BMO HARRIS BANK, N.A., Appellant, *v.* F. HARVEY WHITTEMORE; and ANNETTE WHITTEMORE, Individuals, Respondents.

No. 84304

September 14, 2023 535 P.3d 241

Appeal from a district court order vacating an affidavit of renewal and declaring a judgment expired and void. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Affirmed.

Lee, J., with whom Pickering, J., agreed, dissented.

Gunderson Law Firm and *Mark H. Gunderson*, *Austin K. Sweet*, and *John R. Funk*, Reno, for Appellant.

Echeverria Law Office and *John P. Echeverria*, Reno; *Matthew L. Sharp, Ltd.*, and *Matthew L. Sharp*, Reno, for Respondents.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, C.J.:

In this opinion, we revisit the procedure to renew a judgment under NRS 17.214 and consider whether a judgment creditor must strictly comply with the certified mail method-of-notice requirement outlined in NRS 17.214(3). NRS 17.214(3) requires a judgment creditor to notify a judgment debtor of an affidavit of renewal of judgment by certified mail within three days of filing the affidavit. In *Leven v. Frey*, we concluded that a judgment creditor must satisfy NRS 17.214(3) to renew a judgment and that strict compliance with the three-day deadline is required. 123 Nev. 399, 402-04, 409, 168 P.3d 712, 715, 719 (2007). Here, appellant provided electronic notice of an affidavit of renewal to respondents' counsel but did not provide timely notice by certified mail to respondents, the judgment debtors. Appellant now asks this court to hold that NRS 17.214(3) is not a requirement to renew a judgment, contrary to *Leven*, and alternatively, that substantial compliance may satisfy the certified mail method-of-notice requirement. We decline to do so. Instead, we reaffirm *Leven*'s holding that a judgment creditor must comply with NRS 17.214(3) to renew a judgment, and we also conclude that the certified mail method-of-notice requirement demands strict

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself and thus did not participate in the decision of this matter.

compliance. Accordingly, we affirm the district court's ruling that appellant did not comply with NRS 17.214 and thus could not renew its judgment.

FACTS AND PROCEDURAL HISTORY

Appellant BMO Harris Bank, N.A. (BMO), fka Bank of the West, obtained a judgment against respondents Harvey and Annette Whittemore on November 18, 2015. BMO subsequently recorded the judgment. Later, BMO sued the Whittemores and their family entities in a separate suit, generally alleging they fraudulently transferred assets to avoid their liability. Having not collected on the 2015 judgment and with it set to expire on November 18, 2021, BMO filed an affidavit of renewal of judgment, recorded the affidavit, and electronically served the Whittemores' counsel on November 10. After an inquiry by the Whittemores' counsel, BMO notified the Whittemores by certified mail of the affidavit of renewal on December 2. The Whittemores moved to vacate the affidavit of renewal and declare the judgment void. The district court granted the motion, concluding that BMO did not comply with NRS 17.214(3) because it did not send notice of the affidavit of renewal to the Whittemores by certified mail within three days of filing it. BMO appeals.

DISCUSSION

We generally review an order granting a motion to vacate a renewed judgment for an abuse of discretion. *See Bianchi v. Bank of Am., N.A.*, 124 Nev. 472, 474, 186 P.3d 890, 891-92 (2008) (analogizing a motion to vacate a renewed foreign judgment to an NRCP 60(b) motion for relief from a void judgment and reviewing an order resolving such a motion for an abuse of discretion); *see also Fid. Creditor Serv., Inc. v. Browne*, 106 Cal. Rptr. 2d 854, 857 (Ct. App. 2001) (reviewing an order denying a motion to vacate an affidavit of renewal for an abuse of discretion). However, this appeal presents two questions of law, which we review de novo—the interpretation of NRS 17.214 and whether NRS 17.214(3)'s certified mail method-of-notice requirement demands strict compliance or allows for substantial compliance. *See Leven*, 123 Nev. at 402, 168 P.3d at 714 (providing that this court reviews de novo matters of statutory construction and whether strict compliance is required). We begin with the interpretation of NRS 17.214.

NRS 17.214(3) must be met to renew a judgment under NRS 17.214

BMO argues that the structure of NRS 17.214 reveals that NRS 17.214(3), which addresses notice to the judgment debtor, is not required to renew a judgment. It argues that NRS 17.214(1) alone provides the procedure to renew a judgment, namely, timely filing

the affidavit of renewal and timely recording the affidavit. Because the notice requirement is not enumerated in NRS 17.214(1), BMO asserts, it is not required to renew a judgment. Accordingly, BMO contends it renewed its judgment by timely filing and recording the affidavit.

