Case No. 22-55266

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN-N-OUT BURGERS, a California Corporation,
Plaintiff and Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY,
Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:20-CV-01000-JLS-ADS / Hon. Josephine L. Staton

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CORPORATE DISCLOSURE STATEMENT

Appellee ZURICH AMERICAN INSURANCE COMPANY is wholly owned by Zurich Holding Company of America, Inc., which in turn is wholly owned by Zurich Insurance Company Ltd, a Swiss corporation. Zurich Insurance Company Ltd is owned by Zurich Insurance Group Ltd, a Swiss corporation and the only publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary Receipts.

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INTRODUCTION

In-N-Out Burgers claimed insurance coverage of losses allegedly caused by the presence of the Covid-19 virus in its restaurants. But the relevant policy provisions cover only "direct physical loss of or damage to" property. As described by In-N-Out's allegations, the virus in its restaurants became harmless and undetectable within days—even without intervention or cleaning—and while the virus was present on property, the virus had no effect on the substance of the property itself. Every federal appellate court to address this issue has concluded that such allegations do not plausibly establish "direct physical loss of or damage to" property. This is the first reason that In-N-Out's allegations failed to state a claim for breach of the insurance policy, or any other cause of action.

There is a second independent reason that In-N-Out's allegations failed to state a claim. Even if viral presence could cause physical loss of or damage to property, the policy further requires the physical loss or damage to *cause* the economic loss being claimed. In-N-Out's allegations revealed that it could not establish that causal connection.

Finally, there is a third independent reason that In-N-Out's allegations failed to state a claim. Even if In-N-Out's allegations could establish that its losses were caused by physical loss of or damage to property from the presence of the Covid-19 virus, the policy excludes claims based on "the actual presence" of "virus."

Each of these independent grounds should lead this Court to affirm dismissal of In-N-Out's lawsuit.

JURISDICTIONAL STATEMENT

Zurich American Insurance Company agrees with In-N-Out's statement of jurisdiction. Appellants' Opening Brief (AOB) 10. *See* 9th Cir. R. 28-2.2.

ISSUES PRESENTED

A restaurant chain claims property insurance coverage under policy provisions that require "physical loss of or damage to" property. The policy excludes "[a]ny condition of property due to the actual presence of . . . virus." Does the policy cover losses allegedly related to the presence of virus at the restaurants and to government closure orders intended to limit the spread of viral infection?

STATEMENT OF THE CASE

In-N-Out Burgers operates a chain of hamburger restaurants in several states. 2-ER-35, ¶¶ 12–13 (Consol. Am. Compl.). In-N-Out purchased commercial property insurance for its restaurants from Zurich American Insurance Company (Zurich). 2-ER-34, 36, ¶¶ 4, 18.

The district court concluded that In-N-Out's alleged losses from the Covid-19 pandemic were not covered by the insurance policy. The court dismissed In-N-Out's consolidated amended complaint against Zurich without leave to amend. 1-ER-5–13.

A. The policy.

In-N-Out seeks coverage under commercial property insurance policies in effect for the years 2019–2020 and 2020–2021. 2-ER-36, ¶ 18. The policies are relevantly identical. *See* 2-ER-36–41, ¶¶ 21–44; AOB 13 n.2. For simplicity, we cite the 2020–2021 policy only.

1. The coverages at issue all require direct physical loss of or damage to property.

In-N-Out's complaint sought four types of coverage under the policy. All require direct physical loss of or damage to property:

- "Time Element" coverage and "Contingent Time Element" coverage require a "**Suspension**" of In-N-Out's business activities "due to direct physical loss of or damage" to either "Covered Property" or certain other property; the loss or damage must be "caused by a **Covered Cause of Loss**." 3-ER-272, 279–80, §§ 4.01.01, 5.02.05.

- "Civil or Military Authority" coverage requires that a nearby property suffer "direct physical loss or damage caused by a **Covered Cause of Loss**" to which an authority responds with an order "prohibit[ing] access" to an In-N-Out location. 3-ER-278–79, § 5.02.03.

- "Decontamination Costs" coverage requires that covered property become "**Contaminated** from direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property." 3-ER-281, § 5.02.07.

"**Covered Cause of Loss**" is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." 3-ER-306, § 7.11.

2. The policy excludes claims due to the presence of virus.

The policy excludes "**Contamination**, and any cost due to **Contamination** including the inability to use or occupy property" (unless the contamination "results from direct physical loss or damage not excluded by this Policy"). 3-ER-269, §§ 3.03.01–3.03.01.01. "**Contamination**" means "[a]ny condition of property due to the actual presence of any foreign substance, . . . virus, disease causing or illness causing agent, **Fungus**, mold or mildew." 3-ER-306, § 7.09.

B. In-N-Out's alleged losses.

1. Allegations related to the presence of virus on property.

In-N-Out alleged that "Coronavirus and COVID-19" may be transmitted by "respiratory droplet, airborne/aerosolized and fomite transmission (i.e., transmission from surfaces and objects)." 2-ER-46, ¶ 56.

"Respiratory transmission" occurs "through exposure to an infected person's respiratory particles"; these are dispersed through "coughing, sneezing, talking, singing," or other exhalations. 2-ER-46,

¶ 58. In-N-Out alleged that "tiny particles can remain suspended 'for indefinite periods unless removed by air currents or dilution ventilation.'" 2-ER-47, ¶ 59. "[E]nclosed environments" increase "the risk of disease transmission." *Id.* The CDC recommends installing air filters and fans to "reduce the amount of the Coronavirus present" in an indoor space and "make property safe for its intended use." 2-ER-48–49, ¶ 62.

Virus is also transmitted through "[f]omites," which are simply "physical objects or materials that carry, and are capable of transmitting infectious agents." 2-ER-49, ¶ 64. In-N-Out alleged that removing virus from objects requires measures "far beyond ordinary or routine cleaning." 2-ER-54, ¶ 75.

Even without any cleaning, however, virus on objects goes away on its own. According to In-N-Out's allegations, "Laboratory studies have confirmed that the Coronavirus can remain infectious on inanimate surfaces for up to 9 days" and can survive on surfaces for "up to 28 days." 2-ER-44–45, ¶¶ 51, 53; *see also* 2-ER-50, ¶¶ 65–66 (alleging that virus "can be found on" some surfaces "for periods

ranging from hours to days" after exposure and "survives" for "up to three days" on certain surfaces (emphasis omitted)).

In-N-Out alleged that through "contact tracing," it "has verified the physical presence of the Coronavirus at all of its locations." 2-ER-58, ¶ 91. In-N-Out further alleged that it is "near-certain" many other people "at or in the vicinity of In-N-Out's stores contracted and carried and shed the Coronavirus causing loss of and damage to property," and virus "was certain to be present" at "other businesses and amenities" in areas "where In-N-Out operates its stores." 2-ER-59, 61, ¶¶ 93, 100.

