches to and alters . . . property" are sufficient to plead physical loss or damage to covered property); *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 108–09 (2022) (same).

Similarly, the Vermont Supreme Court held "physical loss" does ***not*** require "physical alteration," but occurs where a physical condition or substance, like a health hazard, renders property unsafe or unusable for its intended purpose.

Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., 287 A.3d 515, 529–30 (Vt. 2022). *Huntington* also held "direct physical damage" does not require "perceptible," "structural" alteration—instead, "microscopic" alterations suffice. *Id.* at 526–28. Such decisions support the reasonableness of Another Planet's interpretation. So do California's well-established canons of insurance policy interpretation.

The interpretation of *Amicus* and Another Planet is reasonable, and therefore must control.

II. ARGUMENT

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

1. *Amicus* and Another Planet Paid Substantial Premiums for the Broadest Form of Property Insurance In the Marketplace

Policyholders like Another Planet and *Amicus* intentionally purchased broad, all-risks insurance to cover unanticipated perils like SARS-CoV-2. The property insurance marketplace generally has two different products: (1) "all-risks" policies, "the broadest form of first-party insurance coverage available," covering *all* risks except those specifically excluded; and (2) "named perils" policies, which cover only certain specified or enumerated causes (*e.g.*, fire, windstorm). *See, e.g.*, *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989). Long before COVID-19, courts reinforced that the broader policies, like Another Planet's and *Amicus*', insure "all risks" not expressly excluded, including those not visible without a microscope. *Garvey*, 48 Cal. 3d at 407;

Vardanyan v. AMCO Ins. Co., 243 Cal. App. 4th 779, 796–97 (2015). Thus, "all-risks" policies not only provide coverage for obvious physical impacts like fires, water damage, and theft, but also for losses or damage caused by the presence of bacteria, particles, vapors, odors, smoke and other substances at the molecular level.[1] In contrast, "named peril" policies provide coverage only for those risks specifically identified as insured. *Garvey*, 48 Cal. 3d at 406.

These broad "all-risks" policies provide at least two major categories of coverage: (1) Property, and (2) Business Interruption. *See, e.g.*, 3-E.R.-443, 454, 483. Property coverage generally insures loss or damage to the real and personal property within the territorial limits of the policy.[2] *See*

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[1] *See, e.g.*, *Cooper v. Travelers Indem. Co. of Ill.*, 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); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (en banc) (gasoline fumes); *Widder v. La Citizens Prop. Ins. Corp.*, 76 So. 3d 1179 (La. 2011) (inorganic lead); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *5 (D. Or. June 7, 2016) (wildfire smoke in ambient air that dissipated naturally); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *see also infra*, Section II(C).

[2] The airspace within a building is part of the real property owned by a policyholder. *See generally "Airspace" and other geometric space*, 3 CAL. REAL EST. § 9:33 (4th ed. 2021) (landowner owns all of the property rights for a particular piece of land, including the airspace above the surface); *Del Mar Beach Club Owners Ass'n v. Imperial Contracting Co.*, 123 Cal. App. 3d 898, 906 (1981) (recognizing that condominium owners could

3-E.R.-456–67. "Business Interruption" coverage, by contrast, provides coverage for *economic losses resulting from the inability to use property* for its intended purpose *because of a physical peril*. *See id.* at 485, 568.

For the hospitality, gaming, and entertainment industries, Business Interruption (sometimes referred to as Business Income or Time Element) coverage is often the more valuable, and an essential reason for purchasing "all-risks" policies.[3] *Amicus* and Another Planet are part of a business model that depends on large groups congregating in and using property for the specific purposes of gaming, accommodation, dining, shopping, and live entertainment. Because of their venue-driven, group-centric model, ***any*** physical peril rendering those properties unsafe or unusable for their intended purposes (such as those listed *supra* n.1 and *infra* Section II.C) could deal a significant financial blow, irrespective of whether that peril physically damages structures. Thus, coverage for losses resulting from inability to use insured property because of a physical peril is precisely what *Amicus*, Another Planet, and other policyholders sought when purchasing their "all-risks" policies.[4]

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purchase "air space" within buildings, or "the buildings and the land underlying them").

[3] *See* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. L.J. 185, 198–99 (2020).

