THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2022-0155

SCHLEICHER AND STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANY, et al.

Interlocutory Transfer from The New Hampshire Superior Court, Merrimack County, Case No. 217-2020-CV-00309

BRIEF OF PLAINTIFFS-APPELLEES SCHLEICHER AND STEBBINS HOTELS, LLC, ET AL

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(*continued*)

Page

TABLE OF CONTENTS
(*continued*)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

TABLE OF AUTHORITIES
(*continued*)

Page

QUESTIONS PRESENTED FOR REVIEW

1. Under *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544 (2015), does the presence of SARS-CoV-2 in the air or on surfaces at a premises, if proven, satisfy a requirement under a property insurance policy of "loss or damage" or "direct physical loss of or damage to property"?

This question was raised by Plaintiffs-Appellees Schleicher and Stebbins Hotels, LLC et al. ("S&S" or "Appellees") in their motion for partial summary judgment, Apx. II at 136, and raised by Defendants-Appellants Starr Surplus Lines Insurance Company et al. ("Appellants") in their cross-motion for partial summary judgment, Apx. IV at 10.

2. Does the Mold, Mildew & Fungus Clause and Microorganism Exclusion endorsement in the insurance policies unambiguously preclude coverage for Plaintiffs' claimed losses?

This question was raised by Appellants in their cross-motion for partial summary judgment. Apx. IV at 10.

3. Does the Pollutants and Contaminants Exclusion in the Axis Policy unambiguously preclude coverage for Plaintiffs' claimed losses?

This question was raised by Cross-Appellee Axis Surplus Insurance Company's motion for partial summary judgment. Apx. IV at 283.

STATEMENT OF THE FACTS

This case involves a COVID-19-related business interruption insurance claim by Schleicher & Stebbins LLC, a company based in Hooksett that is part-owner of 23 hotels located in New Hampshire, Massachusetts and New Jersey (the "Hotels"). Apx. II at 189.

A. The COVID-19 Pandemic

For many months after the COVID-19 pandemic struck the U.S. in March 2020, we changed our way of life to avoid contact with a deadly virus. We shut down our places of public business, including our courts. People stayed home, they wore gloves and other protective clothing, and they disinfected groceries, mail and other items before bringing them inside. Yet the virus still spread, killing 810 New Hampshire citizens in 2020 alone. *See* Total Coronavirus Deaths in New Hampshire, available at https://www.worldometers.info/coronavirus/usa/new-hampshire/ (last visited June 22, 2022).

Scientists and public health authorities have studied how the coronavirus impacts and is transmitted via property. *See, e.g.,* Apx. III 135-261. The World Health Organization (the "WHO") recognizes several possible modes of transmission, including person-to-person contact, airborne and aerosolized particles, and surfaces impacted by the virus. *Id.* at 137-40.

COVID-19 is highly contagious and transmissible through aerosols produced by normal breathing and talking which can remain suspended in the air for hours before they settle on surfaces with the viral material they carry. *Id.* at 190-91, 197-98, 208, 217-19, 224. Studies have determined

that the virus travels up to 13 feet in the air, is deposited on floors and clothing and is then re-suspended as people move around a building. *Id.* at 206, 258-59. Further studies have shown that infectious viral particles can be recovered from non-porous surfaces such as floors, computer mice, remote controls, cell phones, toilets, doorknobs, paper currency, cell phones, bank ATMs and airport check-in kiosks for up to 28 days. *Id.* at 217, 229, 233-34, 245.

B. COVID-19 Leads to Widespread Orders of Civil Authority that Impair Access to S&S's Hotels

Civil authorities issued hundreds of orders in response to COVID-19. These orders deemed a limited number of businesses to be "essential"; required the closure of non-essential businesses; directed individuals to "shelter in place," stay in their homes, and not travel except to receive medical care or buy groceries or other necessities for living; and restricted entry into the United States (the "Orders"). Apx. I at 442-718.

The Orders imposed extreme restrictions on the operation of the Hotels, as well as the movement of the Hotels' customers, requiring them to stay at home or shelter in place and thus preventing them from travelling to or staying at S&S's Hotels. *Id.* at 467-619, 629-42.

C. S&S Purchases Broad Business Interruption Coverage for Its Hotels

To protect against the varied risks that cause business interruption losses, S&S purchased a $600 million property insurance tower that

includes several broad and valuable "Extensions of Time Element Coverage." Apx. I at 111-12 (Policies ¶21); Apx. II at 189.[1]

S&S bought business interruption insurance to be protected in the event that loss or damage occurred at or away from the Hotels that caused S&S to lose revenues. Apx. II at 189. Appellants sold S&S the policies that provide the first $150 million of coverage in the $600 million tower (the "Policies"). Apx. I at 85-441; Apx. II at 189.

The Policies are "all-risk" insurance policies – which cover "any risk of direct physical loss or damage unless specifically excluded." 3 New Appleman Insurance Law Practice Guide § 31.06(2)(d) (2021). Like typical "all-risk" policies, S&S's Policies generally describe the perils insured against as follows: "This policy insures against risks of direct physical loss of or damage to property described herein . . . except as hereinafter excluded." Apx. I at 114 (Policies ¶28).

Central to this Action, the Policies include a section titled "Extensions of Time Element Coverage" with broad extensions of the Policies' business interruption coverage. *Id.* at 111-12, (Policies ¶21). They include Contingent Business Interruption, Attraction Property, Civil Authority and Ingress/Egress coverage, which insure the

[1] Unless otherwise noted, relevant provisions are the same for each Policy. For ease of reference, record citations to the "Policies" are to the Starr Policy.

ACTUAL LOSS SUSTAINED resulting from loss or damage from the perils insured against . . . to:

***

b) property that directly prevents a supplier (of any tier) of goods and/or services to the Insured from rendering their goods and/or services, or property that prevents a receiver (of any tier) of goods and/or services from receiving the Insured's goods and/or services . . . . Coverage includes loss or damage to real and personal property located at Attraction properties, defined as properties not operated by the Insured, which attract potential customers to the vicinity of the Insured's locations.

* * *

d) the actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil or military authority irrespective of whether the property of the Insured shall have been damaged.

e) the actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, ingress to or

> egress from real or personal property is thereby impaired or irrespective of whether the property of the Insured shall have been damaged.

Id. (Policies at ¶21(b) (the "CBI Coverage" and "Attraction Property Coverage"), ¶21(d) (the "Civil Authority Coverage"), ¶21(e) (the "Ingress/Egress Coverage")).

The Policies are exceptionally broad. *See* Apx. II at 150-51. Most importantly, they do not contain an exclusion for loss caused by virus or pandemic.

Appellants have known about the risks from pandemics and viruses for decades, especially since the SARS and other virus outbreaks (*e.g.*, MERS, Zika, etc.) since the mid-2000's.

After the SARS outbreak, the addition of virus and pandemic exclusions became the norm. The National Association of Insurance Commissioners reported in March 2020 that 82.83% percent of business interruption policies sold at that time contained an exclusion for virus, pandemic or disease.[2]

The best known and most widely used exclusion was developed by the Insurance Services Office ("ISO"), a trade organization that serves the

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[2] See COVID-19 Property & Casualty Insurance Business Interruption Data Call Part I, June 2020, available at https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf; NAIC COVID-19 Report for 2020, at 23, available at https://content.naic.org/sites/default/files/naic-covid-19-report-update3-eoy-2020.pdf.

insurance industry. Titled "Exclusion of Loss Due to Virus or Bacteria," the ISO Virus Exclusion provides in relevant part:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
>
> B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

See, e.g., *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 510 F. Supp. 3d 1116 (M.D. Fla. 2021).

The Policies purchased by S&S, however, fall within the 17% sold without a virus or pandemic exclusion. It was only *after* COVID struck that Appellants sought to add exclusions for communicable disease, virus, pandemic and pathogens to S&S's policies:

- Starr: "Communicable Disease Exclusion" (Apx. VI at 16);
- Everest: "Communicable Disease Exclusion EIL 03 540 0320" (*Id.* at 37);

- Hallmark: "HPPA01 03 20 Pandemic and Epidemic Exclusion" (*Id.* at 48-49);
- Evanston: "MECP 1326 09 14 Exclusion- Organic Pathogens" (*Id.* at 59);
- Axis: "Exclusion of Loss or Damage Due to Virus or Bacteria - AXIS 1012682 0520" (*Id.* at 69);
- Scottsdale: "Virus, Bacterium, Microorganism and Communicable Disease Exclusion UTS-460 (04/2020)" (*Id.* at 74);
- Mitsui: "Virus & Bacteria Exclusion" (*Id.* at 84).

S&S paid annual premiums of nearly $1 million for the Polices. Apx. II at 189.

D. S&S Suffers Scores of Millions of Dollars in Business Interruption Losses

S&S suffered a dramatic decrease in business at the Hotels when COVID-19 struck. The Policies cover business interruption losses stemming from loss or damage occurring at and away from the Hotels – and COVID-19 clearly caused both. COVID-19 was present at transportation infrastructure including air, rail and auto travel facilities – and the hazardous conditions at such properties kept travelers from patronizing the Hotels. S&S's business interruption losses were only made worse by the Orders that followed – which either prohibited the Hotels from accommodating guests other than emergency workers, or restricted customers' ability to leave their homes.

In just the first four to five months after the pandemic hit, S&S sustained over $50 million in business interruption losses. Apx. II at 190. These losses resulted from various overlapping causes connected to COVID-19 that are covered under the broad "Extensions of Time Element Coverage" S&S purchased:

- S&S sustained losses because the widespread presence of COVID-19 at places like airports, train stations etc. prevented S&S customers from receiving the Hotels' goods and services. These losses are covered under the CBI Coverage. Apx. I at 111-12 (Policies ¶21(b)).
- S&S sustained losses because of loss or damage from COVID-19 at properties that attract potential customers to the vicinity of the Hotels (*e.g.,* Fenway Park or Gillette Stadium). These losses are covered under the Attraction Property Coverage. *Id.*
- S&S sustained losses because the Orders "impaired or hindered" access to the Hotels and were issued in part because of the risk of physical loss or damage to property from COVID-19. These losses are covered under the Civil Authority Coverage. *Id.* at 112 (Policies ¶21(d)).
- S&S sustained losses because the loss or damage from COVID-19 away from the Hotels "impaired or hindered" access to the Hotels. These losses are covered under the Ingress Egress Coverage. *Id.* (Policies ¶21(e)).

E. The Cross-Motions for Summary Judgment, Judge Kissinger's Decision and This Interlocutory Appeal

The parties filed cross-motions for partial summary judgment on the three threshold issues that are the subject of this interlocutory appeal. Apx. II at 135-187; Apx. IV at 10-47, 284-90;

In deciding the cross-motions about whether COVID-19 causes "loss or damage" or "physical loss of or damage to property," Judge Kissinger undertook a straightforward application of *Mellin* to the facts of this case. He held that the presence of COVID-19 satisfies *Mellin*'s "distinct and demonstrable" standard because: (1) property contaminated by the virus is distinct from uncontaminated property and (2) the presence of the virus is demonstrable. Add. 22-23. Judge Kissinger noted that contaminated property is "distinct" from uncontaminated property because "[c]oming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease." Add. 22. Judge Kissinger aptly referred to an example raised at oral argument of a doorknob which, despite still being functional, is distinctly altered when someone with COVID-19 sneezes on it. Add. 22.

Addressing *Mellin*'s demonstrability requirement, he held that whether "property is or has been infected is clearly 'demonstrable' through a series of means, including laboratory testing." *Id.* Indeed, S&S presented copious evidence, not disputed by Appellants, demonstrating that the presence of SARS-CoV-2 can and has been demonstrated by laboratory testing of property. *See* Apx. III at 123-261.