In-N-Out also alleged that airborne virus "constitutes a physical alteration of the air and airspace" of a property "constituting physical damage." 2-ER-53, ¶ 70. And In-N-Out alleged that "the presence of the Coronavirus" on surfaces "caus[es] a tangible change of the property into a transmission vehicle for disease." 2-ER-52, ¶ 69. This process of "'creating fomites'" entails "physical alteration of property": The virus "harm[s] and physically chang[es] and physically alter[s] those objects by becoming a part of their surface and making physical

contact with them unsafe." 2-ER-52–53, ¶¶ 69–70 (emphasis omitted).

"This direct physical loss of or damage to" property, In-N-Out alleged, required it "to close its dining rooms, incur extra expense, undertake costly efforts to protect and preserve property" (such as installing air filters), and "continue to limit [restaurants'] operations" after reopening. 2-ER-56, 62, ¶¶ 81, 102.

2. Allegations related to government orders.

In-N-Out alleged that in response to the Covid-19 pandemic, beginning in March 2020, governments ordered "restaurant dining rooms" to close in the areas where it operates. 2-ER-67–68, ¶ 120; *see also* 2-ER-68–71, ¶¶ 123–31 (listing these orders). "[I]n compliance" with these orders, "In-N-Out was forced to close all of its restaurants[] dining rooms," and it "has suffered and continues to suffer significant losses from the closures of its dining rooms." 2-ER-72, ¶¶ 134–35; *see also* 2-ER-73, ¶ 138 ("Starting in mid-March 2020," In-N-Out's "dining rooms were closed for extended periods of time resulting in a substantial Time Element loss.").

C. The district court dismisses In-N-Out's lawsuit.

After Zurich denied coverage, In-N-Out sued Zurich for breach of contract, insurance bad faith, and declaratory relief. 2-ER-76–80, ¶¶ 154–171. In-N-Out tried three different complaints: It amended its original complaint, then, after the district court granted Zurich's motion for judgment on the pleadings, it amended its complaint a second time. 3-ER-421–22, 429–30 (district court docket).[1]

The district court then granted Zurich's motion to dismiss for failure to state a claim. The court discerned that "[t]he central dispute in this case" is "whether In-N-Out has adequately alleged that the Coronavirus or the stay-at-home orders," the two sources of In-N-Out's alleged losses, "caused 'a direct physical loss of or damage to property.'" 1-ER-9.

Regarding the stay-at-home orders, the court followed California law that government orders limiting the use of property do

[1] There was even a fourth complaint, originally filed under case number 8:21-cv-00406-JLS-ADS, because In-N-Out sought to focus each suit on a different policy year. But In-N-Out gave up that approach, moving to consolidate that case into 8:20-cv-01000-JLS-ADS. *See* 3-ER-426 (line 44) That yielded the Consolidated Amended Complaint that the district court ultimately dismissed.

not cause "direct physical loss of or damage to" property. 1-ER-10–11 (citing *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021) (applying California law) and *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Ct. App. 2021)).

As for the presence of virus on property, the court concluded that viral presence did not *cause* In-N-Out's losses. In-N-Out would have had to close its dining rooms regardless of whether virus was ever actually present on its property: "In-N-Out's allegation that its restaurants reopened for in-room dining once the stay-at-home orders were lifted belies In-N-Out's assertions that any alleged physical alterations of its property caused its business losses." 1-ER-12; *see also Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 590 (affirming no coverage in part because of "the lack of causal connection between the alleged physical presence of the virus on [policyholder's] premises and the suspension of [policyholder's] operations").

The court dismissed all causes of action because all depended on establishing insurance coverage of In-N-Out's losses. 1-ER-12–13. The court denied further leave to amend, having determined that In-N-Out's suit depended on "'incurably flawed legal theories.'" 1-ER-13.

D. On appeal, In-N-Out abandons the argument that losses caused by government orders are covered.

Between the district court's dismissal and In-N-Out's opening brief in this Court, California law got worse for In-N-Out's position. Two more California appellate courts affirmed pleading-stage dismissals of claims that government closure orders had caused covered property loss or damage. *See Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.*, 293 Cal. Rptr. 3d 1 (Ct. App. 2022) and *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65 (Ct. App. 2022). Numerous federal appellate decisions held the same.

Apparently as a result, although In-N-Out's complaint disclosed losses caused by government orders, its opening brief here omits any such claim. *See*, *e.g.*, AOB 11–13 (summarizing In-N-Out's losses without specifying that governments ordered it to close its dining rooms), 19–20 (summary of argument, with no reference to government orders), 26–27 (distinguishing In-N-Out's complaint from cases "focused on closure orders"). Instead, the opening brief attributes In-N-Out's losses only to viral presence on its property.

It does so even though *United Talent* also held that allegations of viral presence like In-N-Out's cannot establish physical loss or

damage for property insurance purposes, *United Talent*, 293 Cal. Rptr. 3d at 76–80, and even though several federal appellate courts have rejected allegations like In-N-Out's, *see* Arg. § I.A.3., *below*. Notwithstanding these authorities, the opening brief clings to the one California appellate decision to disagree with *United Talent* on this point. The court in *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 296 Cal. Rptr. 3d 777 (Ct. App. 2022)—relying heavily on its generous view of California's liberal pleading standard—held that a policyholder adequately alleged physical loss or damage caused by the presence of virus on property.

Evidently, In-N-Out has decided to stake its appeal on *Marina Pacific* and abandon the theory that losses caused by government orders are covered.[2] *Cf. Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

By extension, In-N-Out has also abandoned its claims of Civil or Military Authority coverage and Decontamination Costs coverage.

[2] Should In-N-Out attempt to resurrect this moribund theory in reply, Zurich will seek leave to file a short sur-reply.

Civil or Military Authority coverage requires a government order that "prohibits access to the" insured location. 3-ER-278–279, § 5.02.03. Decontamination Costs coverage requires a "law or ordinance regulating **Contamination** due to the actual not suspected presence of **Contaminant(s)**." 3-ER-281, § 5.02.07. But In-N-Out's opening brief makes no mention of any such order, law, or ordinance, and no argument for either form of coverage.[3]

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[3] Both forms of coverage also require several additional elements not adequately alleged in In-N-Out's complaint or argued on appeal. In full, Civil or Military Authority Coverage covers certain "Time Element loss" "resulting from the necessary **Suspension** of the Insured's business activities at an Insured Location if the **Suspension** is caused by order of civil or military authority that prohibits access to the Location. That order must result from a civil authority's response to direct physical loss of or damage caused by a **Covered Cause of Loss** to property not owned, occupied, leased or rented by the Insured or insured under this Policy and located within" a set "distance of the Insured's Location." 3-ER-278–79, § 5.02.03.