[4] *See id.* at 199; *see also* Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 Conn. Ins. L.J. 1, 20–23 (2020) ("all-risks"

SARS-CoV-2 is just such a physical peril. The presence of the virus renders property unsafe and unusable, especially for group congregation.[5] The virus is a physical particle that deposits on property and lasts for days, remains harmful while suspended in air and on surfaces, transmits from impacted property as fomites, is repeatedly reintroduced to property by infected individuals, and cannot be contained by routine cleaning alone. *See* Another Planet Opening Brief ("Opening Brief") at 43–49.

2. Insurers Are Required To Plainly and Clearly Exclude Uncovered Perils In an "All Risk" Policy—Vigilant Instead Chose To Sell 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 to expressly limit coverage for emerging perils. In 2006, responding to the SARS virus outbreak, the industry's Insurance Services Office, Inc. ("ISO") developed a broad exclusion for "loss or damage caused by or

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policyholders reasonably expect business interruption coverage "when their business operations are interrupted due to catastrophic events beyond their control," "even if the properties do not have tangible, physical damage").

[5] *See* French, *supra* n.4 at 23 ("In the COVID-19 context … [t]he risk of people getting sick and dying from being in the policyholders' business premises was so high that the business premises were rendered uninhabitable and unusable. That is enough to trigger coverage.").

resulting from any virus."[6] When justifying its so-called "absolute" virus exclusion, ISO told regulators that virus-related property loss and damage could occur, giving rise to business interruption losses.[7] Insurers thereafter incorporated a virus exclusion in an estimated 83% of the "all-risks" property policies sold in recent years.[8] Insurers have relied on, and courts have enforced, virus exclusions to deny coverage in the vast majority of COVID-19 cases.

But while the "absolute virus" exclusion was widely used, it was not ubiquitous. On the contrary, *Amicus* and other policyholders paid even higher premiums for "all-risks" coverage without this so-called "absolute" virus exclusion. Such policyholders reasonably expected that their decision to pay higher premiums for policies without that exclusion would buy something that the vast majority of policyholders did not have:

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[6] 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.

[7] *See id.*, 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).

[8] *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.

coverage for physical loss or damage caused by a virus. Notably, as the small minority of "all-risks" policies without the "absolute" virus exclusion came due for renewal after the pandemic began, insurers insisted on adding virus and/or pandemic exclusions into new policies. Although the insurance industry may be unwilling to underwrite these risks going forward, it does not excuse them from honoring their original bargain and providing the broad grant of coverage expected under all-risks policies to the select group of policyholders that paid for the most comprehensive insurance available.

B. California's Canons of Insurance Policy Interpretation and Case Law Confirm That Policyholders' Expectations of Coverage Are Reasonable

To prevail, Vigilant must establish that its interpretation is the ***only*** reasonable one and that there is ***no*** alternative. *MacKinnon*, 31 Cal. 4th at 655 (for insurer to prevail, "it would have to establish that its interpretation is the only reasonable one."). Vigilant cannot meet that burden. At least ***six bedrock canons of insurance policy interpretation*** independently confirm *Amicus*' interpretation of the phrase "direct physical loss or damage" is correct, or at the very least reasonable.

1. Plain and Ordinary Meaning

First, Another Planet's Policy, like *Amicus*', does not define any of the terms in the phrase "physical loss or damage." "Words in an insurance policy, unless given special meanings by the policy itself, must be understood in their ordinary sense," which is typically found in the dictionary. *See Scott v. Continental Ins.*

Co., 44 Cal. App. 4th 24, 29 (1996) ("In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries.").

"Physical" generally means "of or relating to natural or material things."[9] "The COVID-19 virus—like smoke, ammonia, odor, asbestos—is a physical force." *Shusha, Inc.*, 87 Cal. App. 5th at 269. Vigilant does not (nor could it) contend otherwise. The definition of "loss" includes "the act of losing possession" or "the harm of privation resulting from loss or separation."[10]

Thus, "physical loss" occurs where a physical peril or government order renders property unusable or uninhabitable, temporarily or permanently. *Coast Rest. Grp.*, 90 Cal. App. 5th at 340; *see also Huntington*, 287 A.3d at 529–30 (noting that "physical loss" may occur where "property is not harmed but may not be used for some reason [such as] due to a health hazard"); *Hughes*, 199 Cal. App. 2d at 248 (holding physical loss or damage occurs when a building is rendered "useless to its owners," even where "some tangible injury to the physical structure itself could [not] be detected.").[11] "Physical loss" simply requires some

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[9] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/physical (last visited July 17, 2023).

