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, The Honorable John S. Tigar

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

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January 14, 2021

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 January, 2021.

/s/ Jeffrey R. White

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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 irreparably harmed as a result of the pandemic, and similar court cases.

SUMMARY OF ARGUMENT

1. AAJ urges this Court to certify to the Supreme Court of California Appellant's proposed 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 "direct physical loss" is at a minimum ambiguous. Appellant's interpretation of that term is a reasonable one, one that 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. Instead, the district court adopted an alternative construction favoring Travelers, based upon other policy terms that "suggest" a narrower meaning.

2. Appellant's proposed 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 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 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 comprehensive commercial coverage that Appellant bought, and many of those policies provide coverage for "direct physical losses."

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.

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.

ARGUMENT

Amicus curiae American Association for Justice addresses this Court in support of Appellant's request 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?

I. THE DISTRICT COURT DECIDED THE DISPOSITIVE ISSUE IN THIS CASE WITHOUT APPROPRIATE REGARD FOR CALIFORNIA LAW GOVERNING THE CONSTRUCTION OF INSURANCE CONTRACTS.

A. "Direct Physical Loss" Is at a Minimum Ambiguous.

Early this 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 stay-at-home orders that forced non-essential businesses to suspend their business operations. As a result, Plaintiff Mudpie, Inc., which operates a San Francisco clothing store, lost the use of its physical premises for retail sales and suffered significant losses. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020) ["*Mudpie*"].

Mudpie, like many small businesses in California, had purchased and paid premiums on an all-risk comprehensive commercial insurance policy, issued by Travelers. In exchange for the premiums paid by Mudpie, Travelers covenanted:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by *direct physical loss of* or damage to property at the described premises.

Mudpie, 2020 WL 5525171, at *3 (emphasis added).

Mudpie filed a claim under this policy for losses caused by business interruption when its store could no longer perform its core function – generating business income through in-store sales – because of governmental stay-at-home orders. After Travelers denied its claim, Mudpie brought this action on behalf of itself and other similarly situated retailers seeking a declaratory judgment that its business interruption losses are covered under its comprehensive business insurance policy. The district court dismissed Mudpie's cause of action, holding that Mudpie's loss of use of its physical property did not constitute "direct physical loss of . . . property." *Id.* at *6.

The district court did not acknowledge the ambiguous nature of that phrase. The court did note that another district court had held that plaintiffs who had to close their businesses due to COVID-19 and governmental Closure Orders adequately alleged "direct physical loss." *Id.* at *5 (discussing *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020)). The district court below distinguished *Studio 417* on the basis that those plaintiffs alleged that the coronavirus had entered their premises. *Mudpie*, 2020 WL 5525171, at *5-6. However, the court's opinion in *Studio 417* makes clear that it found plaintiffs had sufficiently alleged "direct physical loss" caused by "the COVID-19 pandemic and Closure Orders" regardless of whether the complaint specifically alleged the

presence of coronavirus in their property. *Studio 417*, 2020 WL 4692385, at *6 & n.6.

Other courts around the country have found that business interruption coverage for "direct physical loss" may include losses due to government shut-down orders. For example, in *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct., Durham Cty. Oct. 9, 2020), the court 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." *North State Deli*, 2020 WL 6281507, at *3-4. See also *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) (plaintiffs "experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive [Shut-Down] Orders."); *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"); *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."); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London et al.*, No. 2020-02558, at 2 (La. Dist. Ct., Orleans Par. Nov. 4, 2020) (denying insurer's motion for summary judgment, finding genuine issue regarding loss caused by governmental prohibition of access to restaurant); *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) ("Court finds 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."); *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) (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.); *cf. JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance 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 least, it is clear that "direct physical loss" is an ambiguous term in Travelers's policy and that Appellant's interpretation of that term is a reasonable

one. *E.g., Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *3 (Wash. Super. Ct. Nov. 13, 2020) (Court "finds that the phrase 'physical loss of' is ambiguous."). 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 do not dispute that California law governs the interpretation of the underlying insurance policy here. *Mudpie*, 2020 WL 5525171, at *2 n.2.

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 court would construe the ambiguous term "direct physical loss." 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) (emphasis added). *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, Mudpie'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. Here, the district court disagreed with Travelers's interpretation of "direct physical loss of" property

as requiring damage or physical alteration. Nevertheless, "the surrounding provisions within Travelers's insurance policy suggest" a different interpretation favoring the insurer. *Mudpie*, 2020 WL 5525171, at *3. In the court's view, the policy's use of the terms "rebuild, repair, and replace all strongly suggest that the damage contemplated by the Policy is physical in nature." *Id.* (internal quotation marks omitted).

Amicus curiae AAJ believes that the district court failed to ascertain what interpretation the Supreme Court of California would give to the policy language at issue. Because this question meets the requirements set by the California Rules of Court, AAJ submits that the question proposed by Mudpie is appropriate for certification to the Supreme Court of California.

II. APPELLANT'S 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).[2]

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.

[2] This Court has consistently applied these state statutory criteria to seek answers to certified questions of state law, even where there was a federal interest in the matter pending in federal court. For example, in *Klein v. United States*, 537 F.3d 1027, 1029 (9th Cir. 2008), Klein, a federal employee bicycling in a national forest owned and maintained by the United States government, was struck by an automobile driven by an employee of the United States Fish and Wildlife Service. This Court certified the question of whether California's recreational use statute shields the U.S., as landowner, "from liability for acts of vehicular negligence committed by the landowner's employee."

III. APPELLANT'S PROPOSED CERTIFIED QUESTION IS SUPPORTED BY 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)).

But even where state law is unclear on an issue, 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." *Lehman Bros.*, 416 U.S. at 391.

This Court has stated that the factors that 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 v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (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 Mudpie 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 Jan. 12, 2021). Over 4 million of those businesses are located in California, the most of any state. *Id.* Moreover, California's small business employees make up 48.5 percent of the state's total employees. *Id.*

However, the average small business has $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 susceptible to losses due to the government's pandemic-related shut-down orders. Many small businesses purchased business interruption insurance so that the losses of a temporary shutdown would not force them to close 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." *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 that involved here, the

interpretation of "direct physical loss of or damage to" carries important public policy considerations that extend far beyond the parties to this putative action. 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).

For that reason, the interpretation of those terms under California law should, in the first instance, "most appropriately be considered and weighed by California's highest court." *Kilby*, 739 F.3d at 1196.

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

As noted above, there are more than 4 million small businesses operating in California. Many of those businesses and their employees may have to depend on the protection they reasonably thought they purchased by their business interruption insurance premiums to tide them over the 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 effect 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 Appellant's 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*, 537 F.3d at 1028 ("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 the harm to healthy federalism from "the existence of parallel state and federal proceedings that address the same legal question 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, 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. *Id.* at 636. This Court added 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." *Beeman*, 689 F.3d 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 file in or remove to 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 Appellant's proposed question to the Supreme Court of California.

Respectfully submitted,

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Date: January 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 4,227 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: January 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 January 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