No. 21-2055

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE CORDISH COMPANIES, INC.,

Plaintiff-Appellant,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2055 Caption: The Cordish Companies, Inc. v. Affiliated FM Insurance Company

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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
   If yes, identify all parent corporations, including all generations of parent corporations:

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   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jad Khazem Date: 12/13/2021

Counsel for: United Policyholders

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INTEREST OF AMICUS CURIAE[1]

United Policyholders[2] is a respected national non-profit section 501(c)(3) organization and policyholder advocate. For nearly three decades, UP has operated as a dedicated information resource and voice for individual and commercial insurance consumers throughout the country, and has helped secure important trial and appellate victories for policyholders.

UP assists insurance consumers when seeking to purchase a policy or pursuing a claim. UP is routinely called upon to help policyholders in the wake of large-scale natural disasters such as floods, wildfires, hurricanes, and, now, a pandemic that has caused substantial economic losses to businesses across the nation. Since March 2020, UP has assisted business owners around the country whose operations have been affected by COVID-19 and COVID-19-related public safety orders. UP conducts educational workshops for businesses and trade associations and maintains an online library at uphelp.org/COVID.

In addition, UP engages on an ongoing basis with insurance regulators through the National Association of Insurance Commissioners, where UP has

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[1] All parties have consented to the filing of this brief. Thus, a motion for leave to file is not necessary. Fed. R. App. P. 29(a)(2).

[2] Pursuant to Fed. R. App. P. 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

served as a consumer representative since 2009. UP gave three NAIC presentations in 2020 concerning coverage for business interruption losses related to COVID-19 and public safety orders.

Since 1991, UP has filed *amicus* briefs in federal and state appellate courts across 42 states and in more than 500 cases, including before this Court in *St. Paul Mercury Ins. Co. v. Am. Bank Holdings, Inc.*, 819 F.3d 728 (4th Cir. 2016). Many state supreme courts, as well as the U.S. Supreme Court, have cited UP's amicus briefs in their opinions. Since the pandemic began in March 2020, UP has filed close to 50 *amicus* briefs in insurance cases involving COVID-19 losses.[3]

[3] A complete list of all cases in which UP has appeared as *amicus curiae* can be found at https://www.uphelp.org/resources/amicus-briefs.

SUMMARY OF ARGUMENT

Affiliated FM Insurance Company sold Cordish Companies an "all risks" property insurance policy ("the Policy") to cover various sports and entertainment properties. J.A. 10. The Policy insures against "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" unless excluded, and has extensions of coverage for business interruption losses involving Attraction Property, Civil Authority Orders, Communicable Disease, and Supply Chain losses, among other things. J.A. 79, 98, 116-28. Yet when the pandemic caused the very business interruption losses that Cordish paid premiums to protect against, Affiliated FM refused to pay.

Under Maryland law, insurance coverage depends "on the terms of the policy,"[4] and the Affiliated FM "all risks" form is meaningfully broader than the standard form policies addressed in nearly every federal court decision on pandemic-related insurance coverage issues—including every federal appellate decision to date. Rather than construe the Policy by giving meaning to all of its terms, as Maryland law requires, the district court followed other federal cases, holding that "physical loss or damage" requires a tangible, material alteration of property. J.A. 1743-45. Although the court also acknowledged that an allegation that the properties were "rendered uninhabitable and unusable by the virus" could trigger coverage, it decided that Cordish had not alleged such harm. J.A. 1746.

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[4] *Kendall v. Nationwide Ins. Co.*, 702 A.2d 767, 771 (Md. 1997).

The court also held that the Policy's qualified contamination exclusion barred coverage. J.A. 1758.

This Court should reverse.

First, the district court's definition of "physical loss or damage" conflates "physical loss" and "damage" even though the Policy uses those two terms in the disjunctive. In fact, the district court's definition renders substantial portions of the Policy "mere surplusage," contrary to Maryland's established rules of insurance policy interpretation.[5]

Second, the qualified contamination exclusion does not provide alternative grounds for affirmance. The exclusion only bars coverage for "**contamination**," which the Policy defines as a condition of property, and for "cost due to **contamination**,"[6] neither of which encompass the business interruption "loss" for which Cordish seeks coverage. Under Maryland law, exclusions "must be given a strict and narrow construction," and a court therefore cannot insert into an exclusion words that the insurer chose not to use.[7] Moreover, the Policy's express coverage for communicable disease means that the exclusion cannot be read to

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5 *JMP Assocs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 693 A.2d 832, 839 (Md. 1997).

