No. 20-16858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUDPIE, INC.,

Plaintiff-Appellant,

v.

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-03213
Hon. Jon S. Tigar

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Mudpie, Inc. states that it has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

Date: January 7, 2021

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INTRODUCTION

In March 2020, state and local officials in California suspended, or severely curtailed, operations of non-essential businesses amid the COVID-19 pandemic. Appellant Mudpie, Inc., a children's store in San Francisco, has business interruption insurance with Appellee Travelers Casualty Insurance Company of America ("Travelers") that pays for lost business income and extra expenses caused by *all risks* of direct physical loss of property.

Mudpie reasonably anticipated business-income coverage when it suffered the physical loss of its store. After all, Mudpie was prohibited from using its insured property for the income-generating business purposes for which it was insured. The coverage clause, an undefined, disjunctive phrase — "direct physical loss of or damage to" — covers the deprivation or dispossession of a storefront resulting from a shutdown order ("direct physical loss of") without physical damage ("or damage to"). If not plainly correct, that is a *reasonable* reading of this phrase, which appears in business-income coverage that is intended to protect against the insured's inability to use its property to generate income. And because, under California law, an insurer (like Travelers) who controls the language

of a policy cannot escape liability when a reasonable interpretation of coverage exists, Mudpie's reasonable interpretation wins the day.

But Travelers denied coverage anyway. Its theory is that "direct physical loss of" has the exact same meaning as "or damage to," and because the shutdown orders did not physically damage Mudpie's store, no direct physical loss occurred and thus no coverage is available.

The district court correctly disagreed with Travelers and found that "direct physical loss of or damage to" does not require physical alteration or physical change to property. 2-ER-15 ¶ A. But the district court erred by interpreting the policy to provide coverage only for "loss or damage" that is "permanent" or the result of an "intervening physical force." 1-ER-9-12. The policy does not expressly include those qualifiers, and a policyholder would not reasonably believe them to be required for "loss or damage" to occur. The district court thus had no basis in the policy or principles of insurance policy interpretation to engraft such limitations on coverage.

The district court believed that coronavirus found on store property that curtails business operations may qualify as a loss, but a public health order that curtails business operations in the same way, to prevent the spread of coronavirus, does not. 1-ER-13. But that distinction is found

nowhere in an all-risk policy and is inconsistent with existing law, not to mention common sense. Just as courts (including in California) recognize that "direct physical loss" covers a home that can no longer safely be a home because of a lurking risk outside (think a home perched on a cliff after a landslide that leaves the home unscathed), so too does "direct physical loss" describe a business that can't function as a business because an order legally prohibits it from physically opening its doors to customers to protect them from a serious public health threat.

Because this dispute presents a novel issue of state law calling for the exercise of judgment by the state's highest court, this Court should certify the issue to the California Supreme Court. If the Court decides to resolve the threshold legal question without certifying the issue to the California Supreme Court, it should reverse the district court's order granting dismissal and remand for further proceedings.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this putative class action under 28 U.S.C. § 1332(d)(2). 2-ER-21 ¶ 13. It dismissed all claims in this case, 1-ER-12-14, and the Clerk's Judgment dismissed the case with prejudice, 1-ER-2. Mudpie timely filed its appeal the same day the Clerk's

Judgment was issued, on September 23, 2020. Fed. R. App. P. 4(a)(1)(A); 2-ER-292. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Could business interruption insurance for all risks of "direct physical loss of or damage to" covered property be reasonably construed to insure against the loss of business property to generate income as a direct result of state and local orders suspending, or severely curtailing, operations of non-essential businesses amid the COVID-19 pandemic?

2. Should this Court certify the aforementioned question of state law to the California Supreme Court?

STATEMENT OF THE CASE

The Travelers' Insurance Policy

Mudpie is a children's store that sells clothing, toys, books, and other goods in San Francisco's historic Fillmore District. 2-ER-23 ¶ 26. Mudpie purchased "deluxe" comprehensive commercial liability and property insurance from Travelers that covers all risks unless specifically excluded. 2-ER-24 ¶ 30, 2-ER-114, 2-ER-117-18 ¶ 4. It has paid all premiums, totaling several thousand dollars, in exchange for protection from unexpected business losses. 2-ER-24 ¶ 31.

The policy's property coverage provision states: "We will pay for direct physical loss of or damage to Covered Property at the premises . . . caused by or resulting from a Covered Cause of Loss." 2-ER-115 ¶ A. "Covered Causes of Loss," in turn, are defined as "RISKS OF DIRECT PHYSICAL LOSS" that are not expressly limited or excluded elsewhere in the policy. 2-ER-117-18 ¶ 4. Although none of the relevant terms are expressly defined, including "direct," "physical," "loss," and "damage," the term "property damage" in the policy's commercial general liability section expressly encompasses both "all resulting loss of use" and "[l]oss of use of tangible property that is not physically injured." 2-ER-186 ¶ 17.

Coverage under the insurance policy includes both lost Business Income and Extra Expense incurred during a defined "period of restoration" following a suspension, or "partial or complete cessation," of business activities. 2-ER-151-52 ¶ 19, 2-ER-153 ¶ 28.a. Specifically, Travelers states it will pay for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" 2-ER-116 ¶ 3.a(2). Extra Expense includes the "reasonable and necessary expenses you incur during the 'period of restoration'" that a

business would not have incurred without loss of or damage to its property. 2-ER-117 ¶ b(1).

The policy also provides an additional three weeks of Business Income and Extra Expense coverage when an "action of civil authority . . . prohibits access to the described premises." 2-ER-129 ¶ g. This action must be "due to direct physical loss of or damage to" other nearby property. *Id.*

The COVID-19 Pandemic and Shut-Down Orders

Reports of COVID-19 began to emanate from China in January 2020. 2-ER-22 ¶ 17. By the time it was labeled a global health pandemic two months later, in March, public health officials realized that ballooning person-to-person transmission could be slowed by large-scale social distancing. *Id.* ¶¶ 17-20. Further, health officials concluded that densely occupied indoor spaces, including retail shops like Mudpie, could become hot spots for transmission. 2-ER-23 ¶ 23. Finally, health officials realized that absent government intervention and the imposition of stringent measures, public infrastructure – including hospitals and health care systems and other essential service providers – would be overwhelmed and could potentially collapse. 2-ER 22-23 ¶¶ 20-23.