Under Decontamination Costs coverage, "If Covered Property is **Contaminated** from direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property and there is in force at the time of the loss any law or ordinance regulating **Contamination** due to the actual not suspected presence of **Contaminant(s)**, then this Policy covers, as a direct result of enforcement of such law or ordinance, the increased cost of decontamination and/or removal of such **Contaminated** Covered Property in a manner to satisfy such law or ordinance." 3-ER-281, § 5.02.07. In-N-Out's opening brief makes some suggestive references to Decontamination Costs

[*Footnote Continues On Next Page*]

SUMMARY OF THE ARGUMENT

The Court should affirm dismissal of In-N-Out's complaint because its policy contract with Zurich does not cover its claims.

1. In-N-Out's claimed losses do not arise from "direct physical loss of or damage" to property as the policy requires.

A. First, "the presence or potential presence of the [Covid-19] virus" on property "does not constitute direct physical damage or loss" for property insurance purposes. *United Talent*, 293 Cal. Rptr. 3d at 79. The contrary holding of *Marina Pacific*, 296 Cal. Rptr. 3d 777, depended on California's liberal pleading standard, which (according to *Marina Pacific*) requires courts to credit even "improbable" allegations. *Id.* at 788. *Marina Pacific*'s holding is irrelevant to In-N-Out's complaint, which must state a plausible claim to relief under the federal pleading standard.

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coverage, AOB 8, 18–21, but they lead nowhere. The government orders alleged in In-N-Out's complaint responded only to the *suspected* presence of virus in places where people gather, and the consequent risk of contracting Covid-19. *See* 2-ER-67–71, ¶¶ 120–132. These orders applied uniformly across cities, counties, and states regardless of whether any virus was ever actually present at any insured location.

B. Second, even if viral presence could cause physical loss of or damage to property, In-N-Out did not allege that any such invisible damage *caused* the economic losses it claimed—as the policy requires. On the contrary, as the district court ruled, the only reasonable reading of In-N-Out's complaint was that the government closure orders caused In-N-Out's losses.

2. As an independent basis to affirm, the policy's contamination exclusion bars claims based on "[a]ny condition of property due to the actual presence of any foreign substance," including a "virus" or a "disease causing or illness causing agent." 3-ER-269, 306, §§ 3.03.01.01, 7.09. Regardless of any physical loss or damage, this exclusion forecloses coverage for losses arising from the presence of virus on property: the very losses In-N-Out asserts. The Louisiana endorsement to the policy does not change this because In-N-Out's claim does not involve any Louisiana property.

3. This case does not merit certifying a question to the California Supreme Court to address *United Talent* and *Marina Pacific*. First, the conflict between those cases centers on how state-level trial courts should apply California pleading standards, so the

state Supreme Court's resolution of it would not settle whether In-N-Out stated a claim to the district court. Second, In-N-Out's allegations closely resemble those in *United Talent* and differ from those in *Marina Pacific*, where the plaintiff specifically alleged "dispos[ing] of property damaged by COVID-19." 296 Cal. Rptr. 3d at 790. This point of distinction further underscores the irrelevance of *Marina Pacific* to In-N-Out's case. Third, the contamination exclusion would require affirmance no matter how the state Supreme Court resolved this conflict.

ARGUMENT

Under California law, which governs here, "interpretation of an insurance policy is a question of law." *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 627 (Cal. 1995); *see also PMI Mortg. Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 394 F.3d 761, 764 (9th Cir. 2005) (court sitting in diversity applies California law to California insurance action).

Adjudication of insurance coverage proceeds in two steps. First, "[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance

coverage." *Aydin Corp. v. First State Ins. Co.*, 959 P.2d 1213, 1215 (Cal. 1998). Second, if the claim may be covered, "the burden is on the insurer to prove the claim is specifically excluded" under the policy. *Id.*

In-N-Out's complaint fails as a matter of law at both steps. We begin by explaining why In-N-Out's claims fall outside the basic scope of coverage. Beyond that, the contamination exclusion discussed in section II provides an independent and obvious basis to affirm. *See Palomar Health v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 3006356, at *1 (9th Cir. July 28, 2022) (not addressing physical loss or damage but concluding as to an identical exclusion that claims based "on the presence of 'Coronavirus and COVID-19 particles'" on property "are barred by the policies' contamination exclusion[ ]").

I. Dismissal should be affirmed because In-N-Out's losses did not fall within the scope of coverage.

A. In-N-Out's allegations could not establish direct physical loss of or damage to property.

Under the coverage provisions that In-N-Out invokes, an absolute requirement for coverage is "direct physical loss of or damage to" property. Stmt. § A.1., *above*. This Court should follow

United Talent, 293 Cal. Rptr. 3d 65, as well as federal decisions on point, to hold that In-N-Out's allegations of viral presence cannot establish direct physical loss of or damage to property.

1. *United Talent* correctly held that viral presence does not cause physical loss of or damage to property.

In-N-Out's allegations match the allegations rejected in *United Talent*.

In *United Talent*, a talent agency sought insurance coverage of business losses it experienced from the Covid-19 pandemic. *United Talent*, 293 Cal. Rptr. 3d at 67–69. Coverage under the agency's policy required showing "direct physical loss or damage" to insured property. *Id.* at 67. The agency alleged that the virus "'has been present in the vicinity of and on and in its [insured] properties'"; "when 'an infected person breathes, speaks, coughs, or sneezes,' the virus permeates the air" and "settles on surfaces"; and exhaled "'respiratory droplets . . . land on and adhere to surfaces and objects'" and "'physically change the property by becoming a part of its surface,'" a process which "'converts those surfaces and objects to active fomites, which constitutes physical loss and damage.'" *Id.* at

69 (quoting the complaint). These allegations mirror In-N-Out's. *See* Stmt. § B.1., *above*.

The court rejected the agency's theory because it went against any reasonable reading of the phrase "physical loss or damage." *Cf. Waller*, 900 P.2d at 627 (courts should interpret policy language based on "its plain meaning or the meaning a layperson would ordinarily attach to it"). The virus "'disintegrates on its own in a matter of days,'" *United Talent*, 293 Cal. Rptr. 3d at 76 (quoting *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021)), a point In-N-Out's complaint also acknowledged, *see* Stmt. § B.1., *above*. The virus cannot "'alter or persistently contaminate property'" in the way radiation does. *United Talent*, 293 Cal. Rptr. 3d at 77 (quoting *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022)). And a policyholder's mere "cleaning" or "remediation or preventive measures" are not "direct *property* damage or loss." *United Talent*, 293 Cal. Rptr. 3d at 80 (emphasis added); *contra* AOB 28–29 (citing In-N-Out's allegations of "great expense in its efforts to decontaminate" property).

Drawing on a decision rejecting comparable coverage for restaurants, *United Talent* explained: "'If, for example, a sick person walked into one of Plaintiffs' restaurants and left behind COVID-19 [virus] particulates on a countertop, it would strain credulity to say that the countertop was damaged or physically altered as a result.'" 293 Cal. Rptr. 3d at 76 (quoting *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.*, 514 F. Supp. 3d 1217, 1226 (S.D. Cal. 2021)).