[10] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/loss (last visited July 17, 2023); *see also Coast Rest. Grp.*, 90 Cal. App. 5th at 340.

[11] *See also Port Authority*, 311 F.3d at 236 ("[P]hysical loss" occurs when the presence of an invisible hazard renders property "uninhabitable and unusable" or when its function is "nearly eliminated."); *Widder*, 82 So. 3d at 296 ("[D]irect physical loss"

"physical condition[] that render[s] property unusable for its intended purpose . . . even though the property itself is not damaged." *Huntington*, 287 A.3d at 531; *see also Coast Rest. Grp*, 90 Cal. App. 5th at 340 (same). Vigilant has not cited any dictionary defining "loss" or "physical loss" as a "tangible," "demonstrable" and non-microscopic change, and certainly does not prove that is the only definition. On the contrary, "physical loss" neither assumes any injury (tangible or otherwise) upon the property, nor does it require total deprivation of property.[12] *Coast Rest. Grp.*, 90 Cal. App. 5th at 340; *see also Huntington*, 287 A.3d at 530 (explaining "direct physical loss" includes a situation when a physical condition or substance (such as SARS-CoV-2) "only impacts ***part*** of the covered property," rendering it "unusable for its intended purpose," even when the property itself is not damaged).

"Damage" is defined as the "loss or harm resulting from injury to . . . property."[13] "Physical damage" can mean some form of "physical alteration," although such alteration need not be

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occurs where property "has been rendered unusable or uninhabitable.").

[12] While ***one*** definition of "loss" is "ruin" or "destruction," that it is not the ***only*** reasonable definition, and others cannot be discarded. *See* Knutsen & Stempel, *supra* n.2 at 234 ("[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.").

[13] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/damage (last visited July 17, 2023).

"structural" or "perceptible." *Coast Rest. Grp.*, 90 Cal. App. 5th at 343; *see also Shusha*, 87 Cal. App. 5th at 260 (allegations of "physicochemical reactions involving cells and surface proteins, which transform the physical condition of the property," are sufficient); *Huntington*, 287 A.3d at 527-28 ("alterations at the microscopic level may meet th[e] threshold" for "physical damage").

Amicus and Another Planet reasonably rely on the plain meaning of the phrase "physical loss or damage" to conclude that the broad, all-risks coverage grant includes coverage for a situation where a physical peril such as SARS-CoV-2 renders property partially or fully unusable for its intended purposes. Moreover, the presence of SARS-CoV-2 on surfaces and in the air, physically altering those objects through chemical bonding and rendering them dangerous, constitutes "direct physical loss or damage." Vigilant improperly ignores plain, ordinary definitions.

2. Different Words, Different Meanings

Second, *Amicus*' interpretation gives independent meaning to both "loss" and "damage"; Vigilant's interpretation does not. It is a cardinal rule in the construction of contracts that courts should "favor an interpretation that gives meaning to each word in a contract over an interpretation that makes part of the writing redundant." *E.g.*, *Yahoo Inc. v. Nat. Union Fire Ins. Co.*, 14 Cal. 5th 58, 69 (2022).

Vigilant contends that physical "damage" requires "structural alteration" to covered property, and that physical "loss" is just an extreme form of damage ("complete destruction")

or "complete dispossession." Answering Brief at 14, 46, 48. Courts within and beyond California have concluded that Vigilant's proffered interpretation of "physical loss or damage" is not the correct one, or even reasonable.

For example, the Fourth Appellate Division explained that "where 'loss' and 'damage' are both included in the insuring clause," "loss" is not simply an extreme form of "damage," but "must mean something different from 'damage'" altogether. *Coast Rest. Grp.*, 90 Cal. App. 5th at 343 (distinguishing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010)). Applying that reasoning, *Coast Restaurant* held that "loss" does not "require[] physical alteration or damage to covered property," whereas "damage" likely does. *Id.* Nor does physical loss require "complete dispossession"—an "inability to use property in a particular way" is sufficient. *Id.* at 342 (explaining the all-risks policy "does not distinguish between a partial loss or a total loss[,] [t]hus, even if appellant's deprivation here is less than [complete], there is still a 'loss' under the policy") (internal citation omitted).