6 J.A. 102, 139.

7 *Megonnell v. United Servs. Auto. Ass'n*, 796 A.2d 758, 772-73 (Md. 2002) (citation omitted).

extend to viruses that cause communicable disease without impermissibly rendering portions of the Policy a nullity.

For these reasons and those discussed in Cordish's opening brief, this Court should reverse.

ARGUMENT

I. "PHYSICAL LOSS OR DAMAGE" DOES NOT REQUIRE MATERIAL ALTERATION AS THOSE TERMS ARE USED IN CORDISH'S "ALL RISKS" POLICY

The district court decided that the SARS-CoV-2 virus could not cause "physical loss or damage" because Cordish needed to, but did not, show "a distinct, demonstrable, physical alteration of the property" or "permanent dispossession of the property rendered unfit or uninhabitable by physical forces" to trigger coverage. J.A. 1743-44, 1755 (quotation omitted).

The district court erred because it inserted requirements into the insuring agreement that are not found in its plain language and are inconsistent with a reading of the Policy as a whole. Further, pre-pandemic cases in Maryland and elsewhere across the country confirm that "physical loss and damage" can occur when external perils render tangible property unusable. Neither the Policy nor Maryland case law limits coverage to property rendered totally or permanently unusable.

Rather, the Policy's language and apposite case law confirm that Cordish can trigger coverage by alleging (1) loss of use of its tangible property based on external physical force or (2) the imminent risk that the virus that causes COVID-19 would enter property. Cordish's complaint alleges both, and each provides an independent basis for reversal.

A. The Policy Covers Loss of Use Caused by an External Peril

1. The Plain Meaning of "Physical Loss or Damage"

The Policy covers business interruption losses including, as relevant here, Rental Income, Attraction Property, Civil Authority, and Supply Chain losses. The Rental Income and Attraction Property provisions are triggered by a "loss incurred ... directly resulting from physical loss or damage of the type insured to property." J.A. 121 (Attraction Property); *see* J.A. 116, 118 (Rental Income coverage for "loss ... as a direct result of physical loss or damage"). The Civil Authority extension is triggered when a civil authority issues an order prohibiting access to Cordish's property as a "direct result of physical damage of the type insured" within five miles of that property. J.A. 121. The Supply Chain extension incorporates the Civil Authority provision to apply to Cordish's direct suppliers, customers, or contract service providers. J.A. 128. As noted, the "type" of

physical loss or damage insured under the Policy is "ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded …." J.A. 79.[8]

The Policy does not define "physical loss or damage." Under Maryland law, undefined words in a contract are given their "ordinary and accepted meanings," that is, the understanding of a "reasonably prudent layperson," which courts typically ascertain by consulting a dictionary. *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488-89 (Md. 1985). A court must construe a contract "in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language …." *Connors v. Gov't Emps. Ins. Co.*, 113 A.3d 595, 603 (Md. 2015) (citation omitted). Courts have "no right to relieve one of the parties from disadvantageous terms by process of interpretation." *C & H Plumbing & Heating, Inc. v. Emps. Mut. Cas. Co.*, 287 A.2d 238, 239 (Md. 1972).

A reasonably prudent person would understand "physical loss or damage" to include loss of use caused by an external peril when those words are read in the context of the entire Policy. The plain meaning of "physical" is "of or relating to the material world." *Physical*, Oxford English Dictionary Online; *see also*

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[8] The Policy's insuring agreement omits from this phrase the word "direct," found in standard form property insurance policies, and on which many federal court rulings have focused, including the Seventh Circuit's recent ruling in *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, No. 21-1186 (7th Cir. Dec. 9, 2021).

Webster's Third New Int'l Dictionary 1706 (unabr. ed. 1968) ("physical" means "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary"). The plain meaning of "loss" is "being deprived of." *Loss*, Oxford English Dictionary Online; *see also Loss*, Merriam-Webster Online (the "absence of a physical capability or function"). And the plain meaning of "damage" is "injury" to something that "impairs its value or usefulness." *Damage*, Oxford English Dictionary Online. Taken together, the phrase encompasses not just a fire or explosion that destroys property but also physical perils that prevent the insured from using property for its intended function.