In applying *Mellin* to the facts before him, Judge Kissinger rejected Appellants' arguments for denying coverage, including: that a '"distinct

and demonstrable alteration' must be readily perceptible by one of the five senses, must be incapable of remediation and must result 'in some dispossession;' and that "COVID-19 cannot be said to effect a distinct and demonstrable alteration because it cannot be perceived without sophisticated equipment, may be eliminated with proper sanitation measures, and does not by itself require the Hotels to 'close properties.'" Add. 20-21.

Judge Kissinger noted that the fact that the odor in *Mellin* could have been cleaned, or that a tenant could have learned to live with the smell, does "not prevent a conclusion that the properties have been changed in a 'distinct and demonstrable' fashion." *Id.* Thus, Judge Kissinger observed that the alteration of property by COVID-19 clearly was no less "distinct and demonstrable" than alteration by cat urine. *See* Add. 21-22.

SUMMARY OF THE ARGUMENT

Businesses buy property and business interruption insurance to ensure that their properties can be used to generate revenues. When property is impacted in a way that interrupts operations and the ability to drive revenues – whether from a massive earthquake, offensive odors, or a microscopic but deadly virus – the "physical loss of or damage to property" is the same and is equally insurable.

Appellants argue that there was no "physical loss of or damage to property" here because COVID-19 supposedly does not cause "material destruction," "material harm" or "permanent dispossession" of property. But this Court rejected those arguments seven years ago in *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544 (2015), holding instead that cat urine odors trigger coverage if they render property "temporarily . . .

unusable" even in the absence of "tangible alteration to the appearance, color, or shape of the property." *Id.* at 548. In doing so, this Court established the standard applicable in this state, holding that coverage is triggered if there has been a "distinct and demonstrable alteration" to property. *Id.* at 551.

If the presence of cat urine odor can trigger coverage, then the presence of a dangerous and often deadly virus does for sure. There is no credible dispute here that COVID-19 causes a "distinct and demonstrable alteration" to property. COVID-19 particles suspended in the air or on surfaces take property that is safe and usable for business purposes and turn it into property that is unsafe and unusable – possibly even deadly. That represents a "distinct and demonstrable alteration" to property in every way that matters.

Appellants have known about the ruling in *Mellin* for years, yet continued to sell policies that cover "physical loss of or damage to property," knowing full well that policyholders and this Court interpret that language to extend coverage for losses that do not involve "material destruction," "material harm" or "permanent dispossession" of property. If Appellants wanted to add such restrictions to their policies and reduce premiums accordingly, they could have. They did not. Nor did they add a virus or pandemic exclusion to the Policies sold to S&S, even though such exclusions were used in 83% of policies sold prior to the COVID-19 pandemic.

Having sold S&S broadly worded Policies with no virus or pandemic exclusion, Appellants now resort to a back-door attempt to overturn or undermine this Court's precedent in *Mellin*. Appellants rely

heavily on recent cases applying other states' law, and contend that COVID-related business interruption claims are not covered under New Hampshire law because the virus does not cause "structural damage" or "tangible alteration" to property. But those are precisely the arguments that this Court *rejected* in *Mellin* and represent the *opposite* of the controlling law here in New Hampshire.

Adherence to *stare decisis* is a bedrock principle of New Hampshire law, and there is no reason to depart from *Mellin* and its "distinct and demonstrable" standard here. The APCIA falsely suggests it would jeopardize the insurance industry to apply *Mellin* and uphold S&S's right to coverage. Such insurance industry scare tactics are based on demonstrably false statements and ignore the simple fact that there are only three COVID business interruption cases pending in New Hampshire's courts – which pose no existential threat to the insurance industry.

This Court should affirm Judge Kissinger's dutiful application of the *Mellin* standard below. Maintenance of such precedent is not only essential to principles of *stare decisis* and the rule of law, but to the protection of fundamental property rights recognized for centuries under New Hampshire law – namely, the protection of citizens' rights surrounding the *use* of property (as opposed to just the property itself).

Appellants try to stretch other exclusions – one in an endorsement concerning limited coverage for mold, mildew, fungus and spores and one for the release, discharge, escape or dispersal of pollutants – into virus or pandemic exclusions. Those exclusions do not apply here, under New Hampshire's rules for insurance policy construction and this Court's precedent.

STANDARD OF REVIEW AND APPLICABLE LEGAL STANDARDS

Where the terms of an insurance policy are clear and unambiguous, the language is afforded "its natural and ordinary meaning." *Colony Ins. Co. v. Dover Indoor Climbing Gym*, 158 N.H. 628, 630 (2009). However, "[i]f more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer." *Great Am. Dining v. Philadelphia Indemn. Ins. Co*., 164 N.H. 612, 616 (2013).

Appellants argue that these established rules of construction do not apply where policyholders are "[s]ophisticated commercial insureds" or where "their broker drafted the policy language." App. Br. at 23. In arguing this point before Judge Kissinger, Appellants relied on this Court's decision in *Trombly v. Blue Cross/Blue Shield*, 120 N.H. 764, 771 (1980). Supp. Apx. at 23. But Appellants now pivot away from Supreme Court precedent because the ruling in *Trombly* confirms that ambiguous provisions are construed in favor of coverage partly because "the object of the contract is to provide protection for the insured, [and so] the construction that best achieves this purpose should be adopted." *Trombly*, 120 N.H. at 771. Appellants' current citations to non-binding New Jersey law and a trial court opinion hardly justify the standard they promote – which is contrary to this Court's decision in *Trombly*.

ARGUMENT

I. THE PRECEDENT IN *MELLIN* IS CONTROLLING AND WAS APPLIED CORRECTLY BY JUDGE KISSINGER

This Court resolved the core issue presented by this appeal in *Mellin v. Northern Security Ins. Co.*, 167 N.H. 544 (2015). In *Mellin*, this Court rejected the insurance company's argument that "physical loss" only occurs when there is a tangible alteration to the material structure of property, finding instead that cat urine odor emanating from a neighboring property triggers coverage if it "rendered the insured property temporarily . . . unusable" even in the absence of "tangible alteration" to property. *Id.* at 550. The Court then established the standard applicable in this state, holding that coverage is triggered if there has been a "distinct and demonstrable alteration" to property. *Id.* at 551.

Judge Kissinger correctly applied the "distinct and demonstrable alteration" standard of *Mellin*. The presence of COVID-19 takes property that is safe and usable and alters it into something that is dangerous and unusable. That alteration is "distinct" because anyone presented with one property that is contaminated with COVID-19 and another that is not would (of course) choose the latter. That alteration is also "demonstrable" using various kinds of testing and modeling used to identify where the virus is present. Thus, property impacted by COVID-19 clearly meets the standard set by this Court in *Mellin* and Judge Kissinger's straightforward application of that standard should be affirmed.

When property is contaminated with COVID-19, whether by aerosolized particles suspended (and re-suspended) in the air or by "fomites" that come to rest on surfaces, the property is transformed from

something safe and useful to something potentially deadly. That alteration – from safe to hazardous – obviously is "distinct" under the dictionary definition of that term. *See Distinct*, Merriam-Webster, https://www.merriam-webster.com/dictionary/distinct (last visited June 15, 2022) (defining distinct to mean "distinguishable to the eye or mind as being discrete or not the same"). As Judge Kissinger observed, the difference between two doorknobs – one that is covered in COVID-19 particles and another that is not – is clear to anyone deciding which door to use. Add. 73. The difference plainly is distinguishable to the mind and the two are not the same – which is the dictionary definition of "distinct." Accordingly, contamination of property by a deadly disease constitutes a "distinct alteration" to property.

The presence of COVID-19 on property also is "demonstrable." Not only was the presence of COVID-19 at various properties common knowledge and widely reported by the government and in the news (*see* Apx. IV at 131-34), but it also can be confirmed through laboratory testing as performed on the air, floors, shoes, banknotes, furniture, toilets, appliances, and other property tested in actual scientific studies, including those in the summary judgment record. *See, e.g.* Apx. II at 179-182, Apx. III at 195-261.[3]

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[3] Any argument that the Court should disregard these studies as they were subject to a motion to strike should be rejected. The Superior Court only stated that it was not admitting them into evidence without expert testimony – not that they were stricken from the record. Add. 66-67.

Appellants have not offered any meaningful response to this common sense assessment – either before Judge Kissinger or on this appeal. Appellants have never contended that the distinct and demonstrable nature of COVID-19 on property raises a disputed issue of fact. Accordingly, the Superior Court's holding under *Mellin* that COVID-19 causes a "distinct and demonstrable alteration" to property should be affirmed.

A. ***Mellin* Is Directly on Point**

Mellin concerned a declaratory judgment action brought by homeowners Doug and Gayle Mellin against Northern Security Insurance Company ("Northern") when Northern refused to reimburse them "for losses to their condominium caused by cat urine odor." *Mellin*, 167 N.H. at 545. The Mellins owned a condominium unit in Epping that they leased to a tenant, who moved out in November 2010 supposedly due to an odor of cat urine emanating from a downstairs unit. *Id.* at 545. The Mellins then moved into the condo unit and noticed the odor themselves, which they say migrated into their unit through an open plumbing chase in the kitchen. *Id.* at 545; Apx. III at 290.

In December 2010, the Epping building inspector "viewed and observed" the unit and suggested that the Mellins move out "temporarily and have a company terminate the odor." *Mellin*, 167 N.H. at 546; Apx. III at 290-91. Eight months later, in August 2011, a professional cleaning service cleaned both units and put an ozone machine in the Mellin's unit to mitigate the odor. Apx. III at 291.

Despite the odor, the Mellins "continued to live in the unit continuously until February 2011," and then "occasionally" lived there, "moving in and out occasionally," until they sold the unit on October 31, 2012. *Id.*

While the Mellins asserted that it was unsafe to live in the condo unit due to the cat urine odor, they acknowledged that they received no medical care as a result of their exposure. *Id.* The Mellins offered no evidence that repairs had been undertaken, or that they had incurred any expenses in seeking to eliminate the odor. *Id.* The Mellins sought insurance coverage for losses mainly sustained in the form of lost rent and the diminished sale price due to the cat urine odor. *Id.*

The coverage grant in the Mellin's insurance policy provided: "We insure against risk of direct loss to property described in Coverage A, only if that loss is a physical loss to property." *Mellin*, 167 N.H. at 547. The insurance company moved for summary judgment, arguing that "direct" and "physical," though undefined, "are commonly understood to require tangible change to the property." *Id.* at 548; *see also* Apx. III at 299. According to Northern, the cat urine odor did not constitute a "physical loss" under the policy because it "did not cause a tangible alteration to the appearance, color or shape" of the condominium. *Mellin*, 167 N.H. at 548; Apx. III at 296, 301). The trial court granted summary judgment in favor of the insurance company. *Id.* at 545.

On appeal, this Court was "not persuaded that the common understanding of the word 'physical' requires the restricted reading [the insurance company] proposes." *Id.* at 548. Because the policy did not define "physical loss," it was appropriate to "give the words their ordinary

meaning." *Id.* (*citing Pawtucket Mut. Ins. Co. v. Hartford Ins. Co.*, 147 N.H. 369 (2001)). Noting that "physical" was "broadly defined" and referred to things "material as opposed to mental or spiritual," this Court "conclude[d] that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that are perceived by the sense of smell." *Id.* at 548.