The Vermont Supreme Court similarly rejected insurers' attempt to conflate "physical loss" with "physical damage," holding that "physical loss" does not require physical alteration. *Huntington*, 287 A.3d at 526-31, n.10. Holding otherwise would render at least one of those phrases a nullity, violating the rule against surplusage. *See Huntington*, 287 A.3d at 527 ("[T]he rule against surplusage requires we give value to the decision to write the policy to cover 'loss *or* damage' . . . each must have a distinct

meaning.") (emphasis original). As with *Coast Restaurant Group*, the Vermont Supreme Court also held that deprivation of property need not be "complete"—an inability to use property "in whole or in part" is all that "physical loss" requires. *See id.* at 530. Other courts are in accord. *See, e.g.*, *Hughes*, 199 Cal. App. 2d at 248 (physical loss or damage occurs when property is rendered "useless to its owners," even without "tangible injury to the physical structure itself"); *Customized Distribution Servs. v. Zurich Ins. Co.*, 373 N.J. Super. 480, 488 (App. Div. 2004) ("[D]irect physical loss to covered property . . . does not require that there be any actual physical damage to or alteration of the material composition of the property."); *Widder*, 82 So. 3d at 296 (When property "has been rendered unusable or uninhabitable, physical damage is not necessary.").

To give meaning to all terms and provisions, the Policy therefore must be read to provide coverage for "loss" that is distinct from "damage." Another Planet's interpretation is proper and gives independent meaning to all terms.

3. The Policy Must Be Read as a Whole

Third, only the interpretation proffered by Another Planet satisfies the requirement that each contract provision must be interpreted in light of all others so that meaning is given to the contract as a whole. *See Palmer v. Truck Ins. Exchange*, 21 Cal. 4th 1109,1115 (1999) (holding that court must "interpret these terms in context and give effect to every part of the policy with each clause helping to interpret the other") (internal quotation marks and citations omitted). Vigilant argues direct physical loss

or damage "requires a tangible alteration of the property or its complete dispossession." Answering Brief at 14; *see also id.* at 46, 48 n.11 (arguing "direct" and "physical" must "limit[] coverage to losses to property that are tangible"). Vigilant ignores that it uses the phrase "direct physical loss or damage" to describe coverage for intangible, imperceptible injuries throughout the Policy, demonstrating to policyholders that such harms are covered.

For example, Vigilant provides coverage for "direct physical loss or damage" to "electronic data," which the Policy defines as "software, data or other information that is in electronic form." 3-E.R.-501–04, 570.[14] Insurers have repeatedly argued, however, that electronic data is not susceptible to "tangible alteration," yet Vigilant offers coverage for physical loss or damage thereto nonetheless. *See, e.g.*, *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 556, 557 (2003) (explaining that the media storing electronic data (*e.g.*, computers) is tangible, but the electronic data itself is not).[15] Thus, a policyholder

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[14] Notably, the Policy differentiates between "Electronic Data Processing Equipment" (*e.g.*, "computers," "computer peripherals," and "blank media,") and "electronic data" itself (*e.g.*, "information" in electronic form), *but provides independent coverage for "direct physical loss or damage" to both*. *See* 3-E.R.-500, 501, 504 (providing separate coverage for direct physical loss or damage to "electronic data processing equipment" and "electronic data"). The Policy provides coverage for "direct physical loss or damage" to electronic data resulting from a "technology peril," which is broadly defined as *any* "peril not otherwise excluded." 3-E.R.-592.

[15] Unlike Vigilant's Policy, the policy in *Ward* did not recognize direct physical loss or damage to "electronic data" itself, but

reasonably understands that "direct physical loss or damage" is not limited to "losses to property that are tangible," as Vigilant contends.[16] Were it otherwise, Vigilant's promise of coverage for physical loss or damage to electronic data would be illusory. *See, e.g.*, *John's Grill, Inc. v. The Hartford Fin. Servs. Grp., Inc.*, 86 Cal. App. 5th 1195, 1220 (2022), *review granted* (Mar. 29, 2023) (insurer cannot offer coverage that is "virtually illusory" or "effectively impossible to meet") (citing *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 (2005)); *see also, e.g.*, *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL

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rather only to "electronic data processing equipment" and other data processing tools. *Id.* at 555. On this basis, *Ward* held that the policyholder's loss of electronically stored data was not a physical loss, and thus not covered. *Id.* However, when, as here, the policy expressly provides coverage for physical loss or damage of electronic data, courts have no difficulty finding in favor of coverage even though the electronic data is "not 'tangible.'" *See, e.g.*, *Lambrecht & Assocs., Inc. v. State Farm Lloyds*, 119 S.W.3d 16, 24–25 (Tex. App. 2003) (holding plain language of policy dictated loss of electronic data was "physical" where data was compromised by a computer virus and policy defined coverage for lost income to include loss of electronic data); *Se. Mental Health Ctr., Inc. v. Pac. Ins. Co.*, 439 F. Supp. 2d 831, 839 (W.D. Tenn. 2006) (finding direct physical loss or damage for loss of electronic data and computer function during power outage where policy recognized "coverage for business losses due to the loss of electronic media for a limited amount of time").

[16] The Policy excludes one type of "direct physical loss or damage to electronic data"—namely, that "caused by or resulting from malicious programming," which the Policy defines as, among other things, "copy[ing]" electronic data. 3-E.R.-573, 592. If the phrase "direct physical loss or damage" could *only* mean "tangible alteration" or "complete dispossession," then this part of the exclusion would be rendered meaningless, as "copying" data is neither.

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").

Similarly, the Policy extends coverage for imperceptible injuries, including those resulting from microorganisms or gases. For instance, the Policy provides coverage for "Fungus Clean-up Or Removal," and "Pollutant Clean-up Or Removal," and defines "Fungus" to include "microorganisms; or any mycotoxins, spores, or other by-products of the foregoing," and "Pollutant" to include any "gaseous . . . irritant or contaminant." 3-E.R.-456–57, 465–66, 572, 582. The Policy further provides coverage for lost business income resulting from direct physical loss or damage caused by "fungus" or "pollutants" at covered property in certain instances, thus recognizing that such imperceptible microorganisms and gases in fact cause direct physical loss or damage. *See id.* at 485–86, 492 (providing coverage for lost business income during period of restoration for presence of fungus and pollutants); *id.* at 578 (defining "period of restoration" as beginning "immediately after the time of direct physical loss or damage").[17]

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[17] This recognition also gives proper meaning to the "period of restoration" provision when reading the Policy as a whole. The "period of restoration" is merely a loss calculation provision—*it is not a coverage grant*. *E.g.*, *Marina Pacific*, 81 Cal. App. 5th at 111–12. It begins upon direct physical loss or damage to property and continues until operations return "to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred." 3-E.R.-578. This includes, but does not require, the time needed to "repair or replace the property." *Id.* The term "repair" is undefined in the

Viewing the Policy as a whole, no reasonable insured would believe that "direct physical loss or damage" requires "tangible," "structural," non-"microscopic," "permanent," physical alteration or "complete" or "total destruction" of property. Vigilant's contention that each of these adjectives is required is undermined by ***its own use of that phrase throughout the Policy***.

4. "All-Risks" Coverage Must Be Interpreted Broadly In Favor of Any Reasonable Insured Interpretation

Fourth, California law requires policies to be "interpreted broadly so as to afford the greatest possible protection to the insured." *E.g.*, *MacKinnon*, 31 Cal. 4th at 648. The policies at issue cover "all risks" of "direct physical loss or damage." An "all-risks" policy (such as those held by Another Planet and *Amicus*) "covers all risks save for those risks specifically excluded by the policy." *Vardanyan*, 243 Cal. App. 4th at 796 (quoting *Strubble v. United Svcs. Auto. Assn.*, 35 Cal. App. 3d 498, 504 (1973)); *see also Garvey*, 48 Cal. 3d at 407 ("because generally 'all risk of physical loss' is covered, the exclusions become the limitation on loss coverage"). An insurer denying liability upon

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Policy, and its ordinary meaning includes "to restore to a sound or healthy state; RENEW; to make good: compensate for: REMEDY." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/repair (last visited July 28, 2023). Under this definition, a policyholder's actions (extensive physical remediation efforts, more than just routine cleaning) or inactions (waiting periods to dispel concentrations or virus presence) reasonably constitute "repairs" to covered property, and until normalcy returned, the policyholder could incur covered business interruption losses.

such a policy "must prove the policy's noncoverage of the insured's loss—that is, that the insured's loss was proximately caused by a peril specifically excluded from the coverage of the policy." *Vardanyan*, 243 Cal. App. 4th at 796–97 (quoting *Strubble*, 35 Cal. App. 3d at 504).