Cordish's complaint alleged physical loss or damage: It pleaded that the virus changed the air and surfaces of property, making them dangerous if Cordish's entertainment and experience-based businesses were used for their intended purpose of hosting large numbers of people. J.A. 12, 15-17; *see* Cordish's Opening Br. 14-19 (citing numerous allegations in its complaint, including allegations that Cordish's property experienced physical alteration). The district court should have accepted those allegations as true. *See, e.g.*, *SD3 LLC v. Black & Decker (US), Inc.*, 801 F.3d 412, 418 (4th Cir. 2015). Instead, the district court disregarded them. *See* Cordish's Opening Br. 14-15.

2. The District Court Erred in Attempting to Impose Requirements on Top of the Plain Policy Language

The district court held that "physical loss or damage" requires "some form of material alteration to the property that has 'experienced loss or damage.'" J.A. 1743. But the plain meaning of the word "physical" does not *require* "alteration." "Physical" limits the kinds of losses to those with a "material" existence, *i.e.,* the Policy does not extend to abstract losses like defects in title or fraudulent descriptions of property. But losses caused by corporeal substances, such as viruses, are no less of the material world merely because they cannot be perceived by the naked eye.[9]

The district court focused on "physical" but did not look to the plain meaning of "loss" or "damage" in its analysis, instead largely conflating those two words. J.A. 1743-44. Yet, Affiliated FM drafted its property insurance policies to cover "physical loss *or* damage," rather than just "physical loss" or just "physical damage." J.A. 98, 116, 121, 128. To give meaning to both terms, as Maryland law requires, "loss" cannot mean the same thing as "damage." *See Plank v. Cherneski*, 231 A.3d 436, 478 (Md. 2020) (the "disjunctive word 'or'" applies "separately, independently, and alternatively"). To the extent that "damage" might imply

[9] *Cf. Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643, at *3 (Del. 2008) ("Mold spores and other bacteria associated with mold undoubtedly have a 'material existence,' even though they are not tangible or perceptible by the naked eye. Therefore, mold contamination constitutes a 'physical loss' ….").

injury or alteration, the word "loss" in the disjunctive must mean something else. The plain meaning of "loss" includes loss of use and the word "physical" does not erase that meaning.

3. The District Court's Interpretation Finds No Support in the Context of the Entire Policy

A court must construe policy language in the context of the contract as a whole, giving meaning to every word and avoiding an interpretation that would render contract language redundant. *Connors*, 113 A.3d at 603; *Bushey v. N. Assur. Co. of Am.*, 766 A.2d 598, 603 (Md. 2001). The district court's reading fails to comply with those requirements.

If, as the district court held, "physical loss or damage" could occur only through material alteration, that would conflict with numerous insuring agreements that cover perils that do not involve the type of alteration of property that the district court suggested would be required. *See, e.g.*, J.A. 104 (coverage for "physical loss or damage caused by the malicious introduction of a machine code or instruction" to electronic data, programs, or software); J.A. 110 (coverage for "physical loss or damage" resulting from interruption of "off-premises data processing or data transmission services"); J.A. 114 (physical loss or damage from unauthorized people representing themselves to be the proper parties to receive a shipment).

The most pertinent insuring agreement that would be rendered invalid is the one covering "Communicable Disease – Property Damage," where the covered peril is disease that is "[t]ransmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges" (J.A. 104, 122, 139), *i.e.,* precisely the peril that the district court found not to involve physical loss or damage.[10]

The Policy also has many exclusions for perils that do not cause material alteration of property under the district court's narrow construction of "physical loss or damage." *See, e.g.*, J.A. 99 (seizure; quarantine); J.A. 100 (dishonesty, theft, lack of incoming utility services); J.A. 101 (faulty workmanship); J.A. 102 (changes in flavor); J.A. 113 (release of pathogenic or poisonous materials). If the Policy were interpreted to limit coverage to structural alteration, those exclusions would have been unnecessary—a result that Maryland law does not permit. *See Connors*, 113 A.3d at 603; *Calomiris v. Woods*, 727 A.2d 358, 366 (Md. 1999).