On March 12, 2020, California Governor Gavin Newsom issued an Executive Order that "[a]ll residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19." *Id.* ¶ 24; 2-ER-41 ¶ 1. One week later, Governor Newsom ordered "all individuals living in the State of California to stay home or at their place of residence," except for specified "critical" sectors. 2-ER-23 ¶ 25, 2-ER-37. Similarly, an order promulgated a few days earlier by the City and County of San Francisco required retailers to cease in-person services. 2-ER-23 ¶ 25; Order of The Health Officer No. C19-07 (Mar. 16, 2020), https://tinyurl.com/y8zeguzo.[1] Violation constituted a misdemeanor, punishable by fine, imprisonment, or both. Order No. C19-07.

Mudpie has complied with these and all other applicable orders issued by California state and local authorities. 2-ER-23 ¶ 27. As a direct result, Mudpie's business operations have been interrupted: Mudpie has suffered direct physical loss of its insured property because it has been unable to use its physical property as a functioning store. *Id.*

[1] The Court may take judicial notice of this order. *See King v. County of Los Angeles*, 885 F.3d 548, 555 (9th Cir. 2018).

Mudpie reported to Travelers its business loss on or about April 27, 2020. 2-ER-24 ¶ 32. Travelers denied Mudpie's claim for coverage under its policy, arguing that since the business interruption was "the result of the Governmental Order, [there was no] 'direct physical loss [of] or damage to property at the described premises.'" *Id.* ¶ 33. At the same time, Travelers stated that Mudpie was not entitled to civil authority coverage because "the Governmental Order that affected your business was not issued due to 'direct physical loss of or damage to property.'" *Id.*

The District Court Litigation

Following Travelers' rejection of coverage, Mudpie filed its class action complaint, in the Northern District of California, for (1) declaratory relief, (2) breach of contract, and (3) bad faith failure to investigate Mudpie's claims before denying coverage. 2-ER-30-33. Travelers moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the grounds that Mudpie did not satisfy the prerequisites for Business Income and Extra Expense coverage, or for supplemental Civil Authority coverage under its policy. 2-ER-288 at 11. It also argued that coverage was precluded by a so-called virus exclusion. *Id.* Mudpie responded that Business Income and Extra Expense coverage was available to it, but it was not seeking

supplemental Civil Authority coverage. 2-ER-289 at 26. On reply, Travelers argued for the first time that Mudpie was also not covered because of an Acts and Decisions exclusion, an Ordinance or Law exclusion, and a Loss of Use exclusion. 2-ER-289 at 20, 2-ER-291 at 38. The district court found that Travelers had failed to preserve such exclusions but then allowed Mudpie to file a sur-reply addressing only the Acts and Decisions exclusion. 2-ER-291 at 38, 43.

Without holding a hearing, the court entered an order dismissing Mudpie's complaint in its entirety. 1-ER-15-17. Addressing first Business Income and Extra Expense coverage, the court rejected Travelers' interpretation of the governing coverage clause ("direct physical loss of or damage to"), holding that it does not require physical alteration or physical change. 1-ER-9. Even still, the court held that Mudpie was not entitled to coverage because its property deprivation was not permanent or the result of an intervening physical force. 1-ER-9-14. The court's ruling also rested in part on the Loss of Use exclusion previously deemed waived by the court. 1-ER-13-14, 2-ER-291 at 38. Next, the court concluded that Mudpie was not entitled to any supplemental Civil Authority coverage because the

triggering civil action was preventative rather than in response to prior property damage. 1-ER-14-15.

Following the court's order, Mudpie informed the court that it would not be amending its Complaint. 1-ER-3. The court dismissed the case with prejudice, *id.*, and the Clerk entered judgment, 1-ER-2. This timely appeal followed. Dkt. 1.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

SUMMARY OF ARGUMENT

Under California insurance principles, which govern here, insurance contracts are read to effectuate broad coverage and narrow exclusions for insureds. The question is what a layperson would reasonably understand the language of a contract to mean. A court should not select the "correct" interpretation of ambiguous contract language drafted by an insurer.

Rather, a court should find coverage if any reasonable interpretation of the insurance policy would allow it.

Applying these principles, this Court should find that Mudpie's "all risk" policy covers business losses arising from Mudpie's inability to use its storefront to generate income as a direct result of government shutdown orders. The coverage clause ("direct physical loss of or damage to Covered Property"), read in its ordinary sense, reasonably (if not plainly) encompasses the "direct physical loss" here: the deprivation (loss) of a storefront (physical) resulting from a shutdown order (direct) without physical damage ("of or").

The district court correctly disagreed with Travelers and found that "direct physical loss of or damage to" does not require physical alteration or physical change to property. But the district court erred in construing Mudpie's policy to require that "physical loss" be "permanent" or the result of an "intervening physical force." That interpretation failed to properly apply the plain terms of the policy and flouted established principles for interpreting insurance policies according to what a reasonable policyholder would understand the policy to mean. The district

court's interpretation thus failed to recognize that coverage may reasonably be expected under these circumstances. Other aspects of the policy do not alter that conclusion.

This dispute presents a novel issue of state law calling for the exercise of judgment by the state's highest court. This Court, then, should ask the California Supreme Court to resolve it. If the Court reaches the merits, however, it should reverse and remand for further proceedings.

ARGUMENT

The district court committed reversible error in its interpretation of Mudpie's policy because it allowed Travelers to escape liability even though a reasonable interpretation of coverage exists. The court's parsing of the policy failed to account for how a reasonable layperson would read it. As such, the court rescued the insurer from the consequences of the broad language it chose and defeated the reasonable expectation of the insured.

Under governing principles of insurance interpretation, the policyholder's reasonable interpretation controls. Travelers must overcome a presumption of coverage by proving that no reasonable reading of the

policy affords coverage. Because Travelers cannot carry that heavy burden, this Court should reverse.

I. Under California law, the policyholder's reasonable interpretation of the insurance contract is the controlling interpretation.

It is undisputed that California law governs the interpretation of Mudpie's policy. 1-ER-7 n.2. Under California law, interpretation of an insurance policy, like any contract, is a question of law governed by "the mutual intention of the parties at the time the contract is formed." *AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 821 (1990) (citing Cal. Civ. Code § 1636). The parties' intent is gleaned, if possible, solely from the contract's written provisions. *Id.* at 822 (citing Cal. Civ. Code § 1638). "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' . . . , controls judicial interpretation." *Id.* (citing Cal. Civ. Code §§ 1638, 1644).