The Court found ample support for its decision in the "substantial body of case law" holding that non-structural damage constitutes physical loss to property. *Id.* at 548-50 (*citing Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 412-13 (D. Conn. 2002) (friable asbestos and non-intact lead-based paint); *Gregory Packaging, Inc. v. Travelers Prop. Case. Co. of Am.*, No. 12 Civ. 04418, 2014 WL 6675934, at *2, 3, 8 (D.N.J. Nov. 25, 2014) (ammonia fumes); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (N.D. Va. 2010), *aff'd* 504 F. App'x 251 (4th Cir. 2013) (toxic gases released by drywall); *Western Fire Ins. Co. v. The First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline fumes); *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (vulnerability of homes to a slow-moving landside); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98 Civ. 434, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (spores that potentially caused odors in garments); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W. 2d 296, 300 (Minn. Ct. App. 1997) (asbestos fibers)).

Thus, this Court rejected the insurance company's arguments and reversed the Superior Court, holding that "physical loss" exists where there is "a distinct and demonstrable alteration of the insured property" even if the impact cannot be seen or touched. *Mellin*, 167 N.H. at 550.

Importantly, whereas the Superior Court had deemed the Mellin's occasional occupancy of the unit to be evidence that there was no physical loss, this Court rejected the idea that "physical loss requires permanent uninhabitability." *Id.* at 550-51 (emphasis added). To the contrary, it held that "[e]vidence 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." *Id.* at 550 (emphasis added). Under this Court's construction of "physical loss," a policyholder "is not required to demonstrate a 'tangible physical alteration' to [property] or to prove that [it] was rendered permanently uninhabitable." *Id.* at 551.

This Court thus vacated the Superior Court's grant of summary judgment and remanded to the trial court for the Mellins to "establish a distinct and demonstrable alteration to the unit." *Id.* at 551.[4] In doing so, this Court made it clear that under New Hampshire law, an odor was capable of causing "physical loss" that is covered under a property insurance policy. If cat urine odor was capable of causing "physical loss" in *Mellin*, then the presence of a deadly virus surely does here.

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[4] Notably, the Superior Court was not asked whether the Mellins were entitled to summary judgment, so that issue was never presented to the Supreme Court to decide. *See* Apx. III at 289.

B. The Holding in *Mellin* Was Never Challenged on *Stare Decisis* Grounds and Is Not Being Openly Challenged on Those Grounds Now

The decision in *Mellin* was well-known across the insurance industry and was discussed in trade publications and law review articles.[5] Yet the Court's decision never drew a challenge on *stare decisis* grounds, as Supreme Court decisions sometimes do.[6] Nor do Appellants expressly seek a reversal of *Mellin* on this appeal, as they must in order to obtain a reversal. *Maplevale Builders, LLC v. Town of Danville*, 165 N.H. 99, 105 (2013).

Thus, the question before this Court is whether Judge Kissinger correctly applied *Mellin* in determining that there is a "distinct and

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[5] *See e.g.,* Burke Coleman, CLAIMS JOURNAL, "Smell May Constitute Physical Loss Under Policy" (May 6, 2015), *available at* https://www.claimsjournal.com/news/east/2015/05/06/263231.htm; Adam P. Karp & Margit Lent Parker, *Recent Developments in Animal Tort and Insurance Law*, 51 Tort Trial & Ins. Prac. L.J. 245, 266-67 (2016); Scott G. Johnson, *What Constitutes Physical Loss or Damage in A Property Insurance Policy?,* 54 Tort Trial & Ins. Prac. L.J. 95, 114 (2019). !

[6] *Compare Russell v. NGM Ins. Co*., 170 N.H. 424, 430 (2017); *Massachusetts Bay Ins. Co. v. Am. Healthcare Servs. Ass'n,* 170 N.H. 342, 355 (2017), modified (Nov. 13, 2017); *State v. Carter*, No. 2014-0693, 2016 WL 4413265, at *1 (N.H. July 12, 2016) (all reported Supreme Court cases which cite *Mellin*, none of which address any stare decisis challenge) *with Providence Mut. Fire Ins. Co. v. Scanlon*, 138 N.H. 301, 303 (1994) (insurance company argued that Supreme Court's past ruling interpreting policy language should be overturned).

demonstrable alteration" to property contaminated with COVID-19. As discussed above, he did.

II. APPELLANTS' SUGGESTION THAT *MELLIN* SHOULD BE LIMITED OR OVERTURNED SHOULD BE REJECTED

Without a way to attack Judge Kissinger's straightforward application of *Mellin* here, Appellants resort to back-door attempts at a reversal or revision of that precedential decision. The holding in *Mellin* is consistent with centuries-old New Hampshire law identifying the *use of property* as the fundamental property right protected in this state. That holding should not be altered to support restrictions on coverage that Appellants easily could have written into the policies they sell, but did not. Simply re-packaging the same arguments rejected in *Mellin* is no grounds for a different result here, and the insurance companies' attempt to do so should be rejected.

A. New Hampshire Law Extends Unique Protection to Property and Its Use

This Court's ruling in *Mellin* and Judge Kissinger's application of that precedent is consistent with New Hampshire law, which goes further than other jurisdictions in protecting private property rights from harm and interference. As a matter of constitutional law, New Hampshire has two separate clauses in its constitution explicitly devoted to the protection of private property rights in a manner not duplicated in any other state. *See* N.H. CONST. pt. I, art. 12; N.H. CONST. pt. I, art. 12-a.

The fact that New Hampshire law offers heightened protection of property rights was noted in this Court's decision regarding citizens' interest in garbage put out by their curb: "in finding protection under our

State constitution under these circumstances we join a small minority of courts." *State v. Goss*, 150 N.H. 46, 48 (2003).

Indeed, this Court repeatedly has ruled that property rights are fundamental under our laws, with particular emphasis on the fact that it is *the right to use property* (as opposed to the property itself) that is central to protection under the law:

> Property, in the constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it. *The term refers to a person's right to possess, use, enjoy and dispose of a thing and is not limited to the thing itself.*

Bellevue Props., Inc. v. 13 Green Street Props., 174 N.H. 513 (2021) (emphasis added) (internal citation omitted); *see also Polonksy v. Town of Bedford*, 173 N.H. 226, 233 (2020) ("the right to property is a fundamental right in New Hampshire").

For at least 150 years, this Court has recognized that the "right to use" is an "essential quality" of the property rights protected under New Hampshire law:

> Property is the right of any person to possess, use, enjoy and dispose of a thing. . . . The right of indefinite use (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. *Use is the real side of property*.

Eaton v. Boston, Concord & Montreal Railroad, 51 N.H. 504, 511 (1872) (emphasis added) (internal citation and quotations omitted).

Lofty words like these about fundamental property rights are meaningless unless the law is applied to protect those rights. To its credit, this Court consistently has done just that, and its decision in *Mellin* is a perfect example. In *Mellin*, the Court acknowledged that the ability to *use* property is an important consideration when evaluating the scope of property insurance policies sold in this state. *Mellin.* 167 N.H. at 550 ("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). Appellants' attempts to roll back established Supreme Court precedent should be rejected.

B. The Significance of *Mellin* Was Well-Known, Yet Insurance Companies Never Revised the Terms of the Policies They Sell

This Court has made it clear that it will not revisit its interpretation of particular insurance policy provisions where the insurance company "fail[s] to help itself" by modifying policy terms in response to the Court's precedential rulings. *Providence Mut. Fire Ins. Co. v. Scanlon*, 138 N.H. 301, 304 (1994). In so holding, this Court stated that "considerations in favor of *stare decisis* are at their acme in cases involving ... contract rights, where reliance interests are involved," and that adherence to *stare decisis* is "essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of

judicial will with arbitrary and unpredictable results." *Id.* at 303-04 (*quoting Payne v. Tennessee*, 501 U.S. 808 (1991)). Notably, the Court ruled in *Scanlon* that its previous interpretation of exclusionary language in an insurance policy should not be overturned, even though "the overwhelming majority of jurisdictions" disagreed with the Court's interpretation, because insurance companies "doing business in this State are best served by being able to rely on our precedents, and to use them as guidance in drafting policy provisions." *Id.* at 304. (emphasis added)

Although Appellants knew that policyholders and this Court interpreted "physical loss" to include coverage for losses without "structural alteration," they continued to sell policies to New Hampshire businesses using the same policy wording – promising coverage in the wake of "physical loss of or damage to" property. If Appellants wanted to restrict coverage consistent with the arguments made and rejected in *Mellin,* they could have changed the terms of its policies to require that property become "useless or uninhabitable" or suffer "material destruction or material harm" – and reduced premiums accordingly. They did not.

As the Court noted in *Scanlon*, changes to policy wordings in response to court decisions or emerging risks are not unusual (*id.* at 304), and over the past two decades, insurance companies have revised policy wordings to limit coverage for losses due to viruses and pandemics, *but not in the Policies they sold to S&S*.

Notably, insurance companies paid claims for business interruption losses due to the SARS-CoV-1 outbreak in 2003-2004, under policies that promise coverage for "physical loss or damage." *See* Gavin Souter, "Hotel Chain to get Payout for SARS-Related Losses", BUSINESS INSURANCE,

Nov. 2, 2003, available at https://www.businessinsurance.com/article/20031102/story/100013638/hotel-chain-to-get-payout-for-sars-related-losses. Following that outbreak, and possibly in response to court decisions holding that disease-causing agents cause "physical loss or damage," insurance companies started adding broad virus exclusions to their policies. *See* Christopher C. French, *Covid-19 Business Interuption Insurance Losses: The Cases For and Against Coverage*, 27 CONN. INS. L. J. 1, 4, 28 n. 95 (July 1, 2020).

The use of virus and pandemic exclusions has since become the norm, with 83% percent of business interruption policies sold in 2020 containing an exclusion for virus, pandemic or disease. *See supra* at n. 2. The broad Policies that S&S purchased, however, were among the 17% that *did not include a virus exclusion*.

Not only did Appellants ignore their opportunity to narrow the terms of the Policies sold to S&S, but after the pandemic struck, they ignored the warnings of their own lawyers about denying coverage for COVID claims under New Hampshire law, given this Court's precedential ruling in *Mellin*. A March 11, 2020 memo published to the insurance industry by counsel for Appellant Everest Indemnity Insurance Company warned that "it is important to be aware which jurisdiction's law applies" and specifically cited to *Mellin* as the leading case rejecting the argument that "tangible" harm resulting in "material damage" is required:

> Importantly, there appears to be a split in jurisdictions as to what actually constitutes "physical loss or damage." Some courts restrict their analysis to require tangible changes

> resulting in material damage to property [citation omitted]. Others more liberally find "physical loss" due to changes that cannot be seen or touched as long as there is a demonstrable alteration of the insured property [citing *Mellin*].

Supp. Apx. at 106, 117 (Memorandum by Zelle LLP, dated March 11, 2020) (emphasis added).

Fully aware of this Court's ruling in *Mellin* and equipped with express pandemic or virus exclusion commonly added to their policies, Appellants continued to sell policies to S&S with the same broad coverage provisions as before (for over $1 million in annual premiums). It is therefore only fair that this Court – like Judge Kissinger below – hold them to the *Mellin* standard and require coverage here.

C. Appellants Re-Hash the Arguments Rejected in *Mellin* in the Hopes that This Court Will Abandon Its Precedent

Having failed to add a virus exclusion to S&S Polices, Appellants resort to re-formulating the same arguments this Court rejected in *Mellin,* hoping for a different result from a Court with four new Justices. Those arguments failed in 2015, and they should fail again here.