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[10] The district court reasoned that Affiliated FM's decision to add coverage extensions for communicable disease means that a virus could not cause physical loss or damage for purposes of any portion of the Policy apart from those coverage extensions. J.A. 1750. But this ignores that the "Communicable Disease - Property Damage" coverage is specifically made subject to the other provisions in the Policy, J.A. 102, and the Policy states at the outset that it "covers property…against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," followed by the statement that the "Policy is made and accepted subject to the above provisions…." J.A. 77.

In all these examples, policy provisions would be in conflict under the district court's reading of "physical loss or damage." But meaning is restored to each example if the Policy covers loss of use caused by physical external perils that *either* cause physical alteration *or* render property physically unsafe or unusable.

To the extent that conflicting reasonable interpretations of "physical loss or damage" exist, the provision must be construed against Affiliated FM as the drafter. *Collier v. MD-Individual Practice Ass'n Inc.*, 607 A.2d 537, 539 (Md. 1992); *Mut. Fire, Marine & Inland Ins. Co. v. Vollmer*, 508 A.2d 130, 134 (Md. 1986). Affiliated FM was well aware of the meaning that Cordish and UP advocate since its sister company Factory Mutual argued, shortly before the pandemic, that loss of functionality or reliability constituted physical loss or damage under an identical insuring agreement to the one in the Policy. *See* J.A. 1024, *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760 (D.N.M. Nov. 19, 2019) ("Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage."). If Affiliated FM had wanted to limit its liability, it could have done so by defining terms or choosing different language in the Policy; however, it cannot avoid its coverage obligations by asking this Court to rewrite the Policy now that a claim has arisen. *Calomiris*, 727 A.2d at 368.

4. Pre-Pandemic Cases Confirm That A Material Alteration Is Not Required Under The Language Of The Policy

The district court's decision to require "material alteration" to trigger coverage does not derive from the plain meaning of "physical loss or damage" or the text of the Policy. Rather it comes from a 1990s revision to a treatise, *Couch on Insurance*, which said that a "physical loss" means a "distinct, demonstrable, physical alteration of the property." 10A Steven Plitt et al., *Couch On Ins.* § 148:46. The district court relied on this provision and other district court cases that quote or reference it. J.A. 1744-45. But that treatise incorrectly summarized the law at the time the provision was introduced, and its drafter acknowledged ten years later that his statement was wrong. *See* Richard P. Lewis et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort & Ins. L.J. 621, 624-25, 632-34 (Fall 2021) (drafter concluded in 2013 "that the 'modern trend' is that 'courts are not looking for physical alteration, but for loss of use'"). Moreover, the district court disregarded other well-respected treatises that reach the opposite conclusion. *E.g.,* Allan D. Windt, *Insurance Claims and Disputes* § 11:41 (6th rev. ed. Mar. 2021) ("[W]hen an insurance policy refers to physical loss of or damage to property, the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object.").

In fact, courts have found physical loss and/or damage in a wide range of circumstances involving perils that deprive property of its use without also altering the property's structure. A pre-pandemic District of Maryland decision, *National Ink and Stitch, LLC v. State Auto Property and Casualty Insurance Co.*, held that a computer virus could constitute a "physical loss" despite the computer system's "residual ability to function." 435 F. Supp. 3d 679, 685 (D. Md. 2020). After a ransomware attack, the policyholder was able to replace and reinstall its software such that its computers still functioned, but the protective software it installed to prevent re-infection from the ransomware virus slowed down the system. *Id.* at 680-81. The court found coverage because "loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the 'physical loss *or damage to*' language in the Policy." *Id.* at 686 (emphasis in original).

National Ink is consistent with the Maryland Court of Appeals' ruling in *Berry v. Queen*, 233 A.3d 42 (Md. 2020). There, the Court interpreted an uninsured motorist statute that used the phrase "damage to property" to include loss of use. *Id.* at 50-51. The Court explained that damage "necessarily means a

loss of something" and that a "loss of property" involves "loss of use" of that property. *Id.* at 51.[11]

Other courts across the country have similarly not required a "tangible alteration" to property when interpreting "physical loss or damage." For instance, the Sixth Circuit upheld coverage after a highly radioactive radium salt had been disseminated throughout a plant that manufactured radioactivity instruments. *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 922 (6th Cir. 1957). The facility's manufacturing was interrupted for months, in part because the radiation was a hazard to personnel and the instruments they produced required no radioactive material to be present. *Id.* The Court upheld the lower court's factual findings that "all losses due to the contamination of physical property and all business interruption losses" were caused by the micron-sized radium salt spreading throughout the facility by air currents. *Id.* at 925.