An insurance policy, then, must be read as a layperson would read it — not as an attorney or insurance expert might analyze it. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 471 (2004); *see also Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 807 (1982) ("Words used in an insurance policy are

to be interpreted according to the plain meaning which a layman would ordinarily attach to them."). If, but only if, contract language read as a whole and in context is unambiguous to a layperson, courts apply that meaning. *AIU Ins. Co.*, 51 Cal. 3d at 822.

When language in a policy is ambiguous because "it is capable of two or more constructions, both of which are reasonable," *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993) (emphasis omitted), a court should not "select one 'correct' interpretation from the variety of suggested readings," *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 202 (1973). "[U]nder settled principles[,] so long as coverage is available under *any reasonable interpretation* of an ambiguous clause, the insurer cannot escape liability." *Id.* at 197 (emphasis added).

Courts typically resolve policy ambiguities in favor of finding coverage because insurance contracts are usually written by the insurer, with no meaningful opportunity for an insured to bargain for modifications. *AIU Ins. Co.*, 51 Cal. 3d at 822. "This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, the objectively reasonable expectations of

the insured." *E.M.M.I. Inc.*, 32 Cal. 4th at 470 (internal quotation marks and citation omitted).

For these same reasons, insurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] exclusionary clauses are interpreted narrowly against the insurer." *White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 881 (1985). Thus, any exception to coverage must be "*conspicuous, plain and clear*" — a rule that "applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (citations omitted) (emphasis in original).

In the context of an "all-risk" insurance policy — one that covers everything unless specifically excluded — "the insured does not have to prove that the peril proximately causing his loss was covered by the policy." *Strubble v. United Servs. Auto. Ass'n*, 35 Cal. App. 3d 498, 504 (Ct. App. 1973) ("all-risk" homeowner policy). Rather, there is a "presumption of coverage." *Travelers Cas. & Sur. Co. v. Super. Ct.*, 63 Cal. App. 4th 1440, 1454 (Ct. App. 1998). Thus, the insurer, "since it is denying liability upon the 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." *Strubble*, 35 Cal. App. 3d at 504; *see Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1190 (1998) (*Strubble*'s "holding applied *only* to all-risks insurance policies").

II. Mudpie's "all risk" business interruption coverage insures against Mudpie's inability to use its property to generate income as a direct result of government shutdown orders.

Applying the foregoing principles of insurance policy interpretation in the context of the complaint's allegations, this Court should hold that Mudpie's all-risk commercial insurance policy, which includes deluxe coverage for business-income losses and extra expenses, covers business losses arising from Mudpie's inability to use its storefront to generate income as a direct result of government shutdown orders. *See* 2-ER-23 ¶ 27.

Under the policy, Travelers agreed to "pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." 2-ER-115 ¶ A. "Covered Cause of Loss" is, in turn, defined as follows:

> 4. Covered Cause of Loss
>
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> a. Limited in Paragraph A.5, Limitations; or

b. Excluded in Paragraph B, Exclusions.

2-ER-117-18. Courts have characterized this language as designating an "all risk insurance policy," *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wash. App. 368, 370 (Ct. App. 1995), in which all risks are covered unless a limitation or exclusion applies, *see, e.g.*, *Strubble*, 35 Cal. App. 3d at 504; *Gerawan Farming Partners, Inc. v. Westchester Surplus Lines Ins. Co.*, No. CIVF 05-1186 AWI DLB, 2008 WL 80711, at *13 (E.D. Cal. Jan. 4, 2008); *Victory Peach Grp., Inc. v. Greater New York Mut. Ins. Co.*, 310 N.J. Super. 82, 87 (App. Div. 1998). Because no limitation or exclusion applies to Mudpie's losses, coverage hinges on "direct physical loss of or damage to Covered Property." 2-ER-115 ¶ A. Thus, the policy provides coverage for scenarios that are not described in the policy as long as those scenarios are not expressly excluded in the policy.

The policy defines Covered Property to include Mudpie's storefront. 2-ER-106. But neither the remainder of the Covered Cause of Loss definition nor any words are defined or "enclosed in quotation marks" in this portion of the policy. *See E.M.M.I. Inc*, 32 Cal. 4th at 472. Thus, the policy does not indicate that this language "is to be construed in a

specialized or technical manner." *Id*. Consequently, this language must be understood as a layperson would understand it. *See id*.

"In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries." *Scott v. Cont'l Ins. Co.*, 44 Cal. App. 4th 24, 29 (Ct. App. 1996). Merriam-Webster's Dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship."[2] "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature."[3] "Loss" is "the act of losing possession" and "deprivation."[4] "Damage" is "loss or harm resulting from injury to person, property, or reputation."[5] And the ordinary use of the word "or" which separates "loss" from "damage" in the "Covered Cause of Loss" definition indicates that loss and damage have distinct meanings. *See E.M.M.I. Inc.*, 32 Cal. 4th at 473 (citing *Houge v. Ford*, 44 Cal. 2d 706, 712 (1955) ("In its ordinary sense,

[2] www.merriam-webster.com/dictionary/direct (last accessed Jan. 7, 2021).
[3] www.merriam-webster.com/dictionary/physical (last accessed Jan. 7, 2021).
[4] www.merriam-webster.com/dictionary/loss (last accessed Jan. 7, 2021).
[5] www.merriam-webster.com/dictionary/damage (last accessed Jan. 7, 2021).

the function of the word 'or' is to mark an alternative such as 'either this or that[.]'")).

Accordingly, the ordinary meaning of the phrase "direct physical loss" includes the deprivation (loss) of a storefront (physical) resulting from a shutdown order (direct) without physical damage ("of or"). Thus, a reasonable interpretation of Mudpie's policy is that it provides coverage for Business Income and Extra Expenses for Mudpie's loss of its storefront as mandated by government closure orders.

Context and precedent confirm what the plain text says. Direct physical loss is used in this circumstance as part of an agreement to pay for actual loss of business income, among other things. The essential purpose of such coverage is "to indemnify the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment.'" *Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal. App. 3d 270, 275 (Ct. App. 1970). Mudpie's reading of the policy achieves this purpose and closely conforms to what the actual text says.