NRS 17.214 lays out the procedure to renew a judgment. NRS 17.214(1)(a) provides that a "judgment creditor . . . may renew a judgment which has not been paid by: (a) [f]iling an affidavit . . . titled as an 'Affidavit of Renewal of Judgment' " that includes certain information about the judgment. The judgment creditor must record the affidavit within three days of filing it if the original judgment was recorded. NRS 17.214(1)(b). NRS 17.214(2) provides that filing "the affidavit renews the judgment to the extent of the amount shown due in the affidavit." NRS 17.214(3) provides that the "judgment creditor . . . shall notify the judgment debtor of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail . . . within 3 days after filing the affidavit."

In *Leven*, we interpreted NRS 17.214(3) as containing a requirement to renew a judgment. 123 Nev. at 402-04, 168 P.3d at 714-15. We reasoned that NRS 17.214(3) is "clear" that a creditor must notify a debtor of an affidavit of renewal within three days of filing the affidavit to renew a judgment. *Id.* at 402-03, 168 P.3d at 715. "[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted). Such compelling reasons must be "weighty and conclusive," *id.*, such as preventing the "perpetuation of error," *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (internal quotation marks omitted). A "mere disagreement" is not a compelling reason. *Miller*, 124 Nev. at 597, 188 P.3d at 1124. When it comes to NRS 17.214, BMO has failed to demonstrate compelling reasons to disturb *Leven*'s interpretation. Thus, we reaffirm that NRS 17.214(3) must be met to renew a judgment.

Our conclusion is bolstered by the fact that the Legislature has amended NRS 17.214 twice since *Leven* but has not changed NRS 17.214(3) or otherwise indicated that it disagreed with our interpretation. *Compare* 2021 Nev. Stat., ch. 506, § 77, at 3350-51 (enacting a minor amendment to NRS 17.214(1)), *and* 2011 Nev. Stat., ch. 388, § 2, at 2409-10 (similar), *with* NRS 17.214 (1995) (enacting the version of NRS 17.214 in effect when *Leven* was decided). This suggests that *Leven* interpreted NRS 17.214 in accordance with the Legislature's intent. *See Poasa v. State*, 135 Nev. 426, 428-29, 453 P.3d 387, 389 (2019) (holding that the Legislature's silence in the years after the court interpreted the statute at issue "suggests its agreement with the court's construction of the statute, particularly as it has made other changes to the statute"); *see also Runion v.*

State, 116 Nev. 1041, 1047 n.2, 13 P.3d 52, 56 n.2 (2000) (presuming that the Legislature agreed with this court's interpretation where the Legislature subsequently amended a statute but did not change the language that this court interpreted).

A creditor must strictly comply with NRS 17.214(3)'s certified mail method-of-notice requirement

Alternatively, BMO argues that NRS 17.214(3)'s requirement of notice by certified mail may be satisfied by substantial compliance, not strict compliance. It contends that requiring strict compliance leads to an absurd result because it assumes that the Whittemores learned about the affidavit of renewal through electronic service on their counsel.[2]

We disagree. As noted, in *Leven* we considered whether NRS 17.214 requires strict compliance and concluded that NRS 17.214's timing requirement demands strict compliance. 123 Nev. at 409, 168 P.3d at 719. While *Leven* was limited to the timing requirement, our reasoning also extends to the certified mail method-of-notice requirement in NRS 17.214(3), and we now clarify that its certified mail method-of-notice requirement likewise demands strict compliance.

The substantial-compliance standard recognizes performance as adequate where the reasonable purpose of a statute has been met, even absent technical compliance with the statutory language. *Schleining v. Cap One, Inc.*, 130 Nev. 323, 331, 326 P.3d 4, 9 (2014). Strict compliance, in contrast, requires exact compliance with a statute's terms. *In re Murack*, 957 N.W.2d 124, 130 (Minn. Ct. App. 2021). To determine whether a statute requires strict or substantial compliance, we consider the statute's language, as well as policy and equity. *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278 (2011). The inquiry is whether the purpose of the statute can be served by substantial compliance rather than technical compliance with the statute. *Id.* at 476, 255 P.3d at 1278. And we will allow substantial compliance when requiring strict compliance would lead to an absurd result. *See Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 697, 290 P.3d 249, 254 (2012) (concluding that the district court did not abuse its discretion in denying sanctions when the purposes of a statute's requirements were met and requiring strict compliance would have "exalt[ed] literalism for no practical purpose").