The Third Circuit likewise held that "physical loss" can occur when there is a "presence of large quantities of asbestos in the air of a building such as to make the structure uninhabitable and unusable." *Port Authority of N.Y. & N.J. v.*

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[11] The district court here relied upon *Bel Air Auto Auction, Inc. v. Great Northern Insurance Co.*, 534 F. Supp. 3d 492, 504 (D. Md. 2021), *appeal filed* 21-1493 (4th Cir. Apr. 29, 2021), which distinguished *Berry* because the statute did not include the word "physical." *Id*. at 504. But the word "physical" does not change the result; it simply means the loss or damage must result from a physical peril rather than a non-physical cause (such as a change of customer preference).

Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002). The Court explained that such loss can occur even when "there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility." *Id.*; *see also Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1172 (9th Cir. 2012) ("physical loss" refers to "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event," which causes property "to become unsatisfactory for future use or requiring that repairs be made to make it so") (citation omitted).

Similarly, the Supreme Court of New Hampshire rejected a requirement that there be a "tangible physical alteration" or that a unit was "permanently uninhabitable." *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015). There, plaintiffs claimed "physical loss" due to a cat urine odor coming from a condominium above their unit and that the smell had prevented them from having tenants and affected their resale price. *Id.* at 802-03. The Court reversed, determining that "physical loss" could encompass "changes that are perceived by the sense of smell and that exist in the absence of structural damage." *Id.* at 805; *see also* Lewis et al. at 624-30 (citing dozens of pre-pandemic cases that are contrary to *Couch* and the district court interpretation).

Much like the perils in all these cases, SARS-CoV-2 causes "physical loss or damage" to the insured properties under the Policy. As alleged in the complaint, it

alters the surfaces of indoor businesses that are designed to handle crowds of people in close proximity, and renders them unusable for their intended function. This is consistent with several of the COVID-19 cases that have considered similar pleadings.[12]

5. The District Court Erred By Holding That Cordish Needed to Show a Permanent Loss of Use

The district court found, alternatively, that Cordish had to show "permanent dispossession" of Cordish's properties to trigger coverage, which Cordish did not allege. *See* J.A. 1744, 1748. This was error. The Policy has no language limiting coverage to instances of "permanent" deprivation of property and the district court erred in creating textually unsupported restrictions on coverage, which Maryland law does not permit. *See C & H Plumbing & Heating, Inc.*, 287 A.2d at 239.

In fact, the Policy expressly provides coverage for the cost to "repair" *or* "rebuild *or* replace" property and for business interruption losses resulting when the insured is "wholly *or* partially prevented" from continuing pre-loss operations during the time needed to "repair[] *or* replace[]" property. J.A. 117,120, 132 (emphasis added). That language would make no sense if coverage could be triggered only by permanent deprivation of property, as the district court proposed.

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[12] *See, e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 376 (E.D. Va. 2020); *SWB Yankees, LLC v. CNA Fin. Corp.*, No. 20-CV-2155, 2021 WL 3468995, at *21 (Pa.Com.Pl. Aug. 04, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 802 (W.D. Mo. 2020).

Moreover, the district court's construction is contrary to decisions such as *National Ink*, which explains how "loss of use, loss of reliability, or impaired functionality" are "consistent with the 'physical loss or damage to' language in the Policy." 435 F. Supp. at 686. The court "specifically declined to adopt a definition of 'direct physical loss or damage' that requires proof of a permanent loss in the ability to function." *Id.* (citing *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, 2013 WL 4400516, at *6 (E.D. Ky. Aug. 14, 2013)). The court reasoned that the "value in a system is its reliability" and therefore the plaintiff "need not await total failure in order to avail itself of coverage." *Id.* at 685-86.

Other courts have likewise rejected an implied requirement that property be rendered permanently unusable. *See Mellin*, 115 A.3d at 805 ("Evidence that a change rendered the insured property *temporarily* or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property." (emphasis added)); *see also Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 75-76 (3d Cir. 1989) (insured's coverage began when it lost possession and control of insured equipment despite it still being intact at that time); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Colo. 1968) (physical loss or damage occurred where gasoline vapors made use of a church building dangerous, despite the church remedying the problem).