Case law also supports Mudpie's reasonable reading of the coverage clause. Long ago, in *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239

(1962), disapproved on other grounds in *Sabella v. Wisler*, 59 Cal. 2d 21, 34 (1963), the California Court of Appeal concluded that a homeowner suffers physical loss when a home cannot function as intended. There, a home was left (literally) hanging off a cliff after a landslide. Though unscathed, the home could no longer safely function as a dwelling. Still, the insurer denied coverage, claiming the home had not been damaged. The court disagreed with the insurer, reasoning:

> Common sense requires that policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner. [The insured] correctly point out that a "dwelling" or "dwelling building" connotes a place fit for occupancy, a safe place in which to dwell or live. It goes without question that [the insured] "dwelling building" suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff. Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a "dwelling building" in the sense that rational persons would be content to reside there.

199 Cal. App. 2d at 248-49. As in *Hughes*, Mudpie's inability to use its business as a business is a direct physical loss. *See also Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 493 (1998) ("direct physical loss" exists when home is unusable even in the absence of structural damage).

Later, the California Court of Appeal concluded in an unpublished decision that "coverage for 'direct physical loss' by any cause other than those expressly excluded . . . is not limited to theft" but instead "encompasses physical displacement or loss of physical possession." *Universal Sav. Bank v. Bankers Standard Ins. Co.*, No. B159239, 2004 WL 3016644, at *6 (Cal. Ct. App. Dec. 30, 2004) (unpublished).[6] "That the loss must be 'physical' distinguishes the loss from some other, incorporeal loss." *Id.* "The ordinary meaning of 'direct physical loss,'" the court continued, "is not the same as that of 'direct physical damage,' and the use of the terms 'loss' and 'damage' in the context of the insuring clause does not suggest that the terms are synonymous." *Id.*

Along the same lines, but more recently, a court within the Central District of California, applying California law, concluded that the phrase "direct physical loss of" includes, among other potential constructions, "physical dispossession in the absence of physical damage." *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB

[6] This Court "can consider unpublished California Court of Appeal decisions in determining California law." *Attebury Grain LLC v. Cortez*, 794 F. App'x 674, 675 (9th Cir. 2020) (citing *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008 n.2 (9th Cir. 2012)).

(KSX), 2018 WL 3829767, at *4 & n.4 (C.D. Cal. July 11, 2018) (distinguishing *MRI Healthcare Ctr. of Glendale v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010), which interpreted the phrase "direct physical loss to"). In addition, the court reasoned, the "or" in the phrase "direct physical loss of or damage to" means that "loss of" need not encompass physical damage; to require "loss" to include "physical damage" "would render meaningless the 'or damage to' portion of the same clause." *Total Intermodal*, 2018 WL 3829767, at *3.

To date, no federal appellate court has addressed the availability of all-risk business insurance for closures due to pandemic-related public health orders. For tens of thousands of businesses, the outcome could make the difference between continued operation and bankruptcy. Many courts, particularly in response to an early wave of lawsuits, either deferred to the insurers' interpretations rather than credit the reasonable alternative interpretations put forth by policyholders; adopted overly technical readings of "direct physical loss"; or dismissed suits with little or no analysis. But more recently, state courts interpreting their own laws and one federal district court have demonstrated that "direct physical loss" reasonably encompasses government orders that prevent a business from

operating at its property for the income-generating purpose for which the property was insured. These decisions are persuasive and fully support Mudpie's reasonable interpretation.

For example, a North Carolina state court granted summary judgment to certain restaurants with all-risk business interruption coverage similar to Mudpie's, finding that the loss of use of their restaurant properties by operation of public health orders constituted "direct physical loss" under the plain meaning of that phrase. *N. State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020). "Applying [dictionary] definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *Id*. North Carolina's shutdown orders caused "precisely" such loss; the restaurants were legally and physically prohibited from "putting their property to use for the income-generating purposes for which the property was insured." *Id*. And such loss occurred within the plain meaning of the policy even though the shutdown orders did not physically damage (*i.e.*, structurally alter) the restaurant property. *Id*.

Likewise, a Washington state court granted partial summary judgment to a brewery with all-risk business interruption coverage like Mudpie's. *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, 2020 WL 7258116, at *2-3 (Wash. Super. Nov. 23, 2020). The court concluded that "an average lay person would understand" that "the interruption of [plaintiff's] business operations as a result of the [public health] proclamations was a direct physical loss of [plaintiff's] property because [plaintiff's] property could not physically be used for its intended purpose, *i.e.*, [plaintiff] suffered a loss of its property because it was deprived from using it." *Id*. at *3. And the court concluded, "the undefined phrases 'loss of[']and 'damage to' have popular meanings distinct from one another," so interpreting both to require damage would render one or the other superfluous. *Id*. (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012), which held "physical loss means something other than damage" when both are included in the grant of coverage).

Lastly, a federal district court in Virginia denied in part a motion to dismiss a putative class action for declaratory relief and breach of contract, brought by a spa with all-risk business interruption coverage that had

suffered losses due to Virginia's pandemic-related closure orders. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). After surveying decisions from other courts, the court in *Elegant Massage* concluded that a reasonable interpretation of "direct physical loss" accepted by some courts is that "the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources." *Id*. at *10. Thus, even though the spa "was not structurally damaged," it "plausibl[y] . . . experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." *Id*.

For all these reasons, the phrase "direct physical loss," used in the context of business-income coverage that protects against the insured's inability to use its property to generate income, reasonably (even if not unambiguously) covers a government order that prohibits Mudpie from putting its property to use for the income-generating purpose for which the property was insured.

III. The district court's contrary interpretation is not the only reasonable interpretation of coverage — and indeed, is not reasonable at all.

The district court correctly concluded that "direct physical loss of or damage to" does not require physical alteration or physical change to property. 1-ER-8-9. The district court then erred when it added limitations on coverage that are not supported, let alone compelled, by the policy. *See* 1-ER-9-14. In the end, the court's parsing of the policy fails to show that no reasonable reading of it would provide coverage for Mudpie's business-income losses. *See Reserve Ins.*, 30 Cal. 3d at 807-08 ("[I]f semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates" (citations omitted)).

A. The policy does not cover only permanent losses.

The district court found that "direct physical loss of or damage to property" "does not require a 'physical alteration of the property' or 'a *physical change* in the condition of the property,'" but that it does require "permanent dispossession." 1-ER-9 (emphasis in original). That was error.

To begin, the policy does not explicitly require "permanent" dispossession or deprivation. And dictionaries do not define "loss" only as permanent dispossession or deprivation.

What's more, policy interpretation principles do not support requiring that physical loss be "permanent." An insurance policy must be construed as a reasonable layperson would understand it. *E.M.M.I. Inc.*, 32 Cal. 4th at 471. No reasonable layperson, however, would think that a "loss" *must* be "permanent" to qualify for coverage. The district court's contrary conclusion, moreover, fails to interpret coverage "broadly so as to afford the greatest possible protection to the insured[.]" *White*, 40 Cal. 3d at 881.

Case law also doesn't support the district court's reading of the policy as requiring "permanent" dispossession. *See* 1-ER-9. Quite the opposite, courts recognize that loss can be temporary. *See, e.g.*, *Murray*, 203 W. Va. at 493 ("direct physical loss" existed when impending rockfall rendered property unusable "until" the rocks were "stabilized").

In concluding otherwise, the district court relied only on the fact that the lost cargo in *Total Intermodal* appeared to be permanently lost. 1-ER-9 (citing *Total Intermodal*, 2018 WL 3829767, at *4). But *Total Intermodal* does

not articulate a rule requiring permanent dispossession or deprivation to establish any measure of loss, *see Total Intermodal*, 2018 WL 3829767, at *4 n.4, nor does it cite to any California state court case in support of that proposition, *id.* at *4.[7] Nor do other California cases construing the meaning of "physical loss or damage" under "all risk" insurance policies support that position. *See supra* pp. 19-22.

Lastly, the policy provides coverage for "partial or complete cessation" of business activities, 2-ER-116 ¶ 3.a(b), 2-ER-153 ¶ 28.a, and further states that "[i]f you intend to continue your business, you must resume all or part of your 'operations' as quickly as possible," 2-ER-142

[7] The California authorities cited in *Total Intermodal* stand for different propositions. *See Palmer v. Truck Ins. Exchange*, 21 Cal. 4th 1109, 1116 (1999) (finding no coverage for judgment against insured under advertising liability provision); *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (Ct. App. 2003) (holding that loss of intangible database and consequent economic loss is not a "direct physical loss of or damage to"); Cal. Civ. Code § 1641 (stating that contracts are to be read as a whole); *Lyons v. Fire Ins. Exch.*, 161 Cal. App. 4th 880, 886-87 (Ct. App. 2008) (finding no duty to defend false imprisonment lawsuit under homeowner policy coverage for "bodily injury, property damage or personal injury resulting from an occurrence"); *MRI Healthcare Ctr. of Glendale*, 187 Cal. App. 4th at 782 (holding that an MRI machine's failure to ramp up is not an "'accidental direct physical loss' to property within the coverage of the policy").

¶ a(10). Accordingly, the policy itself shows that temporary dispossession or deprivation triggers coverage.

B. The policy does not require an intervening physical force.

The district court also ruled that "loss of functionality of, or access to, a property . . . constitutes a direct physical loss of property" if there is "an intervening physical force which 'made the premises uninhabitable or entirely unusable.'" 1-ER-7. But "intervening physical force" is not language found in the policy, and courts should read coverage clauses broadly, not narrowly. It is also difficult to imagine that a reasonable layperson would discern this limitation in the policy.

Further, no California court, to our knowledge, has ever *required* an "intervening physical force," and even if that were a reasonable interpretation of Mudpie's policy, it is not the only reasonable interpretation. Indeed, the more reasonable interpretation is that direct physical loss of property means the deprivation or dispossession of physical (tangible) property.

In its discussion, the district court cited only one California state court case for the proposition that an intervening physical force is required, and it did so only to rebut an interpretation of a Colorado decision. 1-ER-

11-12 (citing *Ward Gen. Ins. Servs., Inc.*, 114 Cal. App. 4th at 558). But *Ward* concerned intangible business personal property: the loss of electronic data following a computer crash. *Id*. at 556. The loss of a computer database does not qualify as "direct physical loss," the court reasoned, because information on a database does not have "material existence, formed out of tangible matter, and [] perceptible to the sense of touch" — unlike, say, the computer that holds the data. *Id*. ("Plaintiff did not lose the tangible material of the storage medium. Rather, plaintiff lost the stored information.").

That scenario is far afield from the circumstances of this case. The government orders mandated the closure of tangible business property (a storefront) because a tangible substance (coronavirus) is plaguing the world. There is nothing intangible about the property loss here.[8]

[8] *Studio 417, Inc. v. Cincinnati Insurance Co.*, No. 20-CV-03127-SRB, — F. Supp. 3d —, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), is weak support for the district court's theory that COVID-19 can cause physical loss but a closure order cannot. *Compare* 1-ER-13 ("Based on the latter allegations [about the presence of a virus], the *Studio 417* court found that plaintiffs had plausibly alleged a covered loss[.]"), *with Studio 417*, 2020 WL 4692385, at *6 n.6 ("[A] physical loss has been adequately alleged insofar as the presence of COVID-19 *and* the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises." (emphasis added)).

In finding otherwise, the district court overread cases from other jurisdictions as requiring some sort of structural change in property. 1-ER-10-11 (citing, *e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39 (Colo. 1968)). But those cases (as well as others examined in *Elegant Massage*) support the conclusion that "direct physical loss" may exist even absent structural damage to property. 2020 WL 7249624, at *8-9 (collecting cases, including *Gregory Packaging*, 2014 WL 6675934, and *W. Fire Ins. Co.*, 437 P.2d 52).

Consider also *U.S. Airways, Inc. v. Commonwealth Insurance Co.*, 64 Va. Cir. 408, 2004 WL 1094684 (Va. Cir. Ct. May 14, 2004). After the federal government ordered Reagan National Airport closed for almost a month, U.S. Airways was entitled to coverage because "nothing in the Policy [] requires that . . . [there] be damage to U.S. Airways property." *Id.* at *5. Relying on *U.S. Airways*, the court in *Elegant Massage* observed,

> [I]t is plausible that [Plaintiffs] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar [to] those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall,

> which caused properties [to become] uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss."

2020 WL 7249624, at *10.

This interpretation of loss is not only reasonable. It is arguably compelled by the logic of *Hughes*, which explained that a landslide that left a house unscathed but "overhanging a 30-foot-cliff" was entitled to coverage because it was not "fit for occupancy, a safe place in which to dwell or live." *Hughes*, 199 Cal. App. 2d at 249. Just as courts have read "direct physical loss" to include circumstances where what was previously a home could not safely serve as a home, *see id.*; *see also Murray*, 203 W. Va. at 493, and an airline could not function as an airline, *US Airways*, 2004 WL 1094684, at *5, it is also reasonable to interpret the mandate that Mudpie's storefront could no longer safely operate as a storefront as a "direct physical loss" of property.

C. The district court misread other aspects of the policy to support its erroneous conclusion.

1. The policy's "period of restoration" language does not defeat Mudpie's reasonable expectation of coverage.

In finding no coverage for Mudpie's losses, the district court misread the Period of Restoration clause to require physical damage that can be

repaired, rebuilt, or replaced. *See* 1-ER-10. Contrary to the district court's understanding, the Period of Restoration clause, 2-ER-151 ¶ 19, addresses the amount of business-income losses by setting a cut-off date. *See Rogers v. Am. Ins. Co.*, 338 F.2d 240, 243 (8th Cir. 1964). The "amount of business interruption losses ow[ed] … is a 'scope-of-loss' issue as to the amount of damages ow[ed.]" *UrbCamCom/WSU I, LLC v. Lexington Ins. Co.*, No. 12-CV-15686, 2014 WL 1652201, at *5 (E.D. Mich. Apr. 23, 2014). "[It] is not a coverage issue for the court to decide." *Id.*; *see also Fresno Rock Taco, LLC v. Nat'l Sur. Ins. Corp.*, No. 1:11-CV-845-SKO, 2015 WL 135720, at *22 (E.D. Cal. Jan. 9, 2015) ("While the interpretation of policy language is a legal issue under California law, what constitutes a reasonable period to carry out the necessary repairs and resume business for purposes of the period of restoration is a question for the jury.").

In Mudpie's policy, business-income coverage is available "immediately" upon direct physical loss or damage. 2-ER-108, 2-ER-151 ¶ 19.a. Mudpie can continue to recover business income until the earlier of (i) "[t]he date when the property . . . should be repaired, rebuilt, or replaced with reasonable speed and similar quality"; or (ii) "[t]he date

when business is resumed at a new permanent location." 2-ER-151 ¶ 19.a(2).

The district court failed to mention the second cut-off, *see* 1-ER-10, but that cut-off reinforces that no physical damage need occur for coverage. Courts have defined resumption as "begin[ning] anew" following a "stoppage of operations." *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal. App. 4th 434, 445 (Ct. App. 2002) (citation omitted); *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 993 (D. Kan. 1995), *aff'd*, 89 F.3d 850 (10th Cir. 1996). Thus, the period of restoration is reasonably read to contemplate a cut-off date when a business becomes operational again following a stoppage. Put differently, the "controlling event" is "not the repair of the damaged object . . . but the restoration of normal operation to the business." *Gus Meat Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 91 C 0345, 1992 WL 107313, at *3 (N.D. Ill. May 14, 1992); *G&S Metal Consultants, Inc. v. Cont'l Cas. Co.*, 200 F. Supp. 3d 760, 771 (N.D. Ind. 2016) (period ends when the insured should have "resume[d] operations"). As such, an insurer's failure to provide coverage necessary to resume business operations may be taken into account when calculating a cut-off. *See Fresno Rock Taco*, 2015 WL 135720, at *2.

Accordingly, the policy's period of restoration does not defeat Mudpie's reasonable expectation of coverage.

2. The Loss of Use exclusion does not defeat coverage.

The district court invoked a Loss of Use exclusion to bolster its interpretation, 1-ER-13-14, even though it had told the parties that Travelers had waived the exclusion because it had only raised it in reply, 2-ER-291 at 38. This was procedural error: a court should not consider a new argument presented for the first time in reply without providing an opportunity to address it. *See Care First Surgical Ctr. V. ILWU-PMA Welfare Plan*, No. CV 14-01480, 2014 WL 6603761, at *10 n.45 (C.D. Cal. July 28, 2014) ("This is especially true where the new argument asserts that a claim should be dismissed on an entirely new basis not mentioned in the moving papers."); *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."); *Rothman v. Hosp. Serv. of S. Cal.*, 510 F.2d 956, 960 (9th Cir. 1975) (appellate courts ordinarily will not consider arguments that are not "properly raise[d]" in the trial court). Regardless, the exclusion does not mean what the district court thought it meant.

The exclusion says: "We will not pay for loss or damage caused by

or resulting from any of the following: Delay, loss of use or loss of market." 2-ER-138 ¶ 2.b. The exclusion applies to consequential losses not directly caused by the covered event. *See, e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016) ("The exclusion only makes sense in the context of the policy when a delay external to the damage causes a loss of use."), *vacated*, 2017 WL 1034203. Thus, the exclusion might apply to loss based on some other, uncovered cause. But it does not apply to direct losses — otherwise, business-income coverage, the very purpose of which is to cover business losses while the insured cannot use its property for its intended purpose, *see Pac. Coast Eng'g Co.*, 9 Cal. App. 3d at 275, would be illusory.

3. Inapplicable civil authority coverage does not underscore the district court's interpretation.

Lastly, the district court found that the unavailability of supplemental coverage for Civil Authority, which Mudpie explained it was not seeking, "underscores" its conclusion that the initial grant of coverage is not available. 1-ER-15. But an extension of coverage "does not *limit* coverage otherwise available." *See Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012) (emphasis in

original). Here, as in *Elegant Massage*, Mudpie has alleged a direct physical loss of *its* covered property. 2020 WL 7249624, at *10. The unavailability of *supplemental* coverage for a civil authority order triggered because of prior property loss or damage at *other* property is immaterial to that initial coverage determination. *See id*. at *10-11 (finding coverage for business-income losses stemming from preventative COVID-related closure orders but not supplemental coverage for civil authority).

* * *

In sum, Mudpie plausibly alleged that loss of business property to generate income as a direct result of government orders suspending, or severely curtailing, operations of non-essential businesses amid the COVID-19 pandemic is a direct physical loss within the meaning of Business Income and Extra Expense coverage. The district court's interpretation failed to recognize that coverage may reasonably exist under these circumstances.

Accordingly, the Court should reverse the district court and remand for further proceedings. *See Copelan v. Infinity Ins. Co.*, 728 F. App'x 724, 726 (9th Cir. June 6, 2018) (reversing dismissal of breach of contract and duty of good faith claims upon determination that alleged loss was covered).

IV. Certification to the California Supreme Court will expedite this and other cases by clarifying an uncertain area of law.

To facilitate the speedy resolution of this case, which tests an unresolved area of California law, the following question should be certified to the California Supreme Court:

> Could business interruption insurance for all risks of "direct physical loss of or damage to" covered property be reasonably construed to insure against the loss of business property to generate income as a direct result of state and local orders suspending, or severely curtailing, operations of non-essential businesses amid the COVID-19 pandemic?

Under California law, this Court may certify a question to the California Supreme Court if: "(1) The decision could determine the outcome of a matter pending in the requesting court; and (2) There is no controlling precedent." Cal. R. Ct. 8.548(a). A decision by the California Supreme Court on the question presented here would determine the outcome of this matter by resolving the central issue of this litigation: whether Plaintiff's losses are covered by its insurance policy. As this question has newly arisen during the pandemic, neither the California Supreme Court nor the California Courts of Appeal have issued any decision on it, resulting in a total absence of controlling precedent. The statutory requirements for certification are thus easily met.

This Court exercises discretion in certifying questions to state high courts, considering "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (*en banc*) (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003)). Each of these factors favors certification here: Certifying this question will resolve an important question of state insurance law affecting tens of thousands of policyholders; will help conclude dozens of ongoing state and federal lawsuits, reduce court caseloads; and will allow state courts to interpret an area of law uniquely reserved to the states. Rather than attempt to interpret an important question of state insurance law without the benefit of controlling precedent, this Court should seek the views of the California Supreme Court.

A. A decision by the California Supreme Court would determine the outcome of this matter.

Certification is warranted only if the California Supreme Court's decision "could determine the outcome of a matter pending in the

requesting court." Cal. R. Ct. 8.548(a)(1). The California Supreme Court's decision is outcome determinative if it would cause this Court to affirm the district court on the one hand or reverse and remand on the other. *See Grisham v. Philip Morris U.S.A.*, 403 F.3d 631, 638-39 (9th Cir. 2005); *see also Lawson v. PPG Architectural Finishes, Inc.*, 982 F.3d 752, 760 (9th Cir. 2020) (finding question outcome determinative where it would lead to reversal of grant of summary judgment).

Here, the district court granted dismissal because it found that Mudpie did not suffer a direct physical loss of property under the policy because its physical loss was neither "permanent" nor caused by an "intervening physical force." 1-ER-9-14. If the California Supreme Court agrees, this Court will affirm the lower court's decision. If the California Supreme Court disagrees, this Court will reverse and remand. The California Supreme Court's decision would be outcome determinative.

B. There is no controlling precedent on this question.

Certification requires that "[t]here is no controlling precedent" on the question. Cal. R. Ct. 8.548(a)(2). A lack of controlling precedent exists when there is no state case law at all on the question, *see Sierra Pac. Power Co.*, 665 F.3d at 1173-74, when the state high court has not ruled and intermediate

appellate courts are split, *id.* at 1171-72; *Patterson v. City of Yuba City*, 884 F.3d 838, 843 (9th Cir. 2018), or when state and federal courts have reached conflicting decisions, *Grisham*, 403 F.3d at 638. Certification may be warranted even if the high court has ruled on general or related questions, as long as the specific question at issue is unresolved. *BEJ Minerals*, 924 F.3d at 1073; *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1003 (9th Cir. 2008); *Kremen*, 325 F.3d at 1040.

In this case, the COVID-19 pandemic created this novel issue of insurance law that has not been addressed by either the California Supreme Court or any of the California Courts of Appeal. No other state high court has decided this issue either, providing an additional reason to defer to the California Supreme Court. *BEJ Minerals*, 924 F.3d at 1073 ("nor have other state courts to apply the test resolved this question").

Not only is there no controlling precedent as to the specific question at issue here, there is also no controlling precedent as to the principles on which the court below based its decision. The district court, relying on *Total Intermodal*, found that "direct physical loss of or damage to property" requires "permanent dispossession." 1-ER-9. But, again, *Total Intermodal* does not support a permanent-dispossession requirement, nor does the

California authority it cited, including *Ward* and *State Farm Fire & Casualty*, involve such facts or conclusions. *Supra* Part III.A. The district court also held that "loss of functionality of, or access to, a property . . . constitutes a direct physical loss of property" if there is "an intervening physical force which made the premises uninhabitable or entirely unusable." 1-ER-10-11. But, as discussed above, no California authority says that either.

C. Discretionary factors favor certification.

Though California requires only that certified questions could yield outcome determinative answers and lack controlling precedent, this Court considers a number of factors to determine whether, in its discretion, certification is appropriate: "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *BEJ Minerals*, 924 F.3d at 1072 (quoting *Kremen*, 325 F.3d at 1037-38). Each of these factors counsels in favor of certification.

1. The certified question presents important public policy ramifications.

Public policy ramifications include "legal, economic, and practical consequences" for similarly-situated parties. *See Mendoza v. Nordstrom, Inc.*, 778 F.3d 834, 841 (9th Cir. 2015). Such consequences are more pronounced when a large number of other parties will likely be affected. *See, e.g.*, *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1049 (9th Cir. 2019) (finding that more than 77,000 businesses could be affected).

Insurance questions often present important public policy ramifications. *See, e.g.*, *Phila. Indem. Ins. Co. v. Findley*, 395 F.3d 1046, 1049 (9th Cir. 2005). Insurance policies throughout the state often contain similar provisions, so a decision interpreting such a provision will have wide-ranging effects on both policyholders and insurers. *See Sierra Pac. Power Co.*, 665 F.3d at 1171; *see also Minkler v. Safeco Ins. Co.*, 561 F.3d 1033, 1035 (9th Cir. 2009).

In this case, profound legal, economic, and practical consequences will follow from the determination of whether the phrase "physical loss of or damage to" in business interruption insurance policies reasonably includes government-imposed shutdown orders issued amid COVID-19. Millions of businesses nationwide rely on business interruption insurance

to protect against unforeseen losses. *See* Jill M. Bisco, Stephen G. Fier, & David M. Pooser, *Business Interruption Insurance and COVID-19: Coverage and Issues and Public Policy Implications*, 39 J. Ins. Reg. No. 5, 1, 4-6 (2020), https://tinyurl.com/y67skzpw (last accessed Jan. 7, 2021). These policies are similar to each other, and the phrase "physical loss of or damage to" is standard language employed in "all risk" policies. *See* 10A Couch on Insurance § 148.50 (3d ed. Dec. 2020 update). Thus, a decision on the meaning of that phrase will determine whether tens of thousands of California policyholders are entitled to coverage. Moreover, the availability of insurance coverage is a question of existential importance to small businesses, many of which face permanent closure. *See* Margot Roosevelt, *Will California's Small Businesses Survive Another COVID-19 Surge Without More Help?*, L.A. Times (Nov. 24, 2020), https://tinyurl.com/y3mgegmr (last accessed Jan. 7, 2021). The answer to the certified question could determine the vitality of small businesses across the state.

2. The issue at hand is new, substantial, and of broad application.

The issue raised by the certified question is clearly new, having arisen from the novel circumstances created by the COVID-19 pandemic.

As just explained, the issue is also substantial for a large number of businesses whose futures may depend on its resolution. Finally, the issue raised by the certified question is of broad application and likely to recur; many businesses rely on business interruption insurance policies with policy language very similar to that at issue here, and a ruling by the California Supreme Court interpreting that language in these circumstances will resolve ongoing insurance coverage disputes for these businesses.

3. Certifying this question will reduce state court caseloads.

Certification is the most effective way to increase judicial efficiency in both state and federal courts. Certification will, of course, add one case to the California Supreme Court's docket, though that court may always decline to certify the case if it determines that its caseload is already too burdensome. Cal. R. Ct. 8.548(f)(1); *Kremen*, 325 F.3d at 1038. At the same time, certification will resolve scores of pending cases. So far, 60 insurance coverage cases related to the COVID-19 pandemic have been filed in California state courts, and an additional 118 such cases have been filed in

federal court in California.[9] Untold numbers of policyholders and insurers will likely file similar lawsuits in the future. Without guidance from the California Supreme Court, "district courts spend substantial judicial resources addressing this issue." *Robinson v. Lewis*, 795 F.3d 926, 931 (9th Cir. 2015). Additionally, a ruling by this Court could create conflicting law in federal and state courts on the same issue. *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013). Instead of exhausting the resources of lower courts and enabling conflicting adjudications, certification would resolve this and many other pending cases in one stroke.

4. Comity and federalism favor certification.

Concerns for comity and federalism demand that this Court permit the California Supreme Court to decide this important issue of state law. "Certification 'strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to rule on an undecided or unclear issue[,] . . . reinforces the federal judiciary's acknowledgment of state sovereignty[,] and fosters values of federalism

[9] Penn Law Covid Coverage Litigation Tracker, *About the Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/about/ (last accessed Jan. 7, 2020); Penn Law Covid Coverage Litigation Tracker, *CCLT Case List*, https://cclt.law.upenn.edu/cclt-case-list/ (last accessed Jan. 7, 2020).

and comity in a way beneficial to state interests.'" *Kremen*, 325 F.3d at 1037 n.1 (quoting Jerome I. Braun, *A Certification Rule for California*, 36 Santa Clara L. Rev. 935, 940 (1996)). Where the state law issue would have significant effects on California businesses, the interests of comity and federalism are even stronger. *See Vazquez*, 939 F.3d at 1049.

Comity and federalism concerns are especially strong in this case, not only because of the importance of the issue to tens of thousands of California businesses, but also because of insurance law's unique position in federal-state relations. "Insurance regulation is a field traditionally occupied by the states . . . ." *Cal. Ins. Guar. Assoc. v. Azar*, 940 F.3d 1061, 1064 (9th Cir. 2019); *see also Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1058 (9th Cir. 2018) ("[I]nsurance is traditionally an area of state regulation . . . ."). Recognizing that fact, Congress has specifically preserved insurance as an area of state law. 15 U.S.C. § 1011. Federal district courts have recently declined jurisdiction under the Declaratory Judgment Act, acknowledging "the novelty of the state law issue of insurance coverage for losses resulting from the COVID-19 pandemic," and concluding that "state courts are clearly better equipped to settle the uncertainty of obligation, and it is in the public's interest for them to do

so." *Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, — F. Supp. 3d —, 2020 WL 4735498, at *5 (E.D. Pa. Aug. 14, 2020); *see also Mattdogg, Inc. v. Phila. Indem. Ins. Co.*, No. 20-6889, 2020 WL 6111038, at *5 (D.N.J. Oct. 16, 2020) ("[T]he unique nature of the COVID-19 pandemic and its resulting legal issues are best for the New Jersey state courts to resolve, as the resolution of these issues involve significant questions of public policy."). While Mudpie does not suggest that this Court lacks jurisdiction, *see Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 844 n.3 (9th Cir. 2017), the traditional reservation of insurance law to the states enhances concerns for comity and federalism in favor of certification.

CONCLUSION

For the reasons set forth above, certification to the California Supreme Court should be granted. Alternatively, the district court's grant of dismissal should be reversed, and the case should be remanded for further proceedings.

Date: January 7, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s): **20-16858**

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[x] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Marks Engine Company No. 28 v. Travelers Property Casualty Co., No. 20-56031, appears to be an appeal concerning business interruption insurance coverage for losses relating to the COVID-19 pandemic.

Signature /s/ Andre M. Mura **Date** January 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): **20-16858**

I am the attorney or self-represented party.

This brief contains 9,692 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Andre M. Mura **Date** January 7, 2020

ADDENDUM

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ADDENDUM

Cal. Civ. Code § 1636:
A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Cal. Civ. Code § 1638:
The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Cal. Civ. Code § 1641:
The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

Cal. Civ. Code § 1644:
The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Cal. R. Ct. 8.548(a):
On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:
(1) The decision could determine the outcome of a matter pending in the requesting court; and
(2) There is no controlling precedent.

Cal. R. Ct. 8.548(f):
In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate.

15 U.S.C. § 1011:
Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

28 U.S.C. § 1291:
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(d)(2):
The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
(A)any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B)any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
(C)any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Fed. R. App. P. 4(a)(1)(A):
In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.