In addition, "[t]he grant of coverage is generally interpreted broadly in favor of the insured to protect the[ir] objectively reasonable expectations." *John's Grill*, 86 Cal. App. 5th at 1207; *see also American Alternative Ins. Corp. v. Sup. Ct.*, 135 Cal. App. 4th 1239, 1246 (2006) ("Even language that may be plain and clear may be found to be ambiguous when read in the context of the policy and the circumstances of the case and, in order to give effect to the insured's objectively reasonable expectations, construed in the insured's favor."). The insured's interpretation need not be the "best" interpretation, or even "better" than the insurer's to control—it need only be reasonable. *See, e.g.*, *Yahoo*, 14 Cal. 5th at 67 (If policy terms are "susceptible of more than one reasonable interpretation, we interpret them to protect the objectively reasonable expectations of the insured.") (internal quotation marks omitted).

Another Planet's interpretation is at least reasonable. "Physical loss or damage" occurred when SARS-CoV-2 (a physical peril) rendered insured property unsafe and unusable for its purposes of group congregation; "physical loss or damage" also occurred when SARS-CoV-2 attached to objects and permeated the air, rendering surfaces and spaces unreasonably dangerous and unfit for their intended purpose. *See Coast Rest. Grp.*,

90 Cal. App. 5th at 340 ("appellant suffered a covered loss under the policy because the governmental restrictions in this case deprived the appellant of important property rights in the covered property"); *Shusha*, 87 Cal. App. 5th at 265–66 ("it is well-known that SARS-CoV-2 surface contamination is ephemeral . . . an ephemeral, pathogenic surface contamination qualifies as 'damage to' property under this or similar policies") (internal citations omitted); *Marina Pacific*, 81 Cal. App. 5th at 109 (an insured "unquestionably" alleges "physical loss or damage" by alleging the virus was on-site and altered property); *see also Huntington,* 287 A.3d at 527–31, 533–35 ("'Direct physical loss' and 'direct physical damage' are two distinct bases for coverage"). This interpretation provides the broad "all-risks" coverage expected; Vigilant's interpretation improperly removes coverage for "physical loss" and truncates coverage for "physical damage." As Another Planet's and *Amicus*' interpretation effectuates coverage, it must govern. *See Home Savings of Am., F.S.B. v. Continental Ins. Co.*, 87 Cal. App. 4th 835, 841 (2001) ("If an ambiguity may be reasonably resolved by either of two constructions, we must select that which is most favorable to the named insured").

At a minimum, other California appellate courts have issued rulings that support Another Planet's interpretation of the policy language at issue; this is strong evidence of ambiguity. *See Fire Ins. Exch. v. Super Ct.*, 116 Cal. App. 4th 446, 466 (2004) (explaining that conflicting authorities "illustrate our conclusion that the [policy] is reasonably susceptible to more than one

interpretation [and] therefore ambiguous"); *see also, generally*, *Coast Rest. Grp.*, 90 Cal. App. 5th 332 (holding that insured had properly alleged physical loss or damage due to loss of use of property due to government orders); *Shusha*, 87 Cal. App. 5th 250 (reversing grant of demurrer); *Marina Pacific*, 81 Cal. App. 5th 96 (same). The same is true of other learned courts beyond California.[18] And perhaps most notably, prior to the COVID-19 pandemic, insurers had argued that the phrase "direct physical loss or damage" is ambiguous and must be interpreted broadly to allow for coverage when property loses "functionality or reliability." *See* Pl. FM's Mot. *In Limine* No. 5 Re Physical Loss or Damage at 3–6 & n.1, *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760 (D.N.M. Nov. 19, 2019), ECF No. 127 (recognizing that case law "broadly interprets the term 'physical loss or damage' in property insurance policies," and arguing the phrase "is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against [the drafting insurer]"). These court decisions and past industry admissions prove that Vigilant's interpretation is plainly not the ***only*** reasonable one.

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[18] *See, e.g.*, *Huntington,* 287 A.3d at 533, 537 (concluding "direct physical loss or damage" unambiguously includes coverage for COVID-induced loss or damage and one justice concluding the same language unambiguously does not); *Scott Craven DDS PC v. Cameron Mut. Ins. Co.*, 2021 WL 1115247, *2 (Mo. Cir. Mar. 9, 2021) (concluding "the phrase 'direct physical loss of or damage to property' is ambiguous . . . it is proof of ambiguity that jurists are reaching different conclusions in applying the similar policy language to this unique set of circumstances.").