Cordish alleges that its properties suffered a significant physical loss because of SARS-CoV-2 even though they were not rendered permanently unusable. Those properties lost their utility when they were unable to open safely, just as asbestos, gasoline vapors, or cat urine odor can render buildings unusable for their purposes, whether temporarily or permanently, and that suffices to trigger "all risks" coverage.

B. An Imminent Risk That The COVID-19 Virus Would Re-Enter Cordish's Property Also Qualifies As "Physical Loss Or Damage"

Cordish alleges that the virus was present at its surrounding properties. J.A. 16. But even if it did not, Cordish would still have pleaded a claim for relief because courts recognize the common sense notion that imminent harm, like the looming threat of a pandemic-causing virus that is highly transmissible, can constitute a physical loss. For example, in *Murray v. State Farm Fire and Casualty Co.*, the West Virginia Supreme Court held that homeowners suffered "direct physical loss" insured under a property policy when an "unstable" wall caused a risk that rock falls would "continue to occur" and injure people. 509 S.E.2d 1, 5 (W. Va. 1998). There, the insurers argued that their "policies do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 16. But the Court rejected this argument, holding that the insured homes "became unsafe for habitation, and therefore suffered real damage when it

became clear that rocks and boulders could come crashing down at any time." *Id.* at 17.

Other courts have agreed that a policyholder is entitled to coverage for property that is in an imminently dangerous state. *See, e.g.*, *Port Authority*, 311 F.3d at 236 (a building can be rendered unusable when "there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility"); *Pfeiffer v. Gen. Ins. Corp.*, 185 F. Supp. 605, 608-09 (N.D. Cal. 1960) (policy covered damage to land underlying house caused by landslide when it "appears proximate and certain that additional slides will occur" and that "further slippage is imminent"); *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.,* 565 S.E.2d 306, 308 (S.C. 2002) (holding that "risks of direct physical loss involving collapse" includes the threat of an imminent collapse); *Strickland v. Fed. Ins. Co.*, 246 Cal. Rptr. 345, 350 (Cal. Ct. App. 1988) (risk of damage from a landslide was covered under a policy because although the house "has not, up to this point, collapsed or become uninhabitable, there is a significant risk of this occurring").

Cordish has alleged that COVID-19 is "ubiquitous and widespread across the United States," that there have been confirmed cases in proximity to the covered properties, and that SARS-CoV-2 renders property dangerous and potentially fatal. J.A. 16-17. As such, the properties could not be used as they

were meant to, for event and entertainment purposes involving crowds. J.A. 17. This too is sufficient to establish "physical loss or damage" under the Policy. *See NeCo, Inc. v. Owners Ins. Co.*, 520 F. Supp. 3d 1175, 1180 (W.D. Mo. 2021) ("At the very least, because of how COVID-19 is transmitted, a reasonable inference can be drawn from Plaintiff's allegations that an infected person was plausibly in its store and infected its property, thereby making the property unsafe and unusable.").

II. THE CONTAMINATION EXCLUSION DOES NOT BAR COVERAGE FOR CORDISH'S BUSINESS INTERRUPTION LOSSES

Affiliated FM also argued that its qualified contamination exclusion bars Cordish's claims and the district court agreed. But the exclusion is narrower than Affiliated FM contends—it does not apply at all to business interruption losses—and Affiliated FM cannot satisfy its burden of proving that the exclusion unequivocally eliminates coverage for Cordish's claims. *Prop. & Cas. Ins. Guar. Corp. v. Beebe-Lee*, 66 A.3d 615, 624 (Md. 2013); *Megonnell*, 796 A.2d at 772.

The exclusion applies to "[**c**]**ontamination**, and any cost due to **contamination**…" J.A. 102. Affiliated FM defines "**contamination**" as "any *condition of property* due to the actual or suspected presence of" various items including pollutants and virus. J.A. 139 (second emphasis added). The losses for which Cordish seeks coverage are not a "cost" and are not a "condition of

property." The district court erred in construing the term "**contamination**" to cover Cordish's loss, contrary to the narrow definition of "**contamination**" that Affiliated FM chose and Maryland law requiring exclusions to be construed narrowly. Additionally, the exclusion does not apply because it cannot be construed to extend to communicable disease, which the Policy expressly covers.

A. The Contamination Exclusion Does Not Apply To "Loss"

Cordish seeks insurance coverage for the business interruption loss that it has suffered related to COVID-19. J.A. 45. In each business interruption insuring agreement, the Policy states that it will pay "loss" or "actual loss sustained." But contamination exclusion does not use "loss" or "actual loss sustained."

That the exclusion does not apply to "loss" is best understood by contrasting it with the term "cost," which Affiliated FM uses in the second part of its contamination exclusion. A "cost" is an out of pocket amount. *See Cost*, Oxford English Dictionary Online ("The spending or outlay of money; expenditure; expense"); *Cost*, Black's Law Dictionary (11th ed. 2019) (defining as the "amount paid or charged for something"). A business interruption "loss," in contrast, involves the money that the insured *never obtained* because of a covered peril. *See Loss*, Black's Law Dictionary (defining as the "amount of financial detriment"). The text of the Policy reflects the differences between "cost" and "loss."

The Policy consistently uses the word "cost" when it agrees to reimburse an expense. *E.g.*, J.A. 104 ("cost" to "temporarily protect and preserve insured electronic data, programs or software"); J.A. 105 ("costs incurred to remove debris from a location"); J.A. 106 ("costs ... resulting from the Insured's obligation to comply with a law or ordinance" related to demolition and construction).

But when the Policy refers to a financial detriment based on funds the policyholder did not receive, it consistently uses "loss." J.A. 117 (coverage for the "actual loss sustained by the Insured of Gross Earnings," including earnings derived from the operations of the business); *id.* (coverage for "Gross Profits" loss, including "Reduction in Sales" and "Increased Cost of Doing Business"); J.A. 118 (coverage for "Rental Income loss," including the "Income reasonably expected from the rentals of unoccupied or unrented portions of such property").

The Policy also treats loss and expenses differently when outlining the "loss insured" for business interruptions: "This Policy also covers *expenses* reasonably and necessarily *incurred* by the Insured *to reduce the loss otherwise payable* under this Policy." J.A. 116 (emphasis added). *See Jones v. Hubbard*, 740 A.2d 1004, 1016 (Md. 1999) ("each of [a contract's] provisions" must be "interpreted together with its other provisions"). Therefore, Cordish's business interruption losses cannot be characterized as a "cost due to **contamination**."

Nor do those losses fit within Affiliated FM's narrow and specific definition of "**contamination**"—"condition of property"—particularly given that Maryland law requires that exclusions be construed narrowly. *See Megonnell*, 796 A.2d at 772, 776. The ordinary meaning of "condition of property" is "[m]ode of being, state, position, nature .... A particular mode of being of a person or thing ...." *Condition*, Oxford English Dictionary Online. That is *not* the same as "loss" or "actual loss sustained."

Moreover, Affiliated FM knew full well how to exclude coverage for "loss." Numerous other exclusions do so expressly. *E.g.*, J.A. 99-101 (excluding "loss" for terrorism, dishonest acts, manufacturing or processing operations, and changes in temperature or humidity); *id.* 101-02 (excluding "indirect or remote loss or damage," "loss or damage ... arising from any delay," "loss from enforcement of any law or ordinance," and "[l]oss or damage" from losing title to property by fraud). Further, every exclusion in the Business Interruption section of the Policy applies only to "loss." J.A. 121. But Affiliated FM did not use "loss" in the contamination exclusion and a court cannot insert words into an insurance policy that the insurer could have used but decided instead to omit. *Calomiris*, 727 A.2d at 368; *see also Megonnell*, 796 A.2d at 773 (courts "cannot infer" the application of an exclusion where there is no "conspicuous, clear and express clause").

In holding that the exclusion applied, the district court reasoned that Cordish's interpretation would render the phrase "inability to use or occupy property" meaningless. J.A. 1757-58. Not so. The phrase "including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy" modifies only the immediately preceding phrase, "cost due to **contamination**." That is because there is no comma between "any cost due to **contamination**" and "including the inability to use or occupy property," whereas "any cost due to **contamination**" is separated by a comma from the first word in the exclusion, "**contamination**." J.A. 102. Under Maryland law, the drafter's use of a comma at the outset of the exclusion and its omission of a comma later on must be given effect. *See Kane v. Bd. of Appeals*, 887 A.2d 1060, 1070 (Md. 2005) (qualifying clauses modify the immediately preceding clause in the absence of a comma); *Connors*, 113 A.3d at 606 n.13 (same). Thus, "inability to use or occupy property" refers only to a subset of the phrase "cost due to **contamination**." Such a cost would include, for instance, the cost or expense of renting another property because of inability to use the insured property. *See* J.A. 119.

The district court decided that Cordish's interpretation of the exclusion would fail to "give[] effect" to the word "**contamination**." JA 1757. But giving the phrase "condition of property" its plain meaning does not deprive the defined

term "**contamination**" of force. When property becomes contaminated, it is worth less than it was before. *See* 1 *Environmental Insurance Litigation: Law and Practice* § 1:44. That potentially significant diminished value due to a contaminated condition normally would be covered under the circumstances set forth in the Policy's Property Damage Valuation section. J.A. 133 ¶¶ 11-12, 138. However, if such diminution in value—a "condition of property"—results from one of the identified contaminants, then the diminution in value is not covered. Thus, the term "**contamination**" has significant exclusionary effect even though it does not extend to earnings loss.

Affiliated FM could have defined the term "**contamination**" to include "loss" or "loss or damage," as it did in other exclusions. Instead, it chose a narrow definition: "condition of property." The district court erred by broadly construing the exclusion, contrary to the plain text of the definition that Affiliated FM supplied, "condition of property." At minimum, the exclusion is ambiguous and must be construed against its drafter Affiliated FM and in favor of Cordish. *Megonnell*, 796 A.3d at 772.

B. The "Contamination" Exclusion Cannot Extend To Communicable Diseases Such As COVID-19

The contamination exclusion does not bar coverage for an independent reason: The exclusion cannot apply to agents of communicable diseases such as COVID-19 because any such application would eliminate the Policy's two express

grants of additional coverage for "communicable disease." J.A. 104, 122. Such a reading would contravene the cardinal rule of construction that, whenever possible, "effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing ...." *Connors*, 113 A.3d at 606 n.13. Instead, the exclusion must be harmonized with the rest of the policy.

To avoid this conflict, the contamination exclusion's reference to "virus, disease causing or illness causing agent" cannot mean "virus of any type." To harmonize the exclusion with the two express extensions of coverage, the word "virus" in the exclusion should be construed to apply only to viruses or other agents that cause *non-communicable* disease, i.e., viruses that are not "[t]ransmissible from human to human." J.A. 139 (defining "communicable disease"). Many such viruses exist, including those that cause cholera, hantavirus, rabies, salmonella, and West Nile Disease as well as other agents like lawn or landscaping diseases, which affect plants, not humans. That interpretation would leave the Communicable Disease insuring agreements intact while still giving meaning to the contamination exclusion. *See Ross Stores, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 3700659, at *11 (Cal. Super. July 13, 2021) (the same contamination exclusion as the one in the Affiliated FM Policy could reasonably

be read to exempt communicable diseases because the exclusion would otherwise nullify express coverages for Communicable Disease and Decontamination Costs).

Affiliated FM argued below that the Communicable Disease coverages are unstated exceptions to the exclusion. J.A. 341. But the Communicable Disease provisions contain no carve-out for the contamination exclusion. Affiliated FM knew how to create exceptions to exclusions. It did so in the "contamination" exclusion itself for the actual presence of contaminants that directly results from other physical damage. J.A. 102. Affiliated FM also did so in many other exclusions in the Policy such as the exclusions for radiation (J.A. 99) and terrorism (J.A. 100).

Given that Affiliated FM inserted express exceptions in other exclusions but did not do so in the contamination exclusion for Communicable Disease, basic rules of contract interpretation preclude a reading of the exclusion to add an unarticulated exception.[13] Further, Maryland law requires exclusions to be clear and unambiguous and does not allow an insurer to have an unstated exclusion. *Megonnell*, 796 A.2d at 772 (rejecting "exclusion by implication"). At the very least, the exclusion is ambiguous and must therefore be construed against Affiliated FM as the drafter of the policy. *Id.*

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[13] 5 Corbin on Contracts § 24.28 (2021) ("If the parties in their contract have specifically named one item[,] ... a reasonable inference is that they did not intend to include other, similar items not listed.").

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the decision below.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **6,388** words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on December 13, 2021.

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