The *United Talent* court correctly observed that unlike, say, asbestos contamination, virus on property does not "require specific remediation or containment" to make the property useable; instead, "transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks." 293 Cal. Rptr. 3d at 79. Viral presence "may affect how people interact with and within a particular space," but it does not "constitute direct physical damage or loss" to property. *Id.*

In-N-Out attacks *United Talent* for its view that "physical" loss or damage must involve a "distinct, demonstrable, physical alteration," which In-N-Out attributes to *MRI Healthcare Center of*

Glendale, Inc. v. State Farm General Ins. Co., 115 Cal. Rptr. 3d 27 (Ct. App. 2010), and to that case's supposedly mistaken reliance on Couch on Insurance. AOB 29–31.

But the principle that "physical loss" in a property insurance policy entails a tangible or material effect on property transcends *MRI Healthcare* or Couch. *See*, *e.g.*, *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 850–51 (Ct. App. 2003) (holding no "physical loss" without "losing or damaging the *tangible material* of" the property (emphasis added)). Moreover, the California Court of Appeal has rejected this proxy attack: "[A]ny analytical flaws in the Couch formulation" of physical loss or damage "have become largely academic in light of the now-existing wall of precedent" denying coverage of pandemic-related losses. *Apple Annie, LLC v. Or. Mut. Ins. Co.*, 298 Cal. Rptr. 3d 886, 897 (Ct. App. 2022). And numerous courts, including this one, have relied on *MRI Healthcare* as authoritative California law on the meaning of direct physical loss or damage. *See Mudpie,* 15 F.4th 885, 890–93 (9th Cir. 2021) (relying on *MRI Healthcare* and denying coverage of economic losses caused by pandemic-related government closure orders). It will

not suffice for In-N-Out merely to attack Couch or *MRI Healthcare*; In-N-Out avoids grappling with recent, on-point cases on their own terms.

In-N-Out's contrary authorities also fizzle. *See* AOB 29–30. Two of these cases interpret third-party comprehensive general liability (CGL) policies rather than first-party property insurance policies. *See AIU Ins. Co. v. Superior Ct.*, 799 P.2d 1253, 1258, 1266 (Cal. 1990); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 698, 731 (Ct. App. 1996). Cases involving CGL policies are not "persuasive precedent" for property insurance policies, *Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 587 n.16 (affirming denial of coverage for pandemic-related losses), because "'[t]he cause of loss in the context of property insurance is wholly different from that in a liability policy,' and a liability insurer 'agrees to cover the insured for a "broader spectrum of risks" than in property insurance,'" *United Talent*, 293 Cal. Rptr. 3d at 78–79 (quoting *MRI Healthcare*, 115 Cal. Rptr. 3d at 37 n.6). In-N-Out's two CGL cases also involve broader policy language: "property damage," not "direct physical loss

of or damage to property." *AIU*, 799 P.2d at 1279; *Armstrong*, 52 Cal. Rptr. 2d at 731.

In-N-Out's third case holds merely that an insured "dwelling building" includes the soil that underlies it and that is necessary to its stability. *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962), *abrogation on other grounds recognized by La Bato v. State Farm Fire & Cas. Co.*, 263 Cal. Rptr. 382, 386 (Ct. App. 1989). A landslide that physically alters this soil therefore counts as physical damage to the dwelling building. *See Hughes*, 18 Cal. Rptr. at 655. This holding does not undermine *United Talent* in the least. *See United Talent*, 293 Cal. Rptr. 3d at 74–75 (distinguishing *Hughes*).

2. The holding and reasoning of *United Talent* require rejecting In-N-Out's claims.

In-N-Out alleged that virus is present in "respiratory particles" in the air and on surfaces. 2-ER-46–47, 49, ¶¶ 58–59, 64. However, even according to In-N-Out, the virus remains infectious for at most 9 days, and survives *at all* for at most 28 days. 2-ER-44–45, ¶¶ 51, 53; *see also* 2-ER-50, ¶ 66 (allegations citing another source that virus "survives" on surfaces for only "up to three days").

Thus, according to In-N-Out, even when its restaurants were exposed to virus, within days, the virus would no longer have posed any threat—without any intervention or repair whatsoever. And the virus would have soon become undetectable.

Moreover, even during the brief period that virus would have been detectable on surfaces, In-N-Out's allegations do not describe any tangible or material change that the physical *property* itself would have experienced. And designating the property a "fomite"—which simply means a surface infectious to humans—doesn't mean the property itself is physically lost or damaged. In-N-Out alleged that "the presence of the Coronavirus" on property entails "physical alteration" of property, 2-ER-52–53, ¶¶ 69–70; *see also* 2-ER-72, ¶135; but this "mere conclusion[ ]" is "not entitled to the assumption of truth," *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). The presence of matter *on* property does not constitute a physical alteration to the property.

Likewise insufficient and conclusory is In-N-Out's allegation that virus "harm[s] and physically chang[es] and physically alter[s] those objects by becoming a part of their surface and making physical

contact with them unsafe." 2-ER-52–53, ¶ 70. In-N-Out could just as well allege that if a jar of marbles spills on the floor, the floor has been "harmed and physically changed and physically altered" by the marbles because the marbles have "become a part of the floor's surface and made physical contact with it unsafe." To the contrary, what has supposedly "become a part of" the property may in fact be wiped or swept away to reveal the property just as it was. These allegations do not plausibly establish physical loss of or damage to property. *See Iqbal*, 556 U.S. at 663–64 ("[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense."); *see also Mudpie*, 15 F.4th at 892 ("California courts would construe the phrase 'physical loss of or damage to' as requiring an insured to allege physical alteration of its property . . . .").

In-N-Out's various arguments opposing this conclusion fail. First, it is no help to In-N-Out that the policy defines the "suspension" of business to include a mere "slowdown." 3-ER-311, § 7.56.01; *see* AOB 25. Whether it experienced a slowdown or a cessation of activities, what sinks In-N-Out's case is its inability to

meet the more fundamental requirement of "physical loss of or damage" to property.

Indeed, another aspect of this Time Element coverage provision reinforces the conclusion that In-N-Out did not and could not establish "physical loss of or damage" to property. The policy provides coverage only during a "Period of Liability" that lasts until the property "could be repaired or replaced, and made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage." 2-ER-110–11, § 4.03.01. Here, In-N-Out does not allege it had to repair or replace anything. *See United Talent*, 293 Cal. Rptr. 3d at 80 (agreeing with other courts that "cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss"). So it cannot plead a covered period of liability under these provisions. *See Mudpie*, 15 F.4th at 892 ("That this coverage extends only until covered property is repaired, rebuilt, or replaced . . . suggests the Policy contemplates providing coverage only if there are physical alterations to the property.").

The provisions related to ammonia contamination and radioactive contamination also do not help In-N-Out. *See* AOB 25–26. The policy extends coverage to ammonia contamination only in special cases of other physical loss of or damage to property: If the insured experiences a "**Breakdown** of **Covered Equipment** at a **Scheduled Location**," and this breakdown in turn "cause[s]" "direct physical loss of or damage to Covered property," then the policy covers "resulting **Ammonia Contamination**." 3-ER-278, § 5.02.02. This coverage has nothing to do with In-N-Out.