1. Appellants' Disregard for Precedent Is Manifest

In pursuit of this interlocutory appeal, Appellants brazenly stated that changes in the composition of this Court since *Mellin* was decided in 2015 could lead to a different result on this appeal. Supp. Apx. at 71-73 ("Whenever you have a change in the composition of the court and they're

looking at a prior decision that was from years earlier, in any Supreme Court, that's going to -- you're going to have different perspectives (indiscernible) on the issue.").

As Judge Kissinger's incredulous response indicated (*id.*), Appellants' expectations are incompatible with bedrock *stare decisis* principles under New Hampshire law. *See Appeal of Phillips*, 165 N.H. 226, 231–32 (2013), as amended (Feb. 6, 2014) ("The doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results") (quoting *Ford*, 163 N.H. at 290); *see also Gormley v. Rough Diamond Dev., LLC*, No. 2019-0273, 2020 WL 1238873, at *4 (N.H. Mar. 10, 2020) (declining to overrule precedent based on diverging authority from other jurisdictions). There is no reason to depart from *Mellin* here.

2. Appellants Simply Repackage the Arguments Rejected in *Mellin*

As summarized in the chart below, the insurance companies make the same arguments here that were made in *Mellin*:

Requirements Sought by the Insurance Company in *Mellin*:	**Requirements Sought by the Insurance Companies Here:**
"condemned or unusable" (Apx. III at 296) "functionally uninhabitable and unusable" (Apx. III at 296)	"unusable or uninhabitable" (App. Br. at pp. 29, 30) "useless or uninhabitable" (App. Br. at p. 30, 37) "unsafe or unusable for any and all purposes whatsoever" (App. Br. at p. 39)
"tangible change" or "tangible alteration to the . . . material structure" (Apx. III at 299)	"tangible physical loss or damage" (App. Br. at p. 24) "perceptible, material change" (App. Br. at p. 29) "material destruction or material harm that physically altered the covered property requiring repairs or replacement" (App. Br. at p. 38) "material alteration," "material destruction or material harm" or "material, perceptible destruction or ruin" (APCIA Br. at pp. 21-22)

Requirements Sought by the Insurance Company in *Mellin*:	**Requirements Sought by the Insurance Companies Here:**
"altered in appearance, shape, color, or some other material dimension" (Apx. III at 300)	"the property itself must change in a material way" (App. Br. at p. 30) "physical alteration or destruction" or "physical alteration" (APCIA Br. at pp. 10, 13)
"functionality was eliminated or destroyed" (Apx. III at 306)	"more than a diminished ability to use the property" (App. Br. at pp. 38-39)

Those arguments were rejected in *Mellin,* and *stare decisis* requires that they be rejected again here. *See Matte v. Shippee Auto, Inc.*, 152 N.H. 216, 222 (2005).

3. The APCIA Disregards *Mellin*

In what amounts to an acknowledgement that there is no good reason why the outcome here should depart from the holding in *Mellin,* the APCIA treats this Court's decision as an afterthought. The APCIA devotes over two pages to a non-binding intermediate appellate court decision from New York (APCIA Br. at 14-16), but spends just a few sentences on this Court's precedential opinion in *Mellin* – merely stating in conclusory fashion that the Superior Court erred in relying on it (*id.* at 22). Indeed, *Mellin* is not even mentioned until the third-to-last page of the APCIA's 25-page brief. *Id.* Such treatment speaks volumes.

The APCIA offers hollow arguments[7] to suggest that application of the *Mellin* test here would "eliminate the core boundaries that have long defined property insurance" and open the door to all sorts of otherwise uncovered claims. *See* APCIA Br. at 16-18 (suggesting that a "functional use test" (which *Mellin* is not) would lead to assertions of coverage for imagined losses due to noise ordinances, disability access law, fire code regulations and passing rainstorms).

Yet neither the insurance companies doing business in New Hampshire nor its courts have been besieged by any such insurance claims in the years since *Mellin* was decided – for the simple reason that none of these things meet *Mellin's* "distinct and demonstrable alteration" test. Noise ordinances, wheelchair access laws, etc. obviously do not cause a "distinct and demonstrable alteration" to property. A deadly virus that can sicken or even kill people breathing the air there certainly does. Passing rainstorms or high winds that require an outdoor dining area to close for a few hours never result in insurance claims.

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[7] The APCIA also misstates the facts. The APCIA is misleading this Court when it incorrectly states that "Appellees do not identify a distinct, demonstrable, physical alteration to property." APCIA Br. at p. 13 (internal quotes omitted) (note also the APCIA's insertion of the word "physical" into this Court's "distinct, demonstrable alteration" standard established in Mellin). Contrary to this assertion, S&S clearly contends that COVID-19 causes a distinct and demonstrable alteration to property – turning it from safe and useful into something unsafe, unusable and possibly even deadly. See Apx. II at 160-61. Judge Kissinger correctly agreed. Add. 72-74.

To compare such every day occurrences to the once-in-a-century COVID-19 pandemic – which crippled businesses like S&S in a way that policies without a virus or pandemic exclusion promised to cover, all in an attempt to shirk those contractual obligations – is outrageous. The APCIA's straw-man arguments are resolved simply by applying the test established in *Mellin* – does the loss at hand involve a distinct and demonstrable alteration to property? As Judge Kissinger correctly held below, when safe and usable property is rendered dangerous and unusable by a deadly virus, the *Mellin* test is met. Add. 72-74.

The APCIA talks out of both sides of its mouth when it professes an interest in the "clear, *consistent* and reasoned development of law" affecting policyholders. APCIA Motion for Leave at p. 2 (emphasis added). An entity interested in a *consistent* application of the law would not seek a one-off departure from *Mellin* in order to prevent a few New Hampshire businesses from receiving the coverage owed under policies sold without virus exclusions.

D. S&S's Claim Is Not Distinguishable from *Mellin* – COVID-19 Alters Property *More* Substantially than an Odor

1. The Insurance Companies' Trivialize the Hazardous Nature of COVID-19 and the Profound Effect It Had on Property and S&S's Business

COVID-19 resulted in an unprecedented loss of life in this country and an unparalleled disruption to businesses like S&S. *See* Apx. I at 53, 151; Apx. IV at 114, 131-134, 160. The Insurance Companies seek to minimize the impact that COVID-19 had on property, S&S, and society at

large by comparing it to the common cold, or even a fire in a fireplace. App. Br. at 31-32. Such comparisons trivializing COVID-19 are an insult to the intelligence of the Court and to those who have lost their lives.

To begin with, the common cold does not cause business interruption losses. It does not bring travel to a halt. The risk of a common cold does not affect the use of property; nor does it lead to the issuance of orders of civil authority that decimate the hotel business. The same obviously is true of fires in fireplaces. These are straw-man arguments that never have and never will be the subject of claims for business interruption losses, let alone losses the likes of which we experienced because of COVID-19 in 2020.

Second, there is no evidence of the supposedly deleterious impact of the common cold or a fireplace on property. On its face, the suggestion that a cozy fire in a fireplace somehow harms people or property is ridiculous. In reality, its effect is the opposite – a benefit to the people enjoying its warmth and to the use of the property itself. In sharp contrast, S&S has adduced evidence that, among other things, COVID-19 is potentially deadly and highly contagious via aerosolized particles that have been found to impact property for up to 28 days. *See* Apx. III at 205-06, 208, 229, 233-34. There is no comparable evidence concerning the common cold. Appellants' attempt to analogize the presence of COVID-19 with everyday conditions that do not disrupt business generally, and certainly have not caused widespread economic disruption, should be disregarded.

2. S&S's claim is not distinguishable from that in *Mellin* – if anything, it is stronger

COVID-19 causes a "distinct and demonstrable alteration" to property, even if it might not cause "material destruction" or result in "permanent dispossession." The same was true of the cat urine odor in *Mellin* – which impaired the usability of the Mellin's condo unit, but caused no "material destruction" or "permanent dispossession." If anything, the impact of COVID-19 on property – which can be deadly – is far worse than a mere unpleasant odor.

Appellants argue that COVID-19 only "affects people, not property" (App. Br. at 19), but one could say the same thing of the smell at the Mellin's condo. Foul smells affect people far more than they affect a property's structure, yet they render the property unfit for its ordinary business use and trigger coverage based on "physical loss." Indeed, disruptions to a business when property is rendered dangerous and unusable is precisely what business interruption insurance is supposed to cover.

None of the loss scenarios in the cases cited by this Court in *Mellin* support the heightened standards that Appellants seek here. Indeed, the fumes and odors in all of those cases have a less drastic impact on property than a deadly virus, yet resulted in a finding of coverage.[8] None of these

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[8] *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-4418, 2014 WL 6675934, at *1-3, 6, 8 (D.N.J. Nov. 25, 2014) (escape of ammonia fumes into a juice packaging facility due to a leaky refrigeration system, temporarily rendering the facility hazardous and unsafe); *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-56 (Colo. 1968) (1968) (gasoline vapors that contaminated a church,

cases involved "material destruction" or "permanent dispossession" of property, but the impact to each property was "distinct and demonstrable," and therefore supported this Court's confirmation of coverage for similar losses under New Hampshire law.

3. Partial use of a property does not eliminate coverage

The insurance companies ignore *Mellin* and the terms of S&S's Policies in order to argue: "[e]ven thought Appellees may not have been able to use the hotels for their preferred and most lucrative use, they were still at all times' able to use the hotels for other purposes consistent with the closure orders." APCIA Br. at pp. 13-14 (internal quotes omitted); *see also* App. Br. at 20, 30.

As an initial matter, the argument that there is no coverage because the Hotels remained partly usable is belied by the Policies' express promise

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rendering the continued use of the building "highly dangerous" until the problem was rectified); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 703, 708-10 (E.D. Va. 2010) ("noxious odors" from drywall installed in a home that were capable of sickening residents); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332, 1333-1335 (Or. App. 1993) (odors from a methamphetamine lab set up by sub-tenants in a multi-family residential property that caused tenants to move out until the odor was gone); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 298 (Minn. Ct. App. 1997) (microscopic asbestos fibers at a residential building that potentially rendered the property unsafe until the problem was rectified); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434-HU, 1999 WL 619100, at *1-2, 7 (D. Or. Aug. 4, 1999) (coverage for garments "with heightened spore counts" would exist on a showing of a "distinct and demonstrable physical change to the garment" – even if the "distinct and demonstrable" alteration was at the microscopic level).

to cover "loss resulting from the complete *or partial* interruption of business conducted by the Insured." Apx. I at 106 (Policies ¶10) (emphasis added). Clearly, if "partial interruption" is covered, then a complete cessation of operations is not required to trigger coverage.

This argument also was rejected in *Mellin*. The Mellins used their condo unit "continuously" from November 2010 until February 2012, and then "occasionally" until October 2012, but it could not be fully be enjoyed by them or rented at market rates due to the cat urine odors. *See* Apx. III at 291. The Superior Court based its ruling for Northern partly on the fact that the Mellins continued to use the property. *Mellin*, 167 N.H. at 546. But this Court disagreed and held that "[e]vidence 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." *Id*. at 550 (emphasis added).

Not only is the insurance companies' argument barred under the Policies and *Mellin*, it is absurd when applied to the facts here. The insurance companies' new "partial use" standard would eliminate all coverage because the Hotels remained "partially usable" to host a handful of emergency workers, even though a deadly virus caused occupancy rates to plummet and caused devastating losses. Such a standard would be a slap in the face to S&S, which, unlike Appellants, did its part in the emergency response to the pandemic.

E. The Standard Established in *Mellin* Must Not Be Replaced with an Unsound and Unclear "Cleaning" Test

The insurance companies attempt to alter New Hampshire law by replacing *Mellin's* "distinct and demonstrable" standard with a new test

under which property that arguably can be "cleaned" has not suffered "physical loss or damage," even if it was dangerously toxic for an extended period of time. APCIA Br. at 23, App. Br. at 20, 31-35. There is no valid legal basis for such a standard.

Various amounts of "cleaning" could have resolved (or, did resolve) the dangerous conditions in cases this Court relied on in *Mellin*, but the courts in each case held coverage was nevertheless required.[9] Here, even if COVID-19 could be "cleaned" from the air or surfaces at a property (which was not the understanding or practice when the pandemic struck; nor is it even clear today), the property still could not be used for its business purpose until the "cleaning" was known to be complete. It is that impact to property that triggers business interruption coverage, the duration of which is to be determined under the terms of the Policies. The supposed ability to eventually "clean" property rendered hazardous and unusable does not defeat a policyholder's right to coverage.

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[9] *See Gregory Packaging*, 2014 WL 6675934, at *2 (remediation company was able to dissipate ammonia fumes from a juice-packaging facility, yet there was a covered loss because the facility's business use was impacted while the fumes were there); *Sentinel*, 563 N.W.2d at 300-01 (asbestos fibers could be cleaned and removed from contaminated property, yet direct, physical loss to property held to exist even though the policyholder "neither closed its rental properties nor [took] action to remove the released fibers from the buildings"); *Columbiaknit,* 1999 WL 619100, at *7 (court acknowledged that the property could be cleaned, but it still suffered "physical loss or damage" because it could not be used it for its intended business purpose).

Moreover, the new "cleaning" standard proposed by the insurance companies offers no guidance as to how hard the "cleaning" job needs to be in order to trigger coverage, and completely fails to consider the severity of the hazard or impact on operations while the "cleaning" is underway.

For example, does a hotel get coverage if it takes 14 days of scrubbing with specialized chemicals to "clean" mold at a property? Would there be a different result for another hotel whose business is off-line for only two days while its hot water system is flushed with ordinary chlorine to remove legionella bacteria? Is the answer different if someone had died due to the conditions at one or the other property? The question of how hard it is or how long it takes to restore damaged property will tend to affect the *duration* of coverage for a loss, but it does not determine whether or not a loss is covered at all in the first place.

Further still, Appellants' "cleaning" standard conveniently forgets the reality of life with COVID-19 in 2020. When the pandemic struck, no one thought that property contaminated by COVID-19 – either in the air or on surfaces – was safe and usable if it had been "cleaned." On the contrary, people wore gloves and other protective gear every time they left their homes in order to avoid contact with the virus, whether or not a location might have been "cleaned." Moreover, no one provided "cleaning" services that could reliably eliminate COVID-19 from a property. The truth was (and remains) that it is simply not possible to "clean" premises so as to eliminate the risk of COVID-19 transmission. Indeed, even the "cleaning" and containment strategies used in hospitals (including the "installation of high-efficiency particulate air filters") were shown to have less than ideal effectiveness. *See* Zarina Brune, et. al, "Effectiveness of SARS-CoV-2

Decontamination and Containment in a COVID-19 ICU," Int'l J. of Environmental Research and Pub. Health 18(5), 2479; https://doi.org/10.3390/ijerph18052479 (Mar. 3, 2021) ("While chemical decontamination effectively removes detectable viral RNA from surfaces, our approach to droplet/contact containment with an antechamber was not highly effective. These data suggest that hospitals should plan for the potential of aerosolized virions when creating strategies to contain SARS-CoV-2").

Ultimately, the insurance companies are trying to replace the clear and workable standard enunciated in *Mellin* with a jury-rigged and confusing standard that generates their desired outcome here. Their argument turns this Court's approach to *stare decisis* on its head. *See Scanlon*, 138 N.H. at 304 (noting that decisions can be overturned when they prove to be "unworkable" – not the other way around).

What standard will the insurance companies want to apply when the next case with a slightly different fact pattern comes along? The law of the Granite State does not sit on shifting sands. Businesses that purchase insurance contracts here are entitled to do so with the knowledge that the courts will apply the law consistently, and will not alter their interpretation of basic contract terms like "physical loss" after a loss occurs. *Scanlon*, 138 N.H. at 304.

III. THE INSURANCE COMPANIES' REMAINING ARGUMENTS FAIL

A. The Insurance Companies Place Undue Weight on Foreign Decisions Unbound by the Precedent in *Mellin*

Appellants rely heavily on COVID-related business interruption cases from outside New Hampshire, none of which were bound by this Court's precedent in *Mellin*. Although it is not mentioned by the insurance companies, many courts – especially state courts – have criticized the apparent tendency to follow decisions involving different states' law and different policy wordings. As one judge put it:

> Economists refer to this as an appeal to "herding behavior" – a process by which group-think replaces individual decision-making. . . . Judges are not sheep, and I do not decide a case by counting noses. Further, the "herd" can be wrong.

JDS Constr. Grp., LLC, v. Cont'l Cas. Co., No. 2020 CH 5678, 2021 WL 8775920, at *3 (Ill. Cir. Ct. Oct. 25, 2021). Many courts agree,[10] as do respected insurance law scholars.[11]

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[10] *See MacMiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753, 2021 WL 3079941, at *5 (Pa. Com. Pl. May 25, 2021) ("merely accepting the non-binding decisions of other courts 'by the purely mechanical process of searching the nations courts for conflicting decisions' amounts to an abdication of this Court's judicial role*"); Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *6 (Pa. Com. Pl. Mar. 25, 2021) (same); *Brown's Gym, Inc. v. Cincinnati Ins. Co.,* No. 20 CV 3113, 2021 WL 3036545, at *19 (Pa. Com. Pl. July 13, 2021) ("State trial courts throughout the nation have agreed with the foregoing rationale articulated in the federal case law in denying insurers' attempts to dismiss business interruption insurance claims filed by insureds who assert that COVID-19 was present on their covered property"); *Goodwill Indus. of Orange Cty., Cal. v. Phila. Indem. Insur. Co*., No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *3 (Cal. Super. Ct. Jan. 28, 2021) (stating that the Federal cases relied on by the insurance company "are not binding on this court and were decided under a different standard"); *Snoqualmie Enter. Auth. v. Affiliated FM Ins. Co.,* No. 21-2-03194-0 SEA, 2021 WL 4098938, at *6 (Wash. Super. Sept. 3, 2021) ("This Court is not persuaded by [another judge's] reliance on the opinions of other federal district court opinions across the country that applied the laws of other states, nor its holding that the undefined phrase 'all-risks of physical loss or damage' cannot be reasonably interpreted by the average lay person to include the insured's inability to physically use, control, or manipulate its property as a result of the COVID-19 closure orders and Tribal resolutions"), *Boardwalk Ventures CA LLC v. Century-National Ins. Co.,* 20STCV27359, 2021 WL 1215892, at * 3 (Cal. Super. Ct. Mar 18, 2021) (rejecting the "litany of unpublished federal district court cases" cited by the insurance company "in support of the proposition that courts applying California law have 'uniformly dismissed lawsuits like the instant action'" – recognizing that these cases are not binding and the dismissal was not proper); *Risinger Holdings, LLC v. Sentinel Ins. Co.*, No. 1:20-CV-00176, 2021 WL 4520968, at *12 (E.D. Tex. Sept. 30, 2021) (holding that the policy's use of "physical loss" is

Appellants attempt to turn this Court's decision in *Mellin* on its head when they contend that their foreign cases "have applied a legal standard substantially equivalent to the *Mellin* standard." App. Br. at p. 35. The reality is that this Court's decision in *Mellin* rejected the insurance company argument that "physical loss" requires a "tangible alteration to material structure," whereas the cases relied on by Appellants do the opposite, and bar coverage on the grounds that COVID-19 does not cause "structural damage" or "physical alteration" of property.[12] The out-of-state

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ambiguous and concluding that the policyholder "may have suffered direct physical loss due to Governor Abbott's lockdown order by being deprived of the use or full use of the physical space of its covered property, or alternately, because of the severe material losses it endured when it was forcibly excluded from its businesses").

[11] *See* Knutsen and Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. Law J. 185 (2020).

[12] *See e.g., SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358-60 (11th Cir. 2022) (predicting Florida law requires "actual" tangible "damage" or "destruction"); *GPL Enterprise, LLC v. Certain Underwriters at Lloyd's*, -- A.3d --, 2022 WL 1638787, at *5-7 (Md. Ct. Special App. May 24, 2022) (holding that Maryland law requires "actual or tangible harm"); *Consolidated Rest. Ops., Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 85-86 (1st Dep't 2022) (holding that New York law requires a "negative alteration in the tangible condition" of property); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at *1-2 (2d Cir. Jan. 28, 2022) (unpublished) (same under New York law); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 331-32 (7th Cir. 2021) (predicting that Illinois law requires "physical alteration" – *i.e.*, "damage" – or "destruction" to property); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 182 N.E.3d 393, 405 (Ohio Ct. App. 2021) (holding Ohio Law "requires a tangible and structural damage to the property");

cases cited by Appellants are, thus, the exact *opposite* of this Court's precedential decision in *Mellin.* Even if *Mellin* might represent a minority view, this Court has made it clear that it will "adhere to the principle of *stare decisis*" and follow its precedent. *Scanlon*, 138 H.H. at 303.

The Massachusetts Supreme Judicial Court's decision in *Verveine Corp. v. Strathmore Ins. Co.,* 184 N.E.3d 1266 (Mass. 2022) does not control because it reached the *opposite* conclusion of this Court in *Mellin.* 184 N.E.3d at 1274 (applying Massachusetts law which requires "physical alteration" and "destruction" of property). It is worth noting that Massachusetts is less protective of property rights than New Hampshire. *See, e.g.*, *Diane Holly Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 560 (D.N.H. 1983) (noting that New Hampshire's constitutional protection of property demands stronger likelihood of success be shown to secure prejudgment attachment than the "reasonable likelihood" required by Massachusetts); *compare* Lawrence Friedman, The New Hampshire Constitution 63-66 (2d ed. 2015) *with* Lawrence Friedman, The Massachusetts Constitution 53-54 (2011) (showing that protections against takings are manifestly weaker under Massachusetts law than New Hampshire law). Thus, *Verveine* does not justify a departure from established New Hampshire precedent here.

Uncork & Create LLC v. Cincinnati Ins. Co., 27 F.4th 926, 932 (4th Cir. 2022) (holding that West Virginia law would require "material destruction or material harm").

Nor does the Iowa Supreme Court's decision in *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 548-50, 552 (Iowa 2022). In sharp contrast with the Policies purchased by S&S, the policy at issue in *Wakonda* contained a virus exclusion, and the policyholder there did not even allege any "physical loss or damage" caused by COVID-19 (since such allegations would merely trigger the exclusion). Indeed, in ruling for the insurance company under those facts, the Iowa Supreme Court cited favorably to some of the same cases cited by this Court in *Mellin* and left open the possibility for coverage in a case like S&S's without a virus exclusion and with straightforward allegations for "physical loss or damage" caused by COVID-19. *See id.* at 552.[13]

The Louisiana Court of Appeals' decision in *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, -- So.3d --, No. 2021-CA-0343, 2022 WL 2154863 at *16 (La Ct. App. June 15, 2022) is far more instructive here. Prior to the pandemic, Louisiana's courts – like New Hampshire's – had rejected insurance company arguments that "structural damage" was required to trigger property insurance coverage, and had "joined th[e] line of cases extending coverage for a broader array of losses caused by disease-causing agents with a tangible, but microscopic, physical

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[13] The Virginia Supreme Court's refusal of the petition of appeal in *Crescent Hotels & Resorts LLC v. Zurich Am. Ins. Co.*, No. 211074, 2022 Va. Unpub. LEXIS 9 (Va. Apr. 14, 2022) is neither binding precedent nor a bar to a different outcome in another case presented to a different Virginia Court of Appeals. *Sheets v. Castle,* 559 S.E.2d 616, 619 (2002) ("unless the grounds upon which the refusal is based is discernible from the four corners of the Court's order, the denial carries no precedential value").

form." *Cajun Conti*, 2022 WL 2154863, at *5. As Appellants do here, the insurance companies in *Cajun Conti* relied on "recent cases in other jurisdictions that have interpreted 'physical' in relation to coronavirus claims," but the Court of Appeals correctly followed the binding precedent from Louisiana, noting that the decisions from other jurisdictions "are not binding upon this Court." *Id.* This Court should likewise follow its precedent in *Mellin* here.