[2]BMO also argues that the district court erred in voiding the original judgment because BMO acted to preserve the judgment by timely filing the separate, still-pending fraudulent transfer action. BMO, however, fails to provide cogent argument or relevant authority supporting its position, and therefore, we decline to consider this argument. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

The statutory language favors strict compliance

In evaluating a statute's language, we consider the type of provision at issue. *Leven*, 123 Nev. at 408, 168 P.3d at 718. If a statute's provision is a "[t]ime and manner" restriction, strict compliance is generally required, but if the provision concerns "form and content," substantial compliance may suffice. *Id.* A time and manner provision addresses "when performance must take place and *the way in which the deadline must be met*." *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (emphasis added).

Here, the method-of-notice requirement provides that the judgment creditor must notify the debtor of the affidavit of renewal by certified mail. This refers to the way in which the deadline must be met. The certified mail method-of-notice requirement is therefore a time and manner provision, which weighs in favor of demanding strict compliance. *See Marsh-McLennan Bldg. Inc. v. Clapp*, 980 P.2d 311, 313 n.1 (Wash. Ct. App. 1999) (deeming a "manner of service" requirement in a statute to be a time and manner provision).

Additionally, we consider whether the statute uses mandatory language. *See Leyva*, 127 Nev. at 476, 255 P.3d at 1279 (recognizing that strict compliance is usually required where mandatory language is used). NRS 17.214(3) provides that the judgment creditor "shall notify the judgment debtor of the renewal of the judgment by sending a copy of the affidavit of renewal by certified mail." "'Shall' imposes a duty to act." NRS 0.025(1)(d). This mandatory language also supports a determination that the provision requires strict compliance. Accordingly, the statutory language weighs in favor of requiring strict compliance as well.

The purpose of NRS 17.214(3) favors substantial compliance but is not dispositive

In determining whether substantial compliance is permissible, "we examine whether the purpose of the statute . . . can be adequately served in a manner other than by technical compliance." *Leyva*, 127 Nev. at 476, 255 P.3d at 1278. The certified mail method-of-notice requirement in NRS 17.214(3) serves to protect an individual debtor's due process rights. *Leven*, 123 Nev. at 409, 168 P.3d at 719. We recognize that the purpose of notifying the judgment debtor of the renewal is met if the debtor has actual knowledge of the renewal regardless of how the debtor came to learn of it. Thus, the purpose of the certified mail method-of-notice requirement weighs in favor of permitting substantial compliance.

Nevertheless, we are not persuaded that the purpose of NRS 17.214 outweighs the statutory language favoring strict compliance. In contexts where we have held that a method-of-notice requirement may be met by substantial compliance, additional considerations

beyond the purpose factor weighed in favor of substantial compliance. For example, in *Hardy Companies v. SNMARK, LLC*, we held that substantial compliance with the notice requirement of a mechanic's lien statute was permissible because such statutes are "remedial in character and should be liberally construed." 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010) (quoting *Las Vegas Plywood v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)). And in *Schleining v. Cap One, Inc.*, we held that substantial compliance with a method-of-notice requirement in a statute governing notice of default was permissible, in part because the Legislature had expressly permitted substantial compliance in a related statute. 130 Nev. at 329-30, 326 P.3d at 8. Having examined NRS 17.214(3), we do not find additional considerations of the sort that would favor substantial compliance here.[3] Indeed, to the contrary, "because judgment renewal proceedings are purely statutory in nature and are a measure of rights, a court cannot deviate from those judgment renewal conditions." *Leven*, 123 Nev. at 409, 168 P.3d at 719.

CONCLUSION

We reaffirm *Leven*'s holding that a judgment creditor must follow NRS 17.214(3) to renew a judgment. We also clarify that a judgment creditor must strictly comply with NRS 17.214(3)'s certified mail method-of-notice requirement. In light of the foregoing, we affirm.

Cadish, Herndon, and Bell, JJ., concur.

Lee, J., with whom Pickering, J., agrees, dissenting:

I cannot agree with the majority's decision to void a judgment based on the method of service of the renewal notice where (1) requiring strict compliance under these circumstances would lead to an absurd result and (2) a plain reading of NRS 17.214 indicates that service is not a mandatory prerequisite to judgment renewal. *See Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021) ("When interpreting a statute, we look to its plain language."). I therefore dissent and would instead reverse and remand to allow the district court to determine whether the Whittemores had actual notice of the judgment renewal and suffered any prejudice as a result of the method and timing of service.