5. Coverage Limitations Must Be "Clear and Specific"

Fifth, California's interpretive canons dictate that Vigilant cannot belatedly impose limitations that are not "clear and specific" in the policy. In applying all-risks policies, all risks are covered "save for those risks specifically excluded by the policy." *Vardanyan*, 243 Cal. App. 4th at 796 (quoting *Strubble*, 35 Cal. App. 3d at 504). Exclusions must be "conspicuous, plain, and clear" to be enforceable. *E.g.*, *MacKinnon*, 31 Cal. 4th at 648; *see also, e.g.*, *Haynes*, 32 Cal. 4th at 1204 ("As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.'") (quoting *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201 (1973)). Vigilant alleges that "all-risks" coverage is limited to perils that cause non-microscopic, "tangible" and "distinct, demonstrable" physical alterations, but such requirements do not appear in the Policies, let alone in the

coverage grant for lost business income.[19] *See Coast Rest. Grp.*, 90 Cal. App. 5th at 343 ("while physical alteration to covered property could trigger coverage under a 'physical loss or damage' insuring provision, that is not the only possible trigger for coverage" and it was insurer's burden to show clearly that coverage was limited or a specific exclusion applied).

6. Different Circumstances, Different Result

Finally, as a basic principle of insurance law, different policies and different facts compel different conclusions. *See Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 18 (1995). Vigilant cites cases from other states and federal courts finding coverage was unavailable for physical loss or damage due to COVID-19. But most of those cases involved policies that either included an "absolute" virus exclusion, or complaints that did not allege

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[19] Notably, Another Planet pled that droplets "physically alter the air and airspace in which they are present and the surfaces of both the real and personal property to which they attach, constituting physical loss or damage. By doing so, they can render both real and personal property unusable for its intended purpose and function." Compl. ¶ 53. The Vermont Supreme Court recently held that "physical damage" could be proven where the virus was present on and attached to covered property, altering surfaces and air and transforming them into dangerous fomites. *Huntington*, 287 A.3d at 527-28. "[I]f insured can prove such alteration occurred, it may constitute 'direct physical damage,' even if it is at a microscopic level." *Id.*; *accord Marina Pacific*, 81 Cal. App. 5th at 109; *Shusha*, 87 Cal. App. 5th at 265-66 (expanding on *Marina Pacific* and holding "it is well-known that SARS-CoV-2 surface contamination is ephemeral . . . an ephemeral, pathogenic surface contamination qualifies as 'damage to' property under this or similar policies.") (internal citations omitted).

SARS-CoV-2 was present on or physically altered insured property. *See, e.g. Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29, 35 (1st Cir. 2022) ("the factual allegations in Legal's operative complaint allege no more than a presence of the virus that is evanescent"). Courts dismissed these cases, reasoning either that the "absolute" virus exclusion controlled, or coverage under "all-risks" 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); *but see Coast Rest. Grp.*, 90 Cal. App. 5th at 340 ("A governmental order that temporarily deprives the insured of possession and use of covered property can qualify as a 'direct physical loss.'").

In contrast, in its Complaint, Another Planet alleged that SARS-CoV-2/COVID-19 "was present on and in its properties, the properties of dependent businesses, and on property within the vicinity of its own insured premises" and "physically alters property when present," and supported these allegations with scientific information. Opening Brief at 21; *see also* Compl. ¶¶ 5, 53. Another Planet's First Amended Complaint also alleged facts showing that the parties "intended the Policy to insure losses caused by viruses." Opening Brief at 22.

* * *

In sum, nothing in the plain language of the Policy requires Another Planet to prove tangible, distinct, demonstrable, permanent, non-microscopic alteration to property. On the contrary, decades of pre-pandemic case law and this Court's interpretive canons dictate otherwise: coverage is available for

physical loss ***or*** damage. The only way (or at least a reasonable way) to give meaning to the entire policy is to define "direct physical loss or damage" as including situations where a dangerous physical substance ***either*** (1) is present on or around covered property, rendering the property partially or wholly unusable, unsafe, or unfit for its intended purpose ("physical loss", or (2) alters the surfaces or air of covered property ("physical damage"). Another Planet satisfies both.