B. Upholding *Mellin* Will Not Bankrupt the Insurance Industry

The APCIA warns this Court that a ruling for S&S here will "distort the insurance mechanism"[14] – baselessly implying a cascading obligation to cover all "small business losses from the COVID-19 pandemic;" and providing estimates in the billions per month. APCIA Br. at pp. 18-19. These threatening assertions are false.

First, the APCIA's scare tactics ignore the fact that only 17% of policies were sold without virus and pandemic exclusions. Careful review of the statements cited in the APCIA's own brief confirm that virus and pandemic exclusions are the key to restricting coverage for losses caused by COVID-19. *See* NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020) (APCIA Br. at p. 19, n. 6) ("Business interruption policies were *generally* not designed or priced to provide

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[14] This thinly veiled threat (APCIA Br. at p. 18) is outrageous and unfounded. One might read the entire 350-page book cited in support of this notion and still have no clue what this assertion even means, let alone proof that it is true. *Id.* at n. 2.

coverage against communicable diseases, such as COVID-19 *and therefore include exclusions for that risk*.") (emphasis added).

A June 2020 investigation and analysis by Reuters showed that the enormous cost estimates developed by the APCIA are grossly inflated because they ignore the fact that most policies are sold with virus or pandemic exclusions and many do not even provide business interruption coverage at all. *See* Alwyn Scott and Suzanne Barlyn, "U.S. Insurers Use Lofty Estimates To Beat Back Coronavirus Claims," REUTERS BUSINESS NEWS (June 12, 2020) (available at https://www.reuters.com/ article/ us-health-coronavirus-insurance-claims-a/u-s-insurers-use-lofty-estimates-to-beat-back-coronavirus-claims-idUSKBN23J0T6).

As noted in the Reuters article, "if the estimate counted only businesses without explicit exclusions for pandemics, 'it would be in the millions per month'" – not the $255 to $431 billion per month falsely promoted in the APCIA's *amicus* brief in an effort to mislead and scare this Court. *Id.*

The fact of the matter is that there are only about three COVID-related business interruption cases pending in New Hampshire's state and federal courts, combined. *See* Covid Coverage Litigation Tracker, CCLC Case List (available at https://cclt.law.upenn.edu/cclt-case-list/ (last accessed June 20, 2022) (showing three cases filed in New Hampshire). Moreover, the prospect of many new cases being filed is significantly tempered by the fact that most commercial property policies include a "suit limitation" provision that bars suits filed more than two years after the date of loss. *See e.g.* Richard P. Lewis & Nicholas M. Insua, BUSINESS INCOME INSURANCE DISPUTES § 8.02[B] (2nd Edition, 2022-1 Supp. 2012); 1 New

Appleman Insurance Law Practice Guide § 9.17(1) (2021) (noting suit limitation clauses as short as 12 months).

Appellants clearly have the means to pay what they owe to the handful of New Hampshire policyholders, including S&S, who purchased broad business interruption coverage free from virus and pandemic exclusions. Thus, even if the insurance industry's "too big to fail" argument could ever justify excusing their contractual obligations (it cannot), it makes no factual sense in this case.

C. The "Period of Restoration" Provision Cannot Be Used To Eliminate Coverage

Appellants misconstrue the purpose and meaning of the Period of Restoration provision, calling it a "pre-condition" to coverage. App. Br. at 34. That is incorrect.

The Period of Restoration provision serves a specific purpose under the Policies – it guides the quantification of a covered loss by delineating when the loss calculation begins and ends. *See* 3 New Appleman Insurance Law Practice § 31.08(2)(b)(iv) (2021). It does not dictate whether coverage is triggered in the first place. *See, e.g. K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, 561 F. Supp. 3d 827, 838 (W.D. Mo. 2021) ("this provision is not a definition of coverage, but instead describes a time period during which loss of business income may be recovered").

Appellants further distort the meaning of the Period of Restoration provision by focusing in on one clause, while ignoring others that enhance and expand the coverage promised to S&S. Appellants' narrow focus distorts the broad coverage provided in at least three ways.

First, Appellants misrepresent the scope of the Period of Restoration provision when they argue that it applies to "all time element coverages." App. Br. at 33. Contrary to this assertion, the Period of Restoration provision does not apply to the extensions of coverage for Civil Authority and Ingress/Egress. Rather, those coverages insure losses sustained during the period of time (up to 90 days) that access to S&S's Hotels is "impaired or hindered" by an order of civil authority or by "loss or damage" occurring away from the Hotels. Apx. I at 111-12 (Policies ¶21(d) and ¶21(e)). The period of recovery for these extensions of coverage has no logical or contractual connection to the time needed to "rebuild, repair, or replace lost, damaged or destroyed property." *Id.* at 111 (Policies ¶20(a)).

Second, Appellants disregard (and obfuscate by the improper omission of an ellipsis, App. Br. at 34) the clause in ¶20(a) of the Policies that extends the Period of Restoration for the time needed "to make such property ready for operations under the same or equivalent physical and operating conditions that existed prior to the loss" (*i.e.*, until the property is restored to conditions that are free from a deadly virus). *See* Apx. I at 111. Obviously, property still contaminated (or re-contaminated) with COVID-19 was not back to pre-loss "operating conditions," and the Policies expressly cover losses suffered until property is restored to its "operating conditions" prior to the loss.

Third, Appellants ignore the extended business interruption provision in ¶20(c) of the Policies, which provides up to 365 days of *extended* coverage as needed to restore S&S's *business* – not just the physical property – to its pre-loss condition. Apx. I at 111 ("The Period of Restoration shall include such additional length of time to restore the

insured's business to the condition that would have existed had no loss occurred"). This valuable extension of coverage allows not only for the time needed to rebuild, repair, or replace property that has suffered loss or damage, but covers the additional "ramp-up" time needed for S&S to get its *business* back to pre-loss levels.

Thus, to the extent that time needed for "repairs" is germane to the applicable period of recovery, the broad coverage sold by Appellants entitles S&S to coverage for the time it takes:

- to repair the loss or damage to property (*i.e,* to "restore it to a healthy state");
- to make such property ready for operations under the same or equivalent physical and operating conditions that existed prior to the loss; and
- for up to an additional 365 days as needed to restore the business to its pre-loss conditions.

S&S is entitled to the full extent of coverage it purchased – not the truncated amount Appellants misleadingly suggest they sold.

Perhaps more fundamentally, Appellants sidestep the fact that property impacted by COVID-19 does require "repair" within the dictionary definition of that word, that is: "to restore to a sound or healthy state." *Repair Definition*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/repair (last visited June 15, 2022). The Louisiana Court of Appeals recently agreed that application of this plain meaning of "repair" in the COVID-19 business interruption context is quite reasonable. *Cajun Conti*, 2022 WL 2154863, at *16 ("under the plain meaning of

'repair,' it is equally plausible that some portion of the cycle of cleaning and decontamination fulfills the definition of restoring the property to a healthy state.").

Thus, to the extent that one might consider the Period of Restoration provision in assessing whether coverage is triggered, the need to "repair" property affected by COVID-19 (*i.e.,* to "restore it to a healthy state") is clear and the provision does not eliminate coverage for S&S's substantial losses.

IV. S&S'S BROAD POLICIES DO NOT EVEN REQUIRE "PHYSICAL" LOSS OR DAMAGE TO TRIGGER THE EXTENSIONS OF TIME ELEMENT COVERAGE AT ISSUE

Appellants' core argument that there is no coverage here because there has been no "physical loss of or damage to" property fails for a separate reason – the broad "Extensions of Time Element Coverage" at issue here do not require "physical loss of or damage to" property in order to trigger coverage. The "Perils Insured Against" provision in the Policies states that "[t]his policy insures against risks of direct physical loss of or damage to property described herein . . . , except as hereinafter excluded." Apx. I at 114 (Policies ¶28) (emphasis added). "Direct physical loss of or damage to" property is not a "peril" – it is a consequence of a peril. The "peril" insured against under the Policies sold to S&S is any "risk" of physical loss or damage that is not excluded.[15] Over 80% of the commercial policies sold in 2020 excluded the risks of viruses and

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[15] *See* 3 New Appleman Insurance Law Practice Guide § 31.06(2)(d) (2021).

pandemics (*see supra* at n. 2), but not the Policies that Appellants sold to S&S. Because the *perils* of pandemics or viruses are not excluded, those *perils* are covered under the Policies. The Claim here is for business interruption losses *caused by* such insured perils, and the question of whether such losses are covered is determined by looking to the coverage grants.

The coverage grants at issue in S&S's motion for partial summary judgment are triggered by "loss or damage," not "*physical*" loss or damage. Specifically, S&S's Policies state:

> this policy, subject to all its provisions . . .
> insures against ACTUAL LOSS SUSTAINED
> by the Insured resulting from loss or damage
> from the perils insured against, to: . . .
> (b) . . . property that prevents a receiver (of any
> tier) of goods and /or services from receiving
> the Insured's goods and or services; . . .
> (d) the actual loss sustained . . . when , as a
> result of a peril insured against, access to real or
> personal property is impaired or hindered by
> order of civil or military authority irrespective
> of whether the property of the Insured shall
> have been damaged.
> (e) the actual loss sustained . . . when , as a
> result of a peril insured against, ingress to or
> egress from real or personal property is thereby

> impaired or irrespective of whether the property of the Insured shall have been damaged.
>
> (f) Use of Water – This policy is extended to insure loss sustained during the period of time when, as a result of physical loss or damage by a peril not excluded by this policy, recreational use of water from lakes, rivers, or other bodies is impaired or hindered.

Apx. I at 111-12 (Policies ¶21) (emphasis added). The coverage grants under which S&S is entitled to coverage (¶21(b), (d) and (e)) require, at most, only "loss or damage," and not "physical loss."

If Appellants wanted "physical loss or damage" to be a requirement for the CBI Coverage under ¶21(b), the Civil Authority Coverage under ¶21(d) or the Ingress/Egress Coverage under ¶21(e), then they would have included the words "*physical* loss or damage" in those coverage grants, as they did in the coverage grant for Use of Water in ¶21(f). Apx. I at 111-12.

It is black letter law that all contract terms must be given meaning, and that language used in a contract must not be treated as mere surplusage. *Progressive Northern Ins. Co. v. Argonaut Ins. Co.*, 161 N.H. 778, 782 (2011) (rejecting construction that "would render an endorsement a nullity" because the court cannot presume language in insurance policy "to be mere surplusage").

Because Appellants included the word "physical" in the Use of Water coverage grant but not in the CBI, Civil Authority or Ingress/Egress coverage grants, *physical* loss or damage is *not* required to trigger those coverage grants – which are the basis for S&S's Claim.

V. THE MOLD, MILDEW, FUNGUS EXCLUSION DOES NOT BAR COVERAGE HERE

In order to bar coverage under an exclusion, Appellants must not only meet their bear the burden to prove that the exclusion applies (*Cogswell Farm Condo. Assn v. Tower Grp., Inc.*, 167 N.H. 245, 249 (2015)); they also must show that S&S's interpretation of the exclusion is not reasonable (*Great Am. Dining*, 164 N.H. at 616). Appellants can do neither here.

A. The Mold, Mildew Exclusion Is Not a Virus Exclusion

Appellants acknowledge that insurance policy provisions are construed under New Hampshire law by looking at the policy as a whole (App. Br. at p. 40), but never even cite (let alone quote) the rest of the Mold, Mildew & Fungus Clause and Microorganism Exclusion endorsement at issue. That endorsement provides:

> A. This policy only insures physical loss or damage to insured property by mold, mildew or fungus when directly caused by a peril insured by this Policy occurring during the policy period.
>
> * * *
>
> B. Except as set forth in the foregoing Section A, this policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:

> mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.

Apx. I at 124 (Policies, Endorsement #1).

Paragraph A of the endorsement extends coverage for loss or damage from mold, mildew or fungus if directly caused by an insured peril. Paragraph B states that otherwise, there is no coverage for loss or damage arising out of mold, mildew, fungus, spores or other microorganism of any type, nature, or description. Thus, if there is water damage from a hurricane that leads to mold or mildew, it is covered under Paragraph A. In contrast, if the water came from a leak in an old, rusted out pipe, the resulting mold or mildew would not be covered since the Policies have an exclusion for "ordinary wear and tear or gradual deterioration." *See* Apx. I at 114 (Policies ¶29(c)).

The contrast between these loss scenarios highlights the purpose of the endorsement – it is designed to address situations where "mold, mildew, fungus, spores or other microorganism[s]" are allowed to fester, grow and damage property. If, on the one hand, such mold damage results from an insured peril – such as a storm, flood or fire – then the mold damage is covered. If, on the other hand, the mold damage stems from an excluded cause of loss such as "wear and tear" or "faulty workmanship" then it is excluded. But neither scenario has anything to do with the entirely different risk of loss from pandemic or virus.

Appellants in essence attempt to interpret the Policies' Mold, Mildew Exclusion so as to apply to COVID-19 by ignoring the key terms "mold, mildew [and] fungus" used not only in the title of the endorsement and in Paragraph A, but as the principal terms of the exclusion in Paragraph B as well.

Basic principles of New Hampshire law, however, forbid this approach. New Hampshire courts use the doctrine of *ejusdem generis* to construe insurance contract provisions – sometimes favoring the policyholder, other times the insurance company. *See, e.g., Todd v. Vermont Mut. Ins. Co.*, 168 N.H. 754, 770 (2016); *Newell v. Markel Corp*., 169 N.H. 193, 198 (2016). This doctrine has been described as follows:

> The rule of *ejusdem generis,* literally meaning "of the same kind or class," applies when there is an enumeration or listing of specific things, followed by more general words relating to the same subject matter, in which case the general words are interpreted as meaning things of the same kind as the specific matters to which the parties refer.

11 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 32:10 (4th ed. 2020). Indeed, the Lloyd's drafters of the Mold, Mildew Exclusion specifically recognize this standard rule of construction: "If a word or term is not defined, then a court would normally consider that word, or term, to have the 'generally understood' meaning, *given the context of the relevant sentence*." Apx. V at 468 (emphasis added).

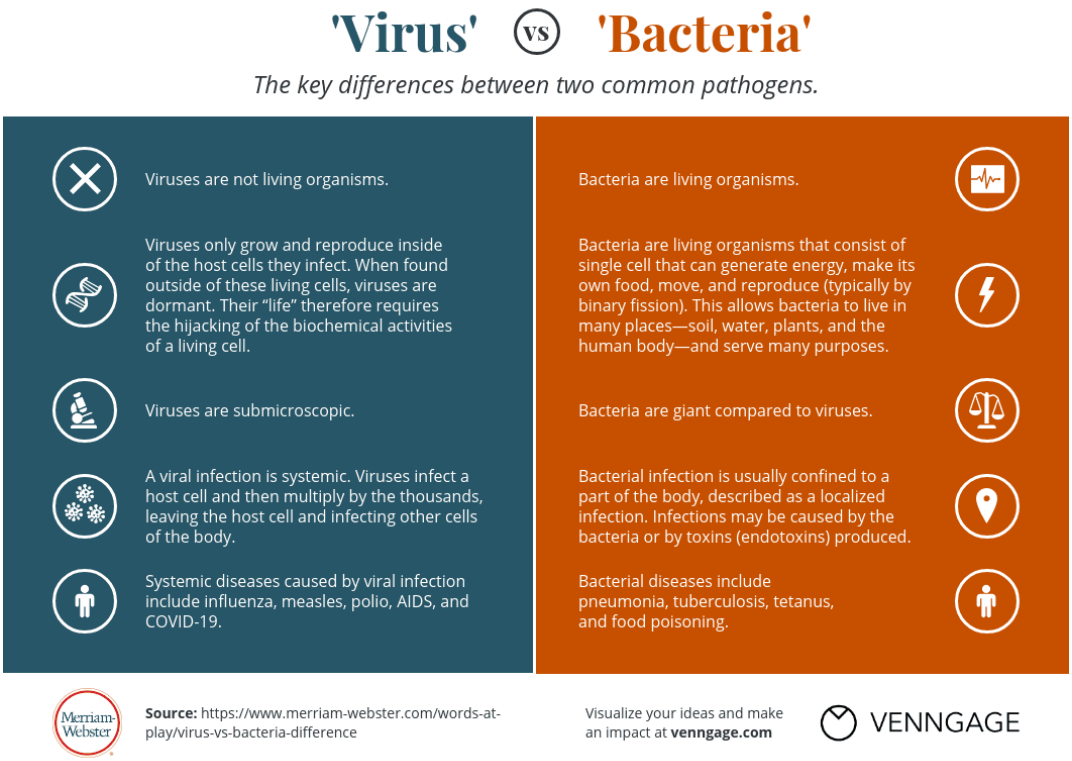
Applying this basic rule of construction to the Mold, Mildew Exclusion, the phrase "other microorganism of any type" must be interpreted in the context of endorsement and the preceding list: "mold, mildew, fungus [and] spores." That list is made up of organisms that fester and grow on their own, especially in moist environments following water intrusion – a common risk of loss that has nothing to do with pandemics or viruses.

Appellants emphasize the phrase "including but not limited to any substance whose presence poses an actual or potential threat to human health" as a catch-all means of expanding the Mold, Mildew Exclusion to encompass viruses and communicable disease. App. Br. at 39. But that phrase is boundless and would swallow even the most basic coverage promised. Floodwater, landslides and lava are just a few examples of "substances whose presence pose an actual or potential threat to human health" that obviously are covered. This Court has recognized that insurance companies cannot use "virtually boundless" language in an exclusion to expand its scope and eviscerate coverage in violation of a policyholder's reasonable expectations. *See Mellin*. 167 N.H. at 552 (*citing Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999)).

B. A Virus Is Not a Microorganism

Appellants' claim that the Mold, Mildew Exclusion applies to COVID-19 because it refers to "microorganisms" and because (according to Appellants) a virus is a "microorganism." Appellants are plainly wrong.

Viruses are not "microorganisms" because they are not living things. The usage notes in Merriam-Webster's dictionary makes the fundamental differences between viruses and living organisms perfectly clear:



MERRIAM-WEBSTER DICTIONARY (ONLINE), Usage Notes (2021) ("Viruses are not living organisms, bacteria are.") (available at https://www.merriam-webster.com/words-at-play/virus-vs-bacteria-difference).

This is not esoteric scientific knowledge; it is the way basic biology is taught to elementary and middle school students.[16]

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[16] *See, e.g.*, Dr. Helen Pilcher, BARRON'S VISUAL LEARNING BIOLOGY: AN ILLUSTRATED GUIDE FOR ALL AGES, at p. 86 (2021) ("Tiny infectious particles that can cause diseases are called viruses. They don't fit into the

Appellants assert that "many dictionaries and encyclopedias expressly define 'microorganism' to include viruses." App. Br. at p. 43. But if one were to pull a dictionary off the bookshelf in their home or office, chances are the definition of "microorganism" would make no reference to "virus,"[17] and the definition of "virus" rarely if ever mentions

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classification of life, because living things are made of cells, and viruses are not made from cells."); Dr. Dale Layman, BIOLOGY DEMYSTIFIED: HARD STUFF MADE EASY, at p. 107 (2003) (chapter heading describing "Viruses" as "Non-living Parasites of Cells"); THE COMPLETE MIDDLE SCHOOL STUDY GUIDE: EVERYTHING YOU NEED TO ACE SCIENCE IN ONE BIG FAT NOTEBOOK, at p. 302 (Nathalie Le Du & Justin Krasner, eds., 2016) ("A virus cannot survive on its own; it must use the machinery and supplies of a living cell to reproduce."); DK SMITHSONIAN, SUPERSIMPLE BIOLOGY: THE ULTIMATE BITE-SIZE STUDY GUIDE, at p. 25 (First American Edition 2020) ("The seven characteristics of life are movement, sensing, nutrition, excretion, respiration, growth, and reproduction . . . . Viruses cannot carry out any of the life process on their own. They can reproduce, but only by invading living cells."), copies at Apx. V at 615-636.

[17] *See, e.g.,* MERRIAM-WEBSTER DICTIONARY (ONLINE) (2021) ("microorganism" defined as "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size."); MERRIAM-WEBSTER DICTIONARY (2016) ("microorganism" defined as "[a]n organism (as a bacterium) too tiny to be seen by the unaided eye"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY – 11TH EDITION (2007) (defining "microorganism" as "[a]n organism (as a bacterium or protozoan) of microscopic or ultramicroscopic size."); MERRIAM-WEBSTER'S DICTIONARY FOR CHILDREN (2010) ("microorganism" is "[a] living thing (as a bacterium) that can only be seen with a microscope."); MERRIAM-WEBSTER'S INTERMEDIATE DICTIONARY (2020) ("microorganism" defined as "[a]n organism (as a bacterium) of microscopic or less than microscopic size."); THE AMERICAN HERITAGE – CHILDREN'S DICTIONARY (2019) (defining "microorganism" as "[a]n organism, such as a bacterium, that is too small to be seen without using a microscope."); THE AMERICAN

the word "microorganism."[18] Appellants do cite to two dictionaries in their brief – a 2018 edition of Webster's and an online printout from Oxford that

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HERITAGE DICTIONARY (1982) ("microorganism" defined as "[a]n animal or plant of microscopic size, especially a bacterium or a protozoan."); THE AMERICAN HERITAGE DICTIONARY – OFFICE EDITION (1983) ("microorganism" defined as "[a]n animal or plant of microscopic size, especially a bacterium or a protozoan."); THE AMERICAN HERITAGE DICTIONARY – SECOND COLLEGE EDITION (1985) ("microorganism" defined as "[a]n animal or plant of microscopic size, especially a bacterium or a protozoan."); THE RANDOM HOUSE COLLEGE DICTIONARY – REVISED EDITION (1988) ("microorganism" defined as "[a] microscopic plant or animal."); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1976) ("microorganism" means "[a]n organism of microscopic or ultramicroscopic size."); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988) ("microorganism" defined as "[a]n organism of microscopic or ultramicroscopic size."), copies in the record at Apx. V at 546-83.