---

[3]Further, we discern nothing absurd here in requiring a sophisticated party, a large bank, to strictly comply with a notification requirement when it seeks to recover on a judgment. Accordingly, we reject BMO's absurdity argument. Although the dissent suggests that following the letter of the law renders an unfair outcome in this instance, we note that "law without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion." 1 William Blackstone, *Commentaries on the Laws of England* 62 (4th ed. 1770).

Mandating strict compliance under NRS 17.214(3) would lead to an absurd result under the facts of this case

Mandating strict compliance with NRS 17.214(3)'s manner of service requirement needlessly extols literalism to the detriment of practicality and equity. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278 (2011) (recognizing that strict compliance with a statute's requirements may not be necessary when it is not required to achieve the statute's purpose). This court previously found that substantial compliance is sufficient in fulfilling service and notice requirements where (1) a party has actual notice and (2) the party is not prejudiced. *See Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010) (holding that the notice requirement for a mechanic's lien is satisfied if the landowner had actual notice and is not prejudiced).

In this case, BMO complied with all renewal and service requirements under NRS 17.214 prior to the expiration of the judgment, except for the manner in which it served its notice on the Whittemores. BMO did not strictly comply with NRS 17.214(3) (requiring service of the notice of judgment renewal to be sent to the debtor via certified mail) and instead electronically served the Whittemores' legal counsel. BMO further notified the Whittemores via certified mail within two weeks after the judgment would have expired. This two-week delay, especially considering the timely notice provided to the Whittemores' counsel, does not subvert the purpose of the statute.

I therefore submit that an application of the substantial compliance rule of construction when assessing the service requirements set forth in NRS 17.214 would be more appropriate. This would allow courts to consider the underlying circumstances in determining whether (1) a debtor was sufficiently on notice of the continuing obligation to repay the judgment, (2) the debtor would be prejudiced if the judgment was renewed, and (3) the creditor made reasonable efforts to comply with the service requirements.

Alternatively, even under a strict compliance analysis, this court has previously elucidated that "strict compliance does not mean absurd compliance." *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012). Guided by this principle, this court held that a judgment was not voided where a creditor did not record the affidavit of renewal within three days of filing because the creditor "satisfied all of NRS 17.214's service and recording requirements before the judgment expired." *Hesser v. Kennedy Funding, Inc.*, No. 81383, 2022 WL 354504 (Nev. Feb. 4, 2022) (Order of Affirmance) (affirming the denial of a motion to declare a judgment expired). Because "the purpose of procuring reliable title searches [was] not affected," the court reasoned that "mak[ing] the outcome turn on the present facts 'exalts literalism

for no practical purpose.'" *Id.* (quoting *Einhorn*, 128 Nev. at 697, 290 P.3d at 254). *See also* 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:2, at 177 (7th ed. 2014) ("Statutes should be read sensibly rather than literally and controlling legislative intent should be presumed to be consonant with reason and good discretion.").

Substantial compliance, especially under the circumstances presented here, does not impinge upon a judgment debtor's due process rights, entirely fulfills the purpose of the statute, and gives judgment creditors an opportunity to avoid a draconian outcome—an irreversible and complete eradication of their judgment. I therefore submit that the court should reverse and remand the matter for further findings by the district court regarding whether the Whittemores had actual notice of the renewal and any potential prejudice.

A plain reading of the statute indicates that service is not a prerequisite to renewal under NRS 17.214

The plain language of NRS 17.214(1)(a) provides that "[a] judgment creditor . . . may renew a judgment which has not been paid by: (a) [f]iling an . . . 'Affidavit of Renewal of Judgment'" that includes specific information. NRS 17.214(1)(b) provides that the affidavit must be recorded if the judgment was recorded. NRS 17.214(2)-(4) are enumerated separately, and unlike NRS 17.214(1), nothing within those provisions states that they are part of the renewal process. This marks a clear distinction between the renewal requirements under NRS 17.214(1) and the remaining provisions of the statute—which this court must not disregard. *See Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 777, 500 P.3d 1257, 1261 (2021) (recognizing the canon of statutory construction that "a legislature's omission of language included elsewhere in the statute signifies an intent to exclude such language"); *see also Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim '*Expressio Unius Est Exclusio Alterius*', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.").

NRS 17.214(2) provides that "[t]he filing of the affidavit *renews the judgment* to the extent of the amount shown due in the affidavit." (Emphasis added.) This shows that the judgment is deemed renewed upon the filing of the affidavit of renewal of judgment. This reading is further reinforced by the language of NRS 17.214(3), which provides that "[t]he judgment creditor . . . shall notify the judgment debtor *of the renewal of the judgment*." (Emphasis added.) This presupposes that renewal of the judgment is complete by the time notice is served.

Had the Legislature intended for service to be a prerequisite of renewal, NRS 17.214 could have instead required that the creditor send notice of the intent to renew or of the filing of the affidavit

of renewal of judgment. The Legislature did not do so; thus, the only reasonable interpretation of NRS 17.214(3)'s plain language is that renewal occurs prior to notice and that the notice requirement only serves to make the debtor aware that the judgment has been renewed. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." (internal quotation marks omitted)).[1]

If the court looks beyond the plain language, legislative history and public policy considerations underlying the enactment of NRS 17.214 further support the interpretation set forth above. NRS 17.214 was enacted in 1985. *See* 1985 Nev. Stat., ch. 223, § 2, at 699-700. NRS 17.214 was amended in 1995. *See* 1995 Nev. Stat., ch. 475, § 21, at 1525. The 1995 amendment added NRS 17.214(1)(b) as it appears in the statute today. The 1995 amendment was a "housekeeping attempt" meant to provide the public with easier access to information on liens and to facilitate reconveyances of real property where appropriate. *See Hearing on S.B. 455 Before the S. Judiciary Comm.*, 68th Leg., at 10 (Nev., May 23, 1995). The recording requirement was included so that the judgment renewal could be "easily ascertained" in title searches. *Id.* at 11. The 1995 amendment was not enacted to alter the standard means to renew a judgment—filing the affidavit; rather, it simply imposed an additional conditional requirement where a judgment was recorded.

Bisecting the service requirement from the renewal requirements demonstrates that each section serves a distinct purpose. The service requirement is implemented to put the debtor on notice of the continuing obligation to repay the judgment, not to effectuate renewal of the same. *See, e.g.*, *Orme v. Eighth Judicial Dist. Court*, 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989) ("The primary purpose underlying the rules regulating service of process is to [e]nsure that individuals are provided actual notice of suit and a reasonable opportunity to defend."). Therefore, I must dissent.

---

[1]To the extent that this court imported a service requirement to renew a judgment based on NRS 17.214(3) in *Leven v. Frey*, I would overrule that holding based on the analysis above. 123 Nev. 399, 402-04, 168 P.3d 712, 714-15 (2007).

STARR SURPLUS LINES INSURANCE CO., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MARK R. DENTON, District Judge, Respondents, and JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.

No. 84986

September 14, 2023 535 P.3d 254

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion for summary judgment in an insurance action.

Petition granted.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Abraham G. Smith*, Las Vegas; *Clyde & Co US LLP* and *Amy M. Samberg* and *Lee H. Gorlin*, Las Vegas, for Petitioner.

Latham & Watkins LLP and *John M. Wilson*, San Diego, California; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Real Party in Interest.

Christian Kravitz Dichter Johnson & Sluga, LLC, and *Tyler J. Watson*, Las Vegas; *Robinson & Cole LLP* and *Wystan Michael Ackerman*, Hartford, Connecticut, for Amicus Curiae American Property Casualty Insurance Association.

McDonald Carano LLP and *Adam D. Hosmer-Henner*, *Chelsea Latino*, and *Jane E. Susskind*, Reno, for Amicus Curiae Nevada State Medical Association.

Kemp Jones, LLP, and *Don Springmeyer*, Las Vegas; *Reed Smith LLP* and *David M. Halbreich*, *Amber S. Finch*, *Margaret C. McDonald*, and *Katherine J. Ellena*, Los Angeles, California, for Amicus Curiae Panda Restaurant Group, Inc.

Brownstein Hyatt Farber Schreck, LLP, and *Frank M. Flansburg, III*, Las Vegas; *Covington & Burling LLP* and *Wendy L. Feng*, San Francisco, California, for Amicus Curiae Boyd Gaming Corporation.

Pisanelli Bice, PLLC, and *James J. Pisanelli* and *Debra L. Spinelli*, Las Vegas; *Reed Smith LLP* and *John N. Ellison* and *Richard P. Lewis*, New York, New York, for Amicus Curiae United Policyholders.

Brownstein Hyatt Farber Schreck, LLP, and *Frank M. Flansburg, III*, Las Vegas; *Latham & Watkins LLP* and *Brook B. Roberts*, *John M. Wilson*, and *Corey D. McGhee*, San Diego, California, and *Christine G. Rolph*, Washington, D.C., for Amicus Curiae Caesars Entertainment, Inc.

Brownstