No. 20-56031

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK'S ENGINE CO. NO. 28 RESTAURANT,

Plaintiff-Appellant,

v.

TRAVELERS INDEMNITY CO. OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of California, No. 2:20-cv-04423-AB-SK
The Honorable André Birotte

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certifies that it is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

Respectfully submitted this 14th day of May, 2021.

/s/ Jeffrey R. White

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John R. Brown, *Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1977) 19

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Oberlo, *How Many Small Businesses Are There in the U.S. in 2020*, https://www.oberlo.com/statistics /number-of-small-business-in-the-us 20

Anne Srader and Lance Lambert, *Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business*, Fortune (Sept. 28, 2020) 21

AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including business interruption coverage cases. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.[1]

This case is of acute interest to AAJ and its members. Many AAJ members represent plaintiffs in business interruption cases arising from the COVID-19 pandemic, including in California. AAJ is concerned that without certification to the California Supreme Court, California will not be given the opportunity to weigh in on an important matter of state law. And, the California court's answer to the proposed question could determine the outcome of this matter, which will have a

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

major impact on many small businesses throughout California that have been severely harmed as a result of the pandemic.

SUMMARY OF ARGUMENT

1. AAJ urges this Court to certify to the Supreme Court of California the question of whether governmental orders restricting operations of non-essential businesses can result in "direct physical loss of . . . property" covered by business interruption insurance. The term is ambiguous, and Plaintiff's interpretation—that the term encompasses loss of the use of the insured premises due to government-ordered shut-down—is reasonable. This interpretation of the same policy language has been adopted by many courts around the country.

The district court below did not attempt an *Erie* determination of how the California Supreme Court would construe the policy terms as a matter of state law. The court declined to apply the presumption under California law that ambiguous policy provisions must be construed in favor of coverage of the insured. In addition, the court relied on decisions of California's intermediate court of appeal that involved different policy language and different factual situations. Consequently, the district court failed to arrive at a reliable prediction of whether the California Supreme Court would require a showing of physical alteration of Plaintiff's insured property as an essential condition for coverage of loss due to "direct physical loss of" the property.

2. Amicus therefore proposes that this Court certify a question to the California Supreme Court as to whether business interruption insurance covering "direct physical loss of or damage to" covered property can be reasonably construed to include the loss of use of business property as a direct result of state and local orders curtailing the operations of non-essential businesses amid the COVID-19 pandemic. Plaintiff in another appeal to this Court from the Northern District of California has urged this Court to certify the identical question.

The proposed certified question meets the California Rules of Court requirements. The California court's answer to the proposed question could determine the outcome of this pending matter, and there is no controlling California Supreme Court precedent. Previously, this Court has certified questions that meet these conditions.

3. The factors this Court has identified as guiding the exercise of its discretion to certify questions to state courts also support certification in this case. First, the question involves important public policy considerations. Small businesses, many of whom have purchased business interruption insurance to protect against unexpected business losses, face the possibility that a temporary shut-down will become permanent. The impact will affect not only small business owners and their employees, but will also slow the recovery of California's economy generally.

Second, the interpretation of the policy terms involved here will have very broad impact. Millions of California small businesses have purchased the type of commercial coverage that Plaintiff bought, and many of those policies provide coverage for "direct physical losses" of the insured property.

Third, although the California Supreme Court's caseload is substantial, its authoritative interpretation of the policy terms involved here will assure a consistent and efficient resolution of the many claims that may be expected as a consequence of the current pandemic.

Finally, certification of the proposed question will advance healthy federalism. Failure to harmonize federal and state court decisions raises the danger that forum shopping by insurers will deprive the California Supreme Court of the opportunity to pass on an important matter of state law affecting numerous California residents and businesses.

ARGUMENT

Amicus curiae American Association for Justice addresses this Court to urge the Court to certify the following question to the Supreme Court of California:

> 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?

Appellant in *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, No. 20-16858 has also asked this Court to certify this question to the Supreme Court of California.[2]

I. THE DISTRICT COURT DECIDED THE DISPOSITIVE ISSUE IN THIS CASE WITHOUT APPROPRIATE REGARD FOR CALIFORNIA LAW GOVERNING THE CONSTRUCTION OF INSURANCE CONTRACTS AND WITHOUT RELIABLY ASCERTAINING HOW THE STATE COURT WOULD CONSTRUE THIS CONTRACT.

A. "Direct Physical Loss" Is, at Minimum, an Ambiguous Term in the Insurance Policy in this Case.

Early last year, in an effort to "flatten the curve" and slow the spread of the coronavirus, California's governor and state and local health officials issued shut-down and stay-at-home orders that forced non-essential businesses to suspend much of their business activity. As a result, Plaintiff-Appellant Mark's Engine Company, which owns and operates a restaurant in downtown Los Angeles, was required to drastically curtail its business and completely shut down its dine-in restaurant operation. *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *1 (C.D. Cal. Oct. 2, 2020) ["*Mark's Engine*"].

Mark's Engine, like many small businesses in California, had purchased and paid premiums on an all-risk commercial insurance policy issued by Travelers,

[2] A federal court can certify questions to the appropriate state supreme court on its own motion. *E.g.*, *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984).

covering business income losses. *Mark's Engine*, 2020 WL 5938689, at *1. In exchange for the premiums paid by Mark's Engine, Travelers covenanted to "pay for the actual loss of Business Income . . . caused by *direct physical loss* of or damage to property at the described premises." *Mark's Engine*, 2020 WL 5938689, at *2 (emphasis added) (internal quotation marks and citation omitted). Mark's Engine filed this action seeking a declaration that the policy covers the losses it sustained when its restaurant could no longer perform its core function—generating business income through dine-in service—because of governmental orders.

As the district court indicated, the meaning of the term "direct physical loss" is critical to the application of both the Civil Authority Coverage and the Business Income and Extra Expense Coverage provisions in Mark's Engine's policy. *Mark's Engine*, 2020 WL 5938689, at *3. The court dismissed Plaintiff's cause of action, holding that a loss of the use of the restaurant, without "physical alteration" of the premises, did not constitute "direct physical loss of . . . property." *Mark's Engine*, 2020 WL 5938689, at *3 & *6.[3]

The district court's holding essentially rewrites the terms of the insurance contract. Rather than give effect to the plain meaning of coverage of "physical loss

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[3] Most of the district court's discussion on this point is adopted and quoted from District Judge Steven V. Wilson's opinion in *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F.Supp.3d 828, 835-37 (C.D. Cal. 2020). AAJ treats this discussion as District Judge Birotte's own.

of *or* damage to property," the court limits coverage to "physical loss of *and* damage to property." Even if that were a plausible interpretation, it is certainly not the only reasonable reading of the policy language.

Indeed, another Central District of California decision has given the identical policy language the opposite construction. In *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767 (C.D. Cal. Jul. 11, 2018), a container of specialty printer equipment intended for plaintiff's customer in Santa Ana, California was mistakenly shipped to Shanghai, held there by Chinese customs authorities, and eventually destroyed. Total Intermodal filed a claim for the value of the cargo under its insurance policy covering "direct physical loss of or damage to" covered property. *Total Intermodal*, 2018 WL 3829767, at *2.

The district court in that case denied Travelers's motion for summary judgment, holding that "Coverage for 'Direct Physical Loss Of ... Covered Property' Does Not Require Damage to the Covered Property." *Total Intermodal*, 2018 WL 3829767, at *2. The court explained that "to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning." *Total Intermodal*, 2018 WL 3829767, at *3 (citing Cal. Civ. Code § 1641).

The district court in this case acknowledged *Total Intermodal*'s contrary construction of the identical policy language, but limited that interpretation to situations where the insured suffered "permanent dispossession" of the property. *Mark's Engine*, 2020 WL 5938689, at *3. But the court in *Total Intermodal* made it clear that, although the insured's property was destroyed in that case, the crucial factor in coverage in that case was "dispossession," not "permanent dispossession":

> [T]he issue here is simply whether the phrase "loss of" includes physical dispossession in the absence of physical damage. The Court therefore uses the word "includes" to make clear that its construction is non-limiting.

Total Intermodal, 2018 WL 3829767, at *4, n.4.

Additionally, Mark's Engine's policy in this case specifically covers expenses "due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" *Mark's Engine*, 2020 WL 5938689, at *2. Obviously the plain language of the policy contemplates coverage of temporary as well as permanent loss of insured property.

AAJ suggests that the court's reasoning in *Total Intermodal* reflects the proper interpretation of "physical loss of *or* damage to property." At the very least, the phrase is ambiguous, and Plaintiff's interpretation is a reasonable one. Courts across the country have construed identical language to permit coverage of business losses caused by governmental closure orders designed to slow the spread of COVID-19.

For example, the district court in *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), held that plaintiffs had sufficiently alleged "direct physical loss" caused by "the COVID-19 pandemic and Closure Orders" which "prohibited or significantly restricted access to Plaintiffs' premises." *Studio 417*, 2020 WL 4692385, at *6 & n.6.

Another district court has also arrived at the opposite interpretation of the exact policy language involved here. In *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), where plaintiff sought coverage for the loss of income from its clothing store under a policy nearly identical to Mark's Engine's, the district court firmly rejected Travelers's interpretation of "direct physical loss of" property as requiring damage or physical alteration. *Mudpie, Inc.*, 2020 WL 5525171, at *3. The court denied coverage, however, based on other terms in the policy that suggested physical change. *Mudpie, Inc.*, 2020 WL 5525171, at *4.

During just the past few months, state and federal courts around the country have determined that orders to shut down non-essential businesses in an effort to slow the coronavirus can constitute "direct physical loss of" those businesses for purposes of business interruption insurance coverage.

For example, in *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2:20-cv-00265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020), the district court

determined that plaintiffs "experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive [Shut-Down] Orders." Similarly, in *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co*., No. CV-20-932117, 2020 WL 7258114, at *5 (Ohio Ct. Com. Pl. Nov. 17, 2020), the court found that "Plaintiffs' allegations . . . plausibly allege that access to their premises was prohibited [by government order] to such a degree as to trigger the civil authority coverage," which required "direct physical loss." *See also Independence Barbershop, LLC v. Twin City Fire Ins. Co.*, No. A-20-CV-00555-JRN, 2020 WL 6572428, at *3 (W.D. Tex. Nov. 4, 2020) (District court "might be receptive" to the argument that "having to . . . close one's business because of government orders intended to stop the spread of a disease caused by a virus" may be a covered loss.).

Likewise, the court in *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3-4 (N.C. Super. Ct., Durham Cty. Oct. 9, 2020), issued partial summary judgment for the insured plaintiff seeking business interruption coverage. The court held that government orders restricting access to non-essential businesses constituted "direct physical loss" of the insured's premises. *North State Deli*, 2020 WL 6281507, at *3-4. *See also Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *2 & *4 (W.D. Mo. Sept. 21, 2020) (Plaintiffs adequately alleged a "direct physical loss" by

alleging that "COVID-19 and the Stay Home Orders have forced them to suspend most of their business operations and deprived them of the use of their dental clinics."); *Optical Servs. USA/JC1 v. Franklin Mut. Ins. Co*., No BER-L-3681-20, 27-28 (N.J. Super. Ct., Bergen Cty. Aug. 13, 2020) (denying insurer's motion to dismiss and terming plaintiff's argument that governmental shut-down order caused direct physical loss "compelling"); *cf. JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, at 3-4 (Nev. Dist. Ct., Clark Cty. Nov. 30, 2020) (Owner of Las Vegas retail mall sufficiently alleged "direct physical loss and/or damage" where plaintiff alleged that coronavirus was likely present in plaintiff's tenants' shops, causing property damage, but also alleged that the governor's order restricting access caused "significant losses.").

At the very least, this growing list of decisions demonstrates that "direct physical loss" is an ambiguous term in Travelers's policy and that Plaintiff's interpretation of that term is a reasonable one. *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *3 (Wash. Super. Ct., King Cty. Nov. 13, 2020) (Court "finds that the phrase 'physical loss of['] is ambiguous."); *see also Johansing Family Enters. LLC v. Cincinnati Specialty Underwriters Ins*., No. A 2002349, 2021 WL 145416, at *1 (Ohio Ct. Com. Pl., Jan. 8, 2021) ("[W]hile this is a close call," a reasonable jury could have found that "business losses caused by Ohio's health orders during the Covid-19 pandemic"

constituted property damage caused by civil authority and that coverage was not barred by policy's virus exclusion.); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558, at 2 (La. Dist. Ct., Orleans Par. Nov. 4, 2020) (similar).

As the Eighth Circuit has pointed out, in a case involving insurance coverage of direct physical losses, "[t]he fact that several jurisdictions have reached divergent conclusions about the meaning of [a term] is evidence of the term's ambiguity." *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 668 (8th Cir. 2011).

B. The District Court Failed To Decide this Issue of State Law as the California Supreme Court Would Have Decided the Issue.

The McCarran-Ferguson Act states: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). *See also Stanford Univ. Hosp. v. Fed. Ins. Co.*, 174 F.3d 1077, 1083 (9th Cir. 1999). The parties in this action do not dispute that California law governs the interpretation of the underlying insurance policy.

The federal court's task in this diversity case is "to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (certifying question) (quotation marks omitted) (quoting *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)). If

a state's highest court has not spoken on an issue, "then we must predict how the state's highest court would decide" the issue. *Murray*, 924 F.3d at 1071. Or, "if state law permits it, we may exercise our discretion to certify a question to the state's highest court." *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1048-49 (9th Cir. 2019) (internal citations omitted).

The district court in this case did not predict how the state's highest court would construe the ambiguous term "direct physical loss." Not only did the district court fail to apply the presumption favoring the insured in interpreting ambiguous policy language, the court also erred in determining how California courts would construe the precise language involved in this case.

The California Supreme Court "generally interpret[s] the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990). *See also Wildman v. Gov't Emps. Ins. Co.*, 307 P.2d 359, 362 (Cal. 1957) ("If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates."). As the California Supreme Court has stated in response to a certified question from this Court, any ambiguity in an insurance policy "must be construed in favor of coverage that a lay policyholder would reasonably expect." *Minkler v. Safeco Ins. Co. of Am.*, 232 P.3d 612, 614 (Cal. 2010).

In this case, Mark's Engine's expectation of coverage for the losses it suffered due to the government shut-down orders was a reasonable one. As set out above, many courts around the country have arrived at the same interpretation. Yet the district court below declined to recognize the ambiguity in the policy language or to construe that language in favor of coverage of the insured.

In addition, on the dispositive question in this case, the district court failed to ascertain that California's highest court would interpret "direct physical loss of . . . property" as requiring physical alteration of the property.

The California Supreme Court has not addressed this question. But rather than address the question of how the state supreme court would interpret the term "direct physical loss of . . . property" in the context of this case—the insured's loss of use of its business premises due to governmental orders—the district court looked to intermediate appellate decisions dealing with different policy language and factual settings that are plainly inapposite.

For the proposition that physical loss "occurs only when property undergoes a 'distinct, demonstrable, physical alteration,'" *Mark's Engine*, 2020 WL 5938689, at *3, the district court relied primarily on, and quoted from, *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27 (2010). However, the quoted language does not reflect the law

announced by the California Supreme Court, but rather an academic treatise, Couch on Insurance. 115 Cal. Rptr. 3d at 39.

Moreover, the court in *MRI Healthcare* faced circumstances entirely different from this case. MRI Healthcare sought coverage for losses it suffered when it had to ramp down [demagnetize] its MRI machine due to roof repairs, and the machine failed to ramp back up. The California court of appeal upheld summary judgment for the insurer, but the policy language and the court's rationale are not at all similar or applicable to the case before this court. First, unlike Mark's Engine's policy covering "physical loss *of*" the restaurant, MRI Healthcare's policy covered "accidental direct physical loss *to* business personal property." *Id.* at 31 (emphasis added). As the California court of appeal pointed out, "property insurance is a type of insurance with its own historical development," where coverage "is triggered by some threshold concept of injury to the insured property." *Id.* at 37 (internal quotation marks omitted).

Secondly, unlike the Mark's Engine policy covering the "physical loss of or damage to" its property, the MRI Healthcare policy did not explicitly cover "damage" as a separate category. The California court viewed "loss to" as synonymous with "damage to," holding that, to show a "loss" to the property "some external force must have acted upon the insured property to cause a physical change in the condition of the property, i.e., it must have been 'damaged' within the common

understanding of that term." *Id.* at 38. In the case before this Court, the policy's disjunctive use of loss *or* damage indicates coverage of losses as a separate category from physical damage.

Finally, the California court held that there was no physical "damage" within the meaning of the policy because the "loss" – the MRI was turned off and could not be turned back on – was not due to any external force, but "emanated from the inherent nature of the machine itself." *Id.* Mark's Engine, by contrast, has alleged that its loss of the use of its restaurant was due to the shut-down orders imposed by state and local governmental officials.

In short, nothing in the *MRI Healthcare* decision indicates how the California Supreme Court would resolve the interpretive question in this case.

The district court relied on two other intermediate appellate decisions to inform its interpretation of business losses due to "direct physical loss of" the insured's property. Both cases are also inapplicable here. In *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 229 Cal. Rptr. 3d 840 (2018), Doyle acquired a collection of purportedly rare vintage wines that turned out to be counterfeit, and he sought coverage under a "Valuable Possessions" property insurance policy. The court held that plaintiff's economic loss was not covered in the absence of physical damage to the property. However, the court's rationale was that the policy by its terms covered only "losses *to* the wine; Fireman's Fund was not insuring against any

losses *to* Doyle's finances." 229 Cal. Rptr. 3d at 843 (emphasis in original). In the case before this Court, the opposite is true: Travelers *has* insured Mark's Engine against financial losses due to loss *of* the insured property.

Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co., 114 Cal. App. 4th 548, 556, 7 Cal. Rptr. 3d 844, 851 (2003), also relied on by the court below, is inapplicable here as well. The court there held that loss of data that occurred when the insured's computer crashed was not a "physical loss" because plaintiff "did not lose the tangible material of the storage medium [the computer's hard drive]. Rather, plaintiff lost the stored *information*," which has no material existence. 7 Cal. Rptr. 3d at 851 (emphasis in original). In other words, the court's focus was on the word "physical," not "loss." In the case before this Court, plaintiff did lose the use of tangible physical property—the Mark's Engine restaurant.

Because the district court in this diversity case failed to ascertain what interpretation the Supreme Court of California would give to the policy language at issue as a matter of state law, AAJ submits that a certified question to the California Supreme Court is appropriate.

II. THE PROPOSED CERTIFIED QUESTION MEETS CALIFORNIA'S CRITERIA.

The California Rules of Court authorize the California Supreme Court to 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. 8.548(a). This Court has exercised its discretion to certify questions to the California Supreme Court where these criteria were met. *See, e.g.*, *Vazquez*, 939 F.3d at 1049-50; *Cole v. CRST Van Expedited, Inc.*, 932 F.3d 871 (9th Cir. 2019); *Patterson v. City of Yuba City*, 884 F.3d 838 (9th Cir. 2018); *De La Torre v. CashCall, Inc.*, 854 F.3d 1082 (9th Cir. 2017); *Peabody v. Time Warner Cable, Inc.*, 689 F.3d 1134 (9th Cir. 2012); *Grisham v. Philip Morris U.S.A.*, 403 F.3d 631 (9th Cir. 2005).

It is clear that the interpretation of "direct physical loss" of property could determine the outcome of this matter—indeed it was the basis of the district court's grant of Travelers's motion to dismiss. The California Supreme Court's answer to the certified question could determine whether this Court affirms or reverses that order.

It is also clear that there is no controlling precedent from the state courts on this issue. The COVID-19 pandemic and the governmental shut-down orders designed to address it have created a novel question of business interruption insurance coverage that California courts have not squarely addressed. Indeed, no state supreme court or United States Court of Appeals has decided this issue.

III. THE PROPOSED CERTIFIED QUESTION IS SUPPORTED BY THE FACTORS THAT GUIDE THIS COURT'S EXERCISE OF DISCRETION.

Proponents of the certified question procedure have stated that "both federal and state judicial systems are the beneficiaries of a procedure rooted in cooperative federalism." *American E. Dev. Corp. v. Everglades Marina*, 608 F.2d 123, 125 (5th Cir. 1979) (Godbold, J.). It has been called "this wonderful device" that "enables us to obtain a definitive answer when *Erie* charts a perilous course through uncharted waters." *Walters v. Inexco Oil Co.*, 670 F.2d 476, 478 (5th Cir. 1982) (Brown, John R., J.). *See also Boardman v. United Servs. Auto. Ass'n*, 470 So. 2d 1024, 1043 (Miss. 1985) ("Federal courts should hesitate to 'trade judicial robes for the garb of prophet,' when an available certification procedure renders the crystal ball or divining rod unnecessary.") (quoting John R. Brown, *Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1977)).

Even where state law is unclear, resort to certification is not mandatory. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Rather, its use "in a given case rests in the sound discretion of the federal court." *Id.* at 391. This Court has stated that the factors which guide its exercise of that discretion are:

> (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."

Vazquez, 939 F.3d at 1048 (quoting *Murray*, 924 F.3d at 1072 (en banc)).

A. The Proposed Certified Question Has Important Public Policy Ramifications.

Certification is particularly appropriate "where the issues of law are complex and have 'significant policy implications.'" *McKown v. Simon Prop. Grp. Inc.*, 689 F.3d 1086, 1091 (9th Cir. 2012) (quoting *Perez-Farias v. Global Horizons, Inc.*, 668 F.3d 588, 593 (9th Cir. 2011)).

Small businesses like Mark's Engine are the primary customers buying business interruption insurance. There are approximately 31.7 million small businesses in the U.S., employing more than 60 million people. Oberlo, *How Many Small Businesses Are There in the U.S. in 2020*, https://www.oberlo.com/statistics/number-of-small-business-in-the-us (last visited Mar. 16, 2021). Over 4 million of those businesses are located in California, the most of any state. *Id.* In fact, California's small business employees make up 48.5 percent of the state's total employees. *Id.*

But the average small business has only $10,000 in monthly expenses and less than one month of cash on hand at any given time. Alexander Bartik, et al., *How Are Small Businesses Adjusting to COVID-19? Early Evidence From a Survey*, National Bureau of Economic Research, Working Paper Series No. 26989 (Apr. 18. 2020), *available at* https://hbswk.hbs.edu/item/how-are-small-businesses-adjusting-to-covid-19-early-evidence-from-a-survey. They are therefore especially vulnerable to losses due to the government's pandemic-related shut-down orders. Many small

businesses purchased business interruption insurance just so that the losses from a temporary shutdown would not force them to shut their doors permanently.

As of the end of September 2020, it was reported that 97,966 businesses had closed permanently because of COVID-19. Anne Srader and Lance Lambert, *Nearly 100,000 establishments that temporarily shut down due to the pandemic are now out of business*, Fortune (Sept. 28, 2020), *available at* https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/. When "small businesses close en masse, an entire sector of the economy suffers," according to one expert. Emily Flitter, '*I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. Times (Jul. 13, 2020), *available at* https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html. "That leads to a big drag on the eventual recovery, . . . [and] is going to make things far worse than they otherwise need to be" for the whole economy. *Id.* (internal quotation marks omitted).

As this Court has acknowledged, insurance policies often use the same or similar terms of coverage, so that a question of the proper judicial interpretation of such terms is often "one of considerable importance to insureds and insurers alike." *Minkler v. Safeco Ins. Co.*, 561 F.3d 1033, 1035 (9th Cir. 2009). Due to the widespread use of business interruption policies similar to the policy involved here, the interpretation of "direct physical loss of or damage to" insured property carries

important public policy considerations that extend far beyond the parties to this lawsuit. Whether this ambiguous phrase is to be construed against the insurer and whether that construction can extend to business losses caused by governmental shut-down orders could "have a dramatic impact on public policy in California as well as a direct impact on countless citizens of that state." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013).

B. The Proposed Certified Question Raises Issues that Are Substantial and of Broad Application.

Many of the 4 million small businesses operating in California and their employees may have to depend on the protection they reasonably thought they had purchased with their business interruption insurance premiums to tide them over temporary business losses due to government shut-down.

This Court has indicated that where a judicial resolution of state law issues "will have profound legal, economic, and practical consequences for employers and employees throughout the state of California and will govern the outcome of many disputes in both state and federal courts in the Ninth Circuit[,] . . . these questions are worthy of decision by the California Supreme Court." *Mendoza v. Nordstrom, Inc.*, 778 F.3d 834, 841 (9th Cir. 2015). *See also Peabody v. Time Warner Cable, Inc.*, 689 F.3d 1134, 1137-38 (9th Cir. 2012) (Where state law issues will affect "many employers and employees throughout California, we believe that the

Supreme Court of California . . . is better qualified to answer the certified question in the first instance.") (citation and quotation marks omitted).

C. The Proposed Certified Question Will Not Adversely Affect the California Supreme Court's Caseload.

The Supreme Court of California, like many courts around the country, faces a challenging docket. However, an authoritative decision by that court will result in greater efficiency in resolving the large number of claims that can be expected under business-interruption policies.

D. Certifying the Proposed Question Will Promote the Spirit of Comity and Federalism.

As this Court has observed, where an unsettled issue of state law has potential importance to California businesses and employees, "'[c]omity and federalism counsel that the California Supreme Court, rather than this court, should answer' the certified question." *Vazquez*, 939 F.3d at 1048-49 (quoting *Robinson v. Lewis*, 795 F.3d 926, 928 (9th Cir. 2015)). *See also Munson v. Del Taco, Inc.*, 522 F.3d 997, 999 (9th Cir. 2008) (where questions have broad implications for disability rights under California statute and for countless lawsuits alleging violations, "[c]omity and federalism counsel that the California Supreme Court, rather than this court, should answer these questions."); *Klein v. United States*, 537 F.3d 1027, 1028 (9th Cir. 2008) ("because the question we certify is of the utmost importance to both California landowners and recreational users of California lands, considerations of

comity and federalism suggest that the highest court in California, rather than our court, should have the opportunity to answer this question").

Of particular import in this case is avoiding the harm to healthy federalism from "the existence of parallel state and federal proceedings that address the same legal question [which] presents the risk of inconsistent judgments as to the proper interpretation" of the business interruption policy terms. *Doyle v. City of Medford*, 565 F.3d 536, 544 (9th Cir. 2009). For example, in *Grisham*, 403 F.3d 631 (9th Cir. 2005), plaintiffs alleged that they suffered emphysema and other injuries due to cigarette companies' misleading advertising and fraudulent misrepresentations of the risks of smoking. This Court determined that plaintiffs were presumed, as a matter of state law, to be aware of the dangers associated with smoking. However, the Court also found that state and federal courts diverged on whether "an individual plaintiff, in an appropriate case, can overcome this presumption and receive a jury determination on whether the individual plaintiff's reliance on cigarette manufacturers' misrepresentations was justifiable." *Id.* at 638. This Court therefore certified this question to the state court, adding that the California Supreme Court's decision on this matter would "help harmonize federal and state law in tobacco litigation." *Id.* at 638 n.13.

The consequence of allowing divergent state and federal court rulings is that the parties favored by the federal ruling will consistently file in or remove to federal

court, depriving the California Supreme Court of the opportunity to render an authoritative interpretation of the policy language at issue. *Kilby*, 739 F.3d at 1196-97. For example, the question in *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002 (9th Cir. 2012) (en banc), was whether a California statute requiring drug claims processors to generate studies about pharmacy pricing and disseminate that information to their clients violated state constitutional free-speech guarantees. This Court acknowledged that conflicting decisions that held the statute enforceable in federal, but not state courts, "would lead to forum shopping and the inconsistent enforcement of state law." *Id.* at 1007.

This case, as well, presents the potential for harm to federalism and comity. If this Court does not make use of the certified question procedure to obtain an authoritative interpretation of the determinative business interruption policy terms in this case, the parties favored by this Court's ruling will consistently seek to litigate in federal court, depriving the California Supreme Court of the opportunity to decide an important question of state law affecting numerous state businesses and employees.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to certify the proposed question to the Supreme Court of California.

Respectfully submitted,

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Date: May 14, 2021

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5,822 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: May 14, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on May 14, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
JEFFREY R. WHITE