[18] *See, e.g.,* MERRIAM-WEBSTER DICTIONARY (ONLINE) (2021) ("virus" means "[a]ny of a large group of submicroscopic infectious agents that are usually regarded as nonliving extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, animals, and plants also: filterable virus."); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY – 11TH EDITION (2007) ("virus" defined as "[t]he causative agent of an infectious disease" and as "[a]ny of a large group of submicroscopic infective agents that are regarded either as extremely simple microorganisms or as extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, lower animals, or plants"); MERRIAM-WEBSTER'S DICTIONARY FOR CHILDREN (2010) ("virus" is "[a] disease-causing agent that is too tiny to be seen by the ordinary microscope, that

may be a living organism or may be a very special kind of protein molecule, and that can only multiply when inside the cell of an organism."); MERRIAM-WEBSTER'S INTERMEDIATE DICTIONARY (2020) ("virus" means "[a]ny of a large group of very tiny infectious agents that are too small to be seem with the ordinary light microscope but can be seen with the electron microscope, that are usually regarded as nonliving complex molecules, that have an outside coat of protein around a core of RNA or DNA, that can grow and multiply only in living cells, and that cause important diseases in plants and animals including human beings"); THE AMERICAN HERITAGE – CHILDREN'S DICTIONARY (2019) (defining "virus" as "[a] particle of matter that is not made of cells, is too small to be seen with an ordinary microscope, and reproduces only inside living cells. Viruses are not usually considered to be living organisms. They cause many infectious diseases, such as the common cold, AIDS, and chickenpox."); THE RANDOM HOUSE COLLEGE DICTIONARY – REVISED EDITION (1988) ("virus" defined as "[a]n infectious agent, esp. any of a group of ultramicroscopic, infectious agents that reproduce only in living cells"); WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1976) ("virus" is "[t[he causative agent of an infectious disease" as well as "[a]ny of a large group of submicroscopic infective agents that are held by some to be living organisms and by others to be complex protein molecules containing nucleic acids and comparable to genes, that are capable of growth and multiplication only in living cells, and that cause various important diseases in man, lower animals, or plants"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988) ("virus" defined as "[t]he causative agent of an infectious disease" and "[a]ny of a large group of submicroscopic infective agents that are regarded either as extremely simple microorganisms or as extremely complex molecules, that typically contain a protein coat surrounding an RNA or DNA core of genetic material but no semipermeable membrane, that are capable of growth and multiplication only in living cells, and that cause various important diseases in man, lower animals, or plants"), copies in the record at Apx. V at 585-613.

connect viruses with microorganisms;[19] but the vast majority of dictionaries say otherwise. *See supra* at n. 17-18.

A recent Article in the Harvard Law Review aptly describes what Appellants are doing here as "dictionary shopping" – a topic of criticism in that Article and hardly a persuasive means of showing that the "ordinary meaning" of the Mold, Mildew Exclusion. *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 745 (2020).

If you want to unambiguously tell your policyholders that losses caused by a pandemic or virus are *not* covered, you do not do it with an exclusion for "mold, mildew, fungus, spores or other microorganism." Instead, you use something like the ISO Virus Exclusion, or the "Communicable Disease Exclusion," "Pandemic and Epidemic Exclusion" or "Organic Pathogens Exclusion" that Appellants sought to add to S&S's policies *after* COVID struck. *See* Apx. VI at 16, 37, 48-49, 59, 69, 74 and 84. Indeed, 83% of policies sold in the United States included exclusions for "pandemic, communicable disease or virus." *See supra* at n. 2. Appellants did not include any such exclusion when they sold the Policies to S&S – for nearly $1 Million.

The fact that Defendants had broad virus and pandemic exclusions at their disposal calls for an interpretation of the vastly different Mold, Mildew Exclusion in favor of coverage here:

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[19] The encyclopedia that Appellants cite merely confirms that, at best, the exclusion at issue is ambiguous – noting that viruses are "agents considered on the borderline of living organisms." Apx. IV at 183.

> Where the risk is well known and there are terms reasonably apt and precise to describe it, the use of substantially less certain phraseology, upon which dictionaries and common understanding may fairly differ, is likely to result in interpretations favoring coverage rather than exclusion.

Vargas v. Ins. Co. of N. Am., 651 F.2d 838, 841 (2d Cir. 1981) (*quoting Pan Am. World Airways v. Aetna Cas. & Sur.*, 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974)).

In order to bar coverage based on the Mold, Mildew Exclusion, Appellants must prove that theirs is the only reasonable interpretation of the exclusion. *Great Am. Dining*, 164 N.H. at 616. But S&S's interpretation – which aligns with dictionary definitions and elementary school biology – is also reasonable, to say the least. At best, the question of whether a virus is a "microorganism" involves an ambiguity, as Judge Kissinger observed, and his decision should be affirmed.

C. The Cases Evaluating the Mold, Mildew Exclusion Are Mixed – Further Illustrating the Provision's Ambiguity

Appellants' argument relies extensively on one federal court decision – *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303 (7th Cir. 2021) – without alerting this Court to the fact that other courts have agreed with Judge Kissinger and held that the Mold, Mildew Exclusion does not unambiguously exclude coverage for COVID-related business interruption claims. *See Ungarean DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *13 (Pa. Com. Pl. Mar. 25, 2021). For all

the reasons discussed above, the decisions by Judge Kissinger and the court in *Ungarean* are better reasoned and are more fully in line with New Hampshire's rules of construction. It would violate settled New Hampshire law to disregard S&S's reasonable interpretation of the Mold, Mildew Exclusion and bar coverage as a matter of law (and without any discovery regarding Lloyd's drafting and intent behind the Mold, Mildew Exclusion).

VI. THE AXIS POLLUTION EXCLUSION DOES NOT BAR COVERAGE HERE

Although the Superior Court's rulings were correct on the first two questions presented on appeal, it was error for the trial court to conclude that the Pollutants and Contaminants Exclusion in the Axis Policy unambiguously bars coverage here.

If Axis wanted to unambiguously exclude coverage for losses resulting from the natural spread of a virus, it could have included any one of a plethora of standard exclusions for virus or pandemic. In fact, Axis sought to do precisely that – *after* COVID struck – adding an exclusion for loss or damage from the "actual, alleged or suspected presence of any virus." Apx. VI at 69.

In contrast, the exclusion at issue is a *pollution* exclusion that provides:

> POLLUTANTS AND CONTAMINANTS
>
> EXCLUSION
>
> 1. As used in this endorsement, Pollutants or Contaminants means:
>
>   a. Any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes,

acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

b. Pollutants or contaminants include, but are not limited to those materials that can cause or threaten damage to human health or human welfare or cause or threaten damage, deterioration, loss of value, marketability or loss of use to property. Pollutants or contaminants include, but are not limited to bacteria, fungi, mold, mildew, virus or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency or any other governing authority.

2. This policy does not cover any of the following.

a. Loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened *release, discharge, escape or dispersal of pollutants or contaminants*, however caused.

Apx. I at 352 (emphasis added).

This Court has twice analyzed the scope of coverage under a pollution exclusion like this and has recognized that the key phrase – "discharge, dispersal, release or escape of pollutants" – reflects terms of art in environmental law pertaining to the improper disposal or containment of hazardous material. In both cases, the Court found the exclusion to be ambiguous, interpreted it in favor of the policyholder as required under New Hampshire law, and limited its application to traditional industrial pollution.

In *Weaver v. Royal Ins. Co.*, 140 N.H. 780, 783 (1996), the insurance company attempted to exclude coverage under a policy that "broadly defined 'pollutants'" but did not define the terms "discharge, dispersal, release or escape." 140 N.H. at 782–83. Absent a definition, the Court found it "unclear" whether the transporting of lead paint chips from an employee's worksite to his home was such a "discharge, dispersal, release or escape of pollutants." *Id.* at 783. Consequently, the Court held the insurance company's failure to define those terms rendered the exclusion ambiguous and inapplicable. *Id.*

The Court reaffirmed *Weaver* in *Mellin*. There, the insurance company argued that the cat urine odor at issue was "a chemical smell similar to ammonia; a toxic odor; noxious odor; and a persistent and pervasive odor, resulting in the toxic contamination" that implicated the pollution exclusion for losses from the "[d]ischarge, dispersal, seepage, migration, release or escape" of "vapor . . . . [and] fumes." *Id.* at 551. In rejecting the insurance company's argument, this Court noted that "the terms used in the pollution exclusion [clause], such as 'discharge,' 'dispersal,' 'release,' and 'escape' are terms of art in environmental law which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste." *Id.* at 553 (*quoting Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997, 999 (1997)). The Court then reaffirmed its holding in *Weaver,* noting that policy language excluding coverage for losses arising out of the "discharge, dispersal, release or escape of pollutants" was ambiguous. *Id.* at 553. Accordingly, the Court held the pollution exclusion did not apply. *Id.* at 555–56.

It has been nearly 25 years since this Court's decision in *Weaver* and yet Axis is still selling insurance policies to customers in New Hampshire without defining the terms "release, discharge, escape and dispersal" any differently than the way this Court has construed them for decades.

In order to bar coverage under an exclusion, the insurance company must prove that its interpretation is the *only* reasonable interpretation of the exclusion. *Cogswell Farm Condo. Assn. v. Tower Group, Inc.*, 167 N.H. 245, 249 (2015); *Mellin*, 167 N.H. at 547. Where "more than one reasonable interpretation is possible, and an interpretation provides coverage, the policy contains an ambiguity and will be construed against the insurer." *Great Am. Dining*, 164 N.H. at 616. S&S's interpretation here is not only reasonable, but in line with this Court's rulings in *Weaver* and *Mellin.*

It is true that the Axis Pollution Exclusion's definition of "Pollutants and Contaminants" includes the word "virus" among an array of other hazardous materials. But that does not eliminate the exclusion's requirement of a "release, discharge, escape or dispersal" of such hazardous materials – including a virus. The COVID-19 pandemic was not the result of any "release, discharge, escape or dispersal" of a virus, as that phrase has been interpreted by this Court for nearly 25 years. This is not a case where, for example, a vial or biohazard container broke or leaked, resulting in the escape, release or dispersal of an otherwise contained viral agent. To the contrary, the pandemic is the result of the organic spread of the virus.[20]

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[20] To the extent that Axis were to contend that the pandemic originated from the "escape" of a coronavirus from a lab in China – an assertion it has

Thus, state courts evaluating COVID-19 business interruption claims have held that pollution exclusions do not apply, even where "pollutant" is defined to include virus. *See JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) (pollution and contamination exclusion that included the term "virus" did not preclude coverage because the policyholder reasonably interpreted it "to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease."). That should be the result here, as well.

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never made and found nowhere in the record – it merely would raise a disputed issue of fact precluding dismissal by the Superior Court.

CONCLUSION

For all the reasons discussed above, Appellees respectfully request that this Court answer the first question presented in the affirmative, and the second and third questions presented in the negative.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument before the full Court with 30 minutes per side, and designate Marshall Gilinsky to argue.

Respectfully submitted,

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Dated: June 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief and the Appellees' Supplemental Appendix has been served electronically via the court's e-file system to all parties registered to receive such notice in this case. I further certify that copies were served via first class mail on this date to the following counsel for United Policyholders, who is not registered to receive electronic notice in this case.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael K. O'Neil, hereby certify that this brief contains a total of 13,986 words and meets the requirement of 14,000 words or less, exclusive of the cover page, signatures, pages containing the table of contents, and pages containing the table of citations.

Dated: June 24, 2022

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