The policy also extends coverage for "direct physical loss of or damage to Covered Property . . . caused by sudden and accidental radioactive contamination, including resultant radiation damage." 3-ER-287, § 5.02.25. But radiation, unlike virus, can physically change inanimate property—and do so *permanently*. *See Sandy Point Dental*, 20 F.4th at 333 (distinguishing viral presence from radioactive contamination in part because the latter can cause "embrittlement" of materials); *Kim-Chee LLC*, 2022 WL 258569, at *2 ("[T]he virus's inability to physically alter or persistently contaminate property differentiates it from radiation . . . .").

More broadly, these extensions of coverage are specific and limited to certain instances of ammonia and radioactive contamination; they do not imply coverage of other, unnamed contaminants like Covid-19 (especially in light of an exclusion for "virus," discussed below).

Based on In-N-Out's allegations, viral presence—a self-correcting, intangible condition—does not cause "physical loss of or damage to" property under the insurance policy.

3. The different result in *Marina Pacific* depended on state pleading standards not relevant here; federal appellate courts have universally rejected claims like In-N-Out's.

Marina Pacific recognized that its contrary holding was "at odds with almost all" insurance coverage cases concerning pandemic-related business losses. *Marina Pacific*, 296 Cal. Rptr. 3d at 788. It found, however, that "virtually all" other decisions were "readily distinguishable." *Id.*

The court's foremost basis for distinguishing these other decisions? "[T]he pleading rules in federal court are significantly different from those we apply when evaluating a trial court order

sustaining a demurrer." *Id.* Federal courts assess whether a complaint "states a *plausible* claim for relief," based on their "judicial experience and common sense"; California courts, according to *Marina Pacific*, must "deem as true, 'however improbable,' facts alleged in a pleading—specifically here, that the COVID-19 virus alters ordinary physical surfaces transforming them into fomites through physicochemical processes." *Id.* (emphasis added).

Marina Pacific specifically explained its disagreement with *United Talent* in the same terms. *Marina Pacific* agreed with *United Talent* that "physical loss or damage" requires "distinct, demonstrable, physical alteration of the property." *Marina Pacific*, 296 Cal. Rptr. 3d at 787; *United Talent*, 293 Cal. Rptr. 3d at 74. *Marina Pacific* found fault with *United Talent* not for how it understood this phrase, but for how it applied California's pleading standards: "We are not authorized to disregard those allegations" of physical loss or damage "when evaluating a demurrer, as the court did in *United Talent*." *Marina Pacific*, 296 Cal. Rptr. 3d at 790.

Marina Pacific's substantive result and split from *United Talent* therefore depended on pleading standards that do not apply here.

Marina Pacific held that it could not disregard implausible allegations. But this Court must do so when evaluating In-N-Out's complaint. *See Iqbal*, 556 U.S. at 678 (a viable claim must be "'plausible on its face'"). A recent district court decision followed *United Talent* instead of *Marina Pacific* on this exact basis: "The *Marina* court noted that its opinion was at odds with the majority of other California decisions addressing this issue, and emphasized that—unlike this Court—it was not bound by *Iqbal*'s plausibility requirement." *Neptune Prods., Inc. v. Hartford Fire Ins. Co.*, 2022 WL 4677697, at *4 (S.D. Cal. Sept. 30, 2022).

In keeping with this view, every federal appellate court to address the question has concluded—under federal pleading standards—that viral presence does not cause physical loss of or damage to property. Most recently, the Sixth Circuit faced allegations of "microscopic damage" to restaurant property "from COVID-19 exposure." *Wild Eggs Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 48 F.4th 645, 652–53 (6th Cir. 2022). The court concluded that the plaintiff failed to plausibly allege "physical, tangible damage" to "'property'": "COVID-19 did not alter or harm

the restaurants in a perceptible way." *Id.* at 653. Instead, the plaintiff "simply could not *use* [property] as it wished." *Id.*

The Seventh Circuit has likewise had "a hard time imagining that a reasonably intelligent policyholder" could conclude that "[a] sneeze that spreads cold virus particles" onto a surface "would be deemed to have inflicted 'direct physical damage'" to property. *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1023 (7th Cir. 2022). But this is the implausible implication of In-N-Out's argument. *See also Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau*, 2022 WL 130722, at *3 (11th Cir. Jan. 14, 2022) (allegations of viral presence could not establish physical loss of or damage to property in part because property in this condition returns "to its previous state" without "repair or replacement"); *Sandy Point Dental*, 20 F.4th at 336 (rejecting plaintiff's conclusory, unsupported allegations that viral presence "'has rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss'"); *cf.* 2-ER-53, ¶ 71 (alleging that virus "renders the property lost, unsafe and unfit for its normal usage").

In rejecting plaintiffs' conclusory allegations of physical loss or damage, Circuit Courts—and the district court—did not engage in "mistaken fact finding." AOB 28. They merely insisted that the complaints before them state a claim for relief that is "plausible on its face." *Iqbal*, 556 U.S. at 678. And they found plaintiffs' complaints wanting. This Court should affirm the district court and follow other Circuit Courts to hold that In-N-Out's allegations of viral presence did not plausibly establish physical loss of or damage to property.

4. *Marina Pacific* also involved different allegations from *United Talent*, and misapplied California pleading standards compared to *United Talent*.

Marina Pacific is readily distinguishable from this case not only for its reliance on California pleading standards but also for the specific allegations at issue.

The plaintiff in *Marina Pacific* alleged that it had disposed of property purportedly damaged by Covid-19. 296 Cal. Rptr. 3d at 782. And it alleged that the physical loss or damage caused by the virus "required the closure or suspension of operations" at its hotel "at various times." *Id.* Setting aside the facial implausibility of these allegations, they go well beyond those in *United Talent* and in In-N-

Out's operative complaint (In-N-Out's third attempt to plead a covered loss).

Marina Pacific also misapplied California pleading standards. California courts should not accept as true a complaint's "contentions, deductions or conclusions of fact or law." *Centinela Freeman Emergency Med. Assocs. v. Health Net of Cal., Inc.*, 382 P.3d 1116, 1125 (Cal. 2016). And they must "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *Id.*

United Talent and *Marina Pacific* shared the premise that California law requires a showing of "physical alteration" to property to establish "physical loss or damage." *See United Talent*, 293 Cal. Rptr. 3d at 73–74; *Marina Pacific*, 296 Cal. Rptr. 3d at 787. In both cases, the policyholder alleged that viral presence physically alters property—but also that after 28 days, virus is no longer contagious or detectable, even without any intervention. *See United Talent*, 293 Cal. Rtpr. 3d at 69; *Marina Pacific*, 296 Cal. Rptr. 3d at 781. And neither policyholder described any actual physical alteration to the insured property itself. Instead, they dressed up in scientific

language the simple fact that the virus temporarily lay upon the surfaces of insured property. *See United Talent*, 293 Cal. Rptr. 3d at 69 (virus "converts those surfaces and objects to active fomites" [i.e. surfaces that can infect people]); *Marina Pacific*, 296 Cal. Rptr. 3d at 781 (virus "bonds and/or adheres to such objects through physico-chemical reactions involving, *inter alia*, cells and surface proteins").

In each complaint, the mere "contention" or "conclusion of fact" that viral presence physically alters property was undermined by the factual allegation that viral presence is temporary and self-correcting. *United Talent* recognized this. *See United Talent*, 293 Cal. Rptr. 3d at 80 (policyholder "has not established that the presence of the virus constitutes physical damage to insured property"). *Marina Pacific* did not, instead accepting that virus physically damages property solely because "the insureds here expressly alleged that it can." 296 Cal. Rptr. 3d at 790.

Taking a step back into the real world: As everyone who has lived through the pandemic has seen, businesses that closed because of government orders or the risk from infectious persons reopened long ago without repairing their property—and now remain open

despite the ongoing circulation of infected persons. This fact contradicts the conclusory allegation that virus causes physical loss of or damage to property.

United Talent correctly acknowledged this context: "[T]he virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through *practices unrelated to the property*, such as social distancing, vaccination, and the use of masks." *United Talent*, 293 Cal. Rtpr. 3d at 79 (emphasis added). *Marina Pacific* denied it. *See* 296 Cal. Rptr. 3d at 789–90.

As a guide to California law, *United Talent* is right and *Marina Pacific* is wrong. This provides another reason for this Court to follow *United Talent* (and all on-point federal appellate decisions) and hold that viral presence does not cause physical loss of or damage to property.

B. Even *if* viral presence could cause direct physical loss of or damage to property, no such invisible damage caused In-N-Out's economic harm.

Suppose for argument's sake that presence of the virus that causes Covid-19 could constitute direct physical loss of or damage to property of the type insured here. Even assuming that were true, In-N-Out still failed to plead losses falling within the scope of coverage.

Time Element and Contingent Time Element coverage require a "necessary **Suspension**" of "business activities at an Insured Location" that is "*due to*" or "*results from*" "direct physical loss of or damage" to property. 3-ER-272, 279–80, §§ 4.01.01, 5.02.05 (italics added). "Due to" means "as a result of" or "because of." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/due%20to (last visited Oct. 18, 2022); *see also Scott v. Cont'l Ins. Co.*, 51 Cal. Rptr. 2d 566, 569 (Ct. App. 1996) ("In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries.").

In-N-Out alleged the suspension of some business activities. *See* 2-ER-58, 71, ¶¶ 89, 132 (alleging that In-N-Out's dine-in operations were suspended during much of the pandemic); *but see*

2-ER-35, 72, ¶¶ 16, 137 ("In-N-Out is known for its drive-through operations" and it continued to serve customers throughout the pandemic). In-N-Out also alleged the presence of virus at its locations and at nearby locations. 2-ER-58–64, ¶¶ 91–107. And for argument's sake, we assume in this section that this viral presence caused physical loss of or damage to property. All ingredients are there but one: The suspension of business activities was not caused by the physical loss or damage.

This causal gap was not bridged by In-N-Out's several conclusory allegations attempting to do so, such as, "This direct physical loss of or damage to In-N-Out's property required In-N-Out to close its dining rooms." 2-ER-62, ¶ 102; *see also* 2-ER-71–72, ¶¶ 133–134; *cf. Iqbal*, 556 U.S. at 681 ("conclusory" allegations are "not entitled to be assumed true"). Other allegations fatally undermined these.

First, In-N-Out nowhere alleged that it knew virus was present at any location at any specific time, such that viral presence could then have caused it to suspend onsite dining or any other business at that location. Instead, In-N-Out's alleged knowledge of viral presence

on its properties was abstract and statistical: Given the prevalence of the virus and the nature of its spread, In-N-Out alleged, it was near-certain that at some point during the pandemic, virus was present at each of its restaurants and at nearby locations. *See* 2-ER-59–61, ¶¶ 94–99 (alleging that "it is highly improbable that no customers from the general public would have introduced active, infectious Coronavirus to each of the insured properties" and explaining the vanishingly small "probability of zero introductions" of virus to any location). Even if true, none of that could establish the required causation.

Second, In-N-Out conspicuously failed to allege any concrete causal link: "Upon learning of an infected Associate [employee], In-N-Out undertook prompt and costly steps" "to protect customers and employees"—but those steps did not include reducing business operations in any way. 2-ER-58, ¶ 91. At the very moment In-N-Out allegedly did know that virus was present at a location, supposedly causing physical loss or damage, In-N-Out did *not* suspend business.

Third, In-N-Out's allegations acknowledged that what really caused suspension of its business was government orders: The virus

was spreading freely no later than February 2020, 2-ER-43, ¶ 49, but In-N-Out's dining-room closures started only "in mid-March 2020, . . . resulting in a substantial Time Element loss of the Company's 'gross earnings' as insured under the Policies," 2-ER-73, ¶ 138. According to In-N-Out, that is when government orders first began to be issued that "closed restaurant dining rooms" in all jurisdictions where In-N-Out operates. 2-ER-67–71, ¶¶ 119–130; *see also* 2-ER-71, ¶ 132 ("All of the communities with In-N-Out restaurant locations have been subject to" government restrictions "including complete closure of dining rooms."). Indeed, it is likely that Covid-19 is present on In-N-Out's property today, but In-N-Out continues to use the property and has not had to close its doors. This shows that In-N-Out's allegations of physical damage to property caused by Covid-19 are not plausible.

These government orders aimed to minimize the risk of people becoming ill or dying from Covid-19. *See* 2-ER-67–68, ¶ 120 (alleging orders "limiting business operations of non-essential businesses where people could potentially contract COVID-19 from others or the property itself," including "restaurant dining rooms"); 2-ER-69, ¶ 127 (quoting an order that intended "to protect all members of the

community"); 2-ER-70, ¶ 128 (quoting an order's reference to "long hospital stays," "long-term health consequences or death"). Accordingly, these orders did not address or respond to viral presence at any particular location at any specific time. They applied across cities, counties, and states, for indeterminate times unconnected to any supposed physical loss or damage from viral presence at any property. The suspension of business they brought about therefore was not due to any such "damage."[4]

Because In-N-Out's claimed economic losses were not caused by physical loss of or damage to its insured property, they do not fall

[4] In-N-Out cites two orders that allegedly referred to property damage. But one of these, issued in the City of Los Angeles on March 19, 2020, 2-ER-68, ¶ 123, didn't shut down restaurant dining rooms: Restaurant dining rooms in the City of Los Angeles had already been shut down by a March 15 order that referred only to public health concerns and made no mention of harm to property. Public Order Under City of Los Angeles Emergency Authority: New City Measures to Address COVID-19, issued March 15, 2020, *available at* https://www.lamayor.org/COVID19Orders ("All restaurants and retail food facilities in the City of Los Angeles shall be prohibited from serving food for consumption on premises.") (last visited Oct. 18, 2022). The other, in Dallas County, listed its purpose as "'protect[ing] the safety and welfare of the public by slowing the spread of the virus'"—a purpose disconnected from any harm to property. 2-ER-68, ¶ 124.

within the scope of coverage. *See Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 590 (affirming demurrer dismissal because plaintiff could not establish that any theoretical viral property damage caused its economic loss, as property policy required); 1-ER-12 (district court dismissed In-N-Out's claims on this basis); *see also Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2022 WL 1125663, at *1 (9th Cir. Apr. 15, 2022) (citing *Inns-by-the-Sea* and concluding that despite the "allegation that the COVID-19 virus was present on its premises," "the allegations surrounding [plaintiff's] closure are based on the local Stay at Home Orders" rather than "physical damage to its property caused by the virus").

II. As an independent basis for affirmance, In-N-Out's losses were also barred by the contamination exclusion.

As shown, In-N-Out failed to plead any losses falling within its policy's coverage requirements, the first step in determining insurance coverage. *Aydin Corp.*, 959 P.2d at 1215. The alleged losses are also excluded at the second step by the policy's

contamination exclusion.[5] Affirmance can rest on either or both of these independent grounds.

A. The plain language of the contamination exclusion applies to losses allegedly caused by the presence of virus on property.

The policy's contamination exclusion bars from coverage "[a]ny condition of property due to the actual presence of any foreign substance, . . . virus, disease causing or illness causing agent, **Fungus**, mold or mildew." 3-ER-269, 306, §§ 3.03.01.01, 7.09. The exclusion applies not only to "**Contamination**"—that is, such a "condition of property" itself—but also to "any cost due to **Contamination** including the inability to use or occupy property." 3-ER-269, § 3.03.01.01.

In-N-Out alleged that the presence of "Coronavirus" in and on its property and nearby property "cause[d] direct physical of or damage to" property and thereby constituted a covered loss.

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[5] Although the district court did not reach the contamination exclusion, *see* 1-ER-5–13, Zurich briefed it to the district court in its motion to dismiss. *See* Motion to Dismiss Consolidated Amended Complaint and Memorandum of Points and Authorities in Support Thereof at 22–24, ECF No. 78.

2-ER-52–53, 62, 72, ¶¶ 69–70, 101, 135. These allegations describe a "condition of property due to the actual presence of" "virus" or "disease causing or illness causing agent" and plainly fall within the contamination exclusion.

The contamination exclusion applies "unless [the contamination] *results from* direct physical loss or damage not excluded by this Policy." 3-ER-269, §§ 3.03–3.03.01 (emphasis added). In-N-Out nowhere alleged that viral contamination of its property *resulted from* covered physical loss or damage. In-N-Out asserted the opposite: that the viral contamination of its property *itself* caused physical loss of or damage to the property.

Under the plain language of the contamination exclusion, therefore, this alleged "condition of property" is not covered. Nor is any cost that might be due to In-N-Out's resulting "inability to use or occupy" its property. This Court has made this determination in two other cases applying California law, and it should do so again here. *See Out West Rest. Grp. v. Affiliated FM Ins. Co.*, 2022 WL 4007998, at *2 (9th Cir. Sept. 2, 2022) ("[T]o the extent that Out West argues that infected persons contaminated the property or that virus was

otherwise present, the contamination exclusion would bar coverage . . . ."); *accord Palomar Health*, 2022 WL 3006356, at *1.

B. The "Amendatory Endorsement" applicable to Louisiana does not apply here.

The policy includes "amendatory endorsements" for 31 states, along with four endorsements of general application. 3-ER-258–59. In-N-Out's policy provides coverage for certain property that is "newly acquired" during the policy term. 3-ER-286, § 5.02.21; *see also* 2-ER-67, ¶ 117 (alleging that during the policy period, "In-N-Out opened two new restaurants" in Colorado). This helps explain the policy's inclusion of state-specific endorsements even for states in which In-N-Out does not own property, such as Louisiana.

The "Amendatory Endorsement" that applies in Louisiana (the Louisiana endorsement) is several pages in length, addressing myriad changes to the policy required under Louisiana law. 3-ER-359–61. These include a change to the definition of "Contaminant(s)" for purposes of the contamination exclusion:

> Any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including

> materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus** or **Spores**.

3-ER-361. Under this definition, "contamination" does not include viruses or disease-causing agents.

In-N-Out does not assert any claims for property located in Louisiana. 2-ER-35, ¶ 13 (listing the states in which In-N-Out operates). So the Louisiana endorsement does not apply to In-N-Out's claim.

In-N-Out argues that each state-specific endorsement, including the Louisiana endorsement, applies in *every* state, except when the endorsement says otherwise. AOB 33–34. Initially, In-N-Out's brief alludes to a "special endorsement" regarding contamination. AOB 8–9, 16. Only many pages later, after quoting lengthy portions of the endorsement, does In-N-Out acknowledge that it is referring to the "Amendatory Endorsement – *Louisiana*." AOB 32 (emphasis added). In-N-Out argues that this endorsement applies to all its property and therefore that the contamination exclusion has been changed so that it no longer bars claims based on virus. AOB 31–35.

In-N-Out's position is not reasonable. It creates conflicts, renders the policy incoherent, and violates other rules of policy interpretation. It also goes against a California Court of Appeal decision rejecting this argument.

1. Reading the state-specific endorsements to apply in every state makes the policy incoherent.

It is common for insurance policies to append endorsements that tailor the terms of the policies to conditions and rules of specific states. In-N-Out's idea that these state-specific amendatory endorsements generally apply in every state, rather than in just the state referenced at the beginning of each, leads to insoluble contradictions and renders the policy incoherent.

As just one example, consider the provision for appraisal of property in case of disagreement over its value. The basic policy provides for an appraisal procedure initiated "on the written demand of either" the insured or the insurer. 3-ER-299–300, § 6.13.04. But according to the Nebraska endorsement, this procedure is initiated only "upon mutual agreement" of the parties. 3-ER-380. The West Virginia endorsement, on the other hand, abridges the description of

the procedure. For example, unlike the basic policy, the endorsement doesn't specify that each appraiser must have "no direct or indirect financial interest in the claim," nor that the insured must have "fully complied with all provisions of this Policy" before initiating the procedure. *Compare* 3-ER-404 (endorsement), *with* 3-ER-299, § 6.13.04 (basic policy). Finally, the Louisiana endorsement states that the appraisal provision "is deleted in its entirety." 3-ER-360.

This example illustrates that if the state-specific endorsements applied in every state, the resulting conflicts among them would make the policy impossible to apply in practice. An insurance policy may not be interpreted in a way "which would result in an absurdity." *Eith v. Ketelhut*, 242 Cal. Rptr. 3d 566, 580 (Ct. App. 2018). Yet that is the result of In-N-Out's reading.

2. Reading the state-specific endorsements to apply in every state breaks other rules of contract interpretation.

"'[L]anguage in a contract must be construed in the context of that instrument as a whole . . . .'" *Union Oil Co. v. Int'l Ins. Co.*, 44 Cal. Rptr. 2d 4, 7 (Ct. App. 1995) (emphasis omitted). In the context of the policy as a whole, the intended effect of the state names listed

at the beginning of 31 amendatory endorsements is to reference the area or state in which each one applies.

The policy's "titles" provision directs, "The titles of the various paragraphs and endorsements are solely for reference and shall not in any way affect the provisions to which they relate." 3-ER-302, § 6.20 (cited in AOB 33 as "Section 6.02"). The titles provision does not expand the reach of the Louisiana endorsement, despite In-N-Out's contrary contention. AOB 32–33. It simply confirms that the word "Louisiana" is a geographic reference to assist policyholders in reading the policy.

Strictly, the *title* of each state-specific endorsement is "Amendatory Endorsement," and the state listed after that title on each page is a substantive geographic reference that specifies where the endorsement applies. Even *if* the state names are loosely construed to be part of the endorsements' "titles," (a) the state would remain an essential "reference" or geographic identifier, and (b) in keeping with the titles provision, the state reference would still determine *where* the endorsement's provisions apply; it would not affect the *substance* of those provisions.

In-N-Out reads the "titles" provision instead to make the state names mean nothing whatsoever. Under In-N-Out's proposed reading, the state names become surplusage—and confusing surplusage, at that. By totally ignoring the state references, In-N-Out fails to "give[ ] effect to every clause." *Union Oil Co.*, 44 Cal. Rptr. 2d at 7 ("[A]n interpretation that gives effect to every clause is preferred over one that would render other policy terms meaningless.").

In-N-Out's reading also creates conflicts among the policy terms rather than reconciling them. In-N-Out reads the Louisiana endorsement in isolation, ignoring the implications of its placement among 31 state-specific endorsements, ignoring their mutual contradictions (such as in the appraisal provision, described above), and ignoring the contrast between their state-specific nature and the policy's four endorsements of general application, which lack any geographic identifiers. 3-ER-408–11. The only reasonable reading, by contrast, takes these contextual cues into account and concludes that each state-specific endorsement must apply only in its identified state.

Because the policy language cannot on any account accommodate In-N-Out's reading, Zurich's alleged subsequent amendments to policies not issued to In-N-Out and not part of this case—extrinsic to the policy contract—cannot create any "ambiguity" in the scope of this endorsement. AOB 35; *see ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 217 (Ct. App. 1993) (policyholder's "drafting history argument is inconsistent with the rules of insurance contract interpretation" because policy language "unambiguously does not" permit policyholder's reading); *see also Alameda Cnty. Flood Control & Water Conservation Dist. v. Dep't of Water Res.*, 152 Cal. Rptr. 3d 845, 858 (Ct. App. 2013) ("'Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.'").

Further support for applying the Louisiana endorsement only in Louisiana comes from the legal context in which the state-specific endorsements arise. Under the McCarran-Ferguson Act, the federal government cedes to the individual states the power to regulate within their territory "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. Different states regulate

insurance contracts in different ways. *See, e.g.*, La. Stat. Ann. § 22:1311 (setting requirements for fire insurance policies "on any property *in this state*") (emphasis added). No state has the power to regulate conduct outside its borders. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–72 (1996).

The only reasonable reading of each state-specific endorsement is that it applies only within the state that approved its terms. The Louisiana endorsement does not apply to In-N-Out's claims. *See Palomar Health*, 2022 WL 3006356, at *1 ("[T]hose special endorsements apply only to property in Louisiana."); *accord Boscov's Dep't Store, Inc. v. Am. Guar. & Liab. Ins. Co.*, 546 F. Supp. 3d 354, 369 (E.D. Pa. 2021); *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, 2022 WL 1604438, at *4 (Ill. Ct. App. May 20, 2022) (agreeing that this is "the only reasonable interpretation").

3. The California Court of Appeal has held that state-specific endorsements apply only in the named states.

The California Court of Appeal addressed an argument like In-N-Out's in *American International Specialty Lines Ins. Co. v. Continental Casualty Ins. Co.*, 49 Cal. Rptr. 3d 1 (Ct. App. 2006). The

plaintiffs in that case argued that an endorsement with the heading "Utah Changes" applied in all states. *Id.* at 14. The court rejected that interpretation for some of the same reasons that this Court should reject In-N-Out's: That interpretation failed to "give effect to every part of" the policy, and it failed to interpret the policy as a reasonable whole, with each clause helping interpret the others. *Id.* at 15. "Because the language targets specific places," the court concluded, "we must respect that language." *Id.*

In-N-Out does not even cite *American International*, let alone explain why its reasoning does not apply here. The Louisiana endorsement does not apply to In-N-Out's claims.

In sum, the contamination exclusion bars coverage for In-N-Out's alleged losses. Regardless of whether viral presence could cause physical loss of or damage to property, affirmance can rest on the contamination exclusion alone.

III. This case does not merit certifying a question to the California Supreme Court.

Certification of a question to the California Supreme Court is not proper unless the question "could determine the outcome of a matter pending in the requesting court." Cal. R. Ct. 8.548(a)(1). The discord between *United Talent* and *Marina Pacific* does not require certifying any question to the California Supreme Court to determine the outcome of In-N-Out's case. AOB 36–37.

First, because *United Talent* and *Marina Pacific* differ mainly over how to apply California's pleading standards, §§ I.A.3–4., *above*, the state Supreme Court's input would not determine whether In-N-Out's complaint satisfies *federal* pleading standards. Second, In-N-Out's allegations resemble those in *United Talent*, *see* § I.A.1., *above*, and differ in important respects from those in *Marina Pacific*, *see* § I.A.4., *above*. This further diminishes the relevance to In-N-Out's case of *Marina Pacific* and its break from *United Talent*, making certification unnecessary and unhelpful.

Finally, no matter how the state Supreme Court might address *United Talent* and *Marina Pacific*, the contamination exclusion in In-

N-Out's policy would require affirming dismissal regardless. § II., *above*.

For all these reasons, the proposed question would not "determine the outcome" of this appeal. So certification is not proper.

CONCLUSION

For the foregoing reasons, the Court should affirm dismissal of In-N-Out's complaint.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in Microsoft Word using 14-point Century Schoolbook, a proportionally spaced typeface.

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STATEMENT OF RELATED CASES

Many other appeals in this Circuit "raise the same or closely related issues," 9th Cir. R. 28-2.6(b): whether Covid-19-related business losses are covered by property insurance. Some are set for argument in December 2022, *e.g.*, *HP Tower Invs., LLC v. Nationwide Mut. Ins. Co.*, No. 21-56240; *AECOM v. Zurich Am. Ins. Co.*, No. 22-55092 (also same appellee). We anticipate some will be dismissed or taken off argument calendar, as many have been in recent months.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLEE'S ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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