C. For Decades Before COVID-19, "All-Risks" Policies Have Provided Coverage When a Physical Peril Renders a Policyholder Unable to Fully Use Covered Property for Its Intended Purpose

Since at least the 1950s, courts have consistently held that the presence of a physical substance that renders property unsafe and unusable for its intended purpose constitutes "direct physical loss or damage" to property, without need to show "physical alteration." *See, e.g.*, *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (finding coverage when radon gas rendered building unsafe and unusable for purpose of calibrating medical instruments). Courts have reinforced that

sensible holding in every decade since.[20] Long before the SARS-CoV-2 virus emerged, courts held the following "causes of loss are covered as 'direct physical loss or damage'":

- noxious particles;
- unpleasant odors (*e.g.*, "locker room" smell, cat urine, meth lab);
- carbon monoxide poisoning;
- ambient outdoor smoke;
- drywall off-gassing;
- asbestos;
- mold spores and bacteria;
- *e-coli* in a well;
- unknown substance in sewage treatment plant requiring shutdown;
- trace amounts of benzene in beverages;
- salad dressing exposed to vaporized agricultural chemicals;
- ammonia release;
- spider infestation; and
- cereal oats treated with non-FDA approved pesticide.

Knutsen & Stempel, *supra* n.3 at 242–43.[21] Given this extensive case law, those select policyholders who purchased an "all-risks"

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[20] *See supra* n.1 & *infra* n.21 (listing cases between 1968–2016); *see also Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (motor vibration requiring shutdown, without apparent damage); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir. 1980) (loss of beans from chemical exposure); *Crisco v. Foremost Ins. Co. Grand Rapids, Michigan*, 505 F. Supp. 3d 993, 999 (N.D. Cal. 2020) (residences rendered unusable for lack of utility service constituted physical loss of property, despite no property alteration).

[21] *Citing Schlamm,* 2005 WL 600021 (noxious particles); *Essex*, 562 F.3d 399 ("locker room" smell); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799 (N.H. 2015) (cat urine odor); *Farmers Ins. Co. of Or. v. Trutanich,* 858 P.2d 1332 (Or. 1993) (meth lab odor); *Matzner*

policy intentionally omitting the "absolute" virus exclusion believed—reasonably—that a deadly virus on-site which rendered their property unsafe and unusable would constitute covered "physical loss" of property as well as causing "physical damage" to property.

III. CONCLUSION

California's canons of interpretation and longstanding precedent support the reasonable expectations of coverage for Another Planet for the loss and damage caused by SARS-CoV-2

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v. Seaco Ins. Co., 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (carbon monoxide poisoning); *Or. Shakespeare Festival*, 2016 WL 3267247, at *5 (ambient outdoor smoke); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (drywall off-gassing); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (asbestos); *Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643 (Del. 2008); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *8–10 (D. Or. June 18, 2002) (mold spores and bacteria); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F.App'x 823, 823 (3d Cir. 2005) (*e-coli* in a well); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600, 602 (Fla. Dist. Ct. App. 1995) (unknown substance in sewage treatment plant requiring shutdown); *National Union Fire Ins. Co. of Pittsburgh v. Terra Indus.,* 346 F.3d 1160 (8th Cir. 2003) (trace amounts of benzene in beverages); *Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979) (salad dressing exposed to vaporized agricultural chemicals); *Gregory Packaging, Inc. v. Travelers Prop. & Cas. Co. of Am.*, 2014 WL 6675934 at *5–6 (D.N.J. Nov. 25, 2014) (ammonia release); *Cook v. Allstate Ins. Co.*, 2007 Ind. Super. LEXIS 32, at *7–9 (Ind. Super. Ct. Nov. 30, 2007) (spider infestation); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (cereal oats treated with non-FDA approved pesticide).

at its properties. For these reasons, *Amicus* asks the Court to define "direct physical loss or damage" as including situations where a physical substance ***either*** (1) is present on or around covered property, rendering the property partially or wholly unusable, unsafe, or unfit for its intended purpose ("physical loss", ***or*** (2) alters the surfaces or air of covered property ("physical damage").

Dated: August 2, 2023

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that, according to theword-count feature in Microsoft Word, this *Amicus Curiae* Brief contains 7,156 words,including footnotes, but excluding the application and the content identified in rule 8.520(c)(3).

Dated: August 2, 2023

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 2, 2023, at San Diego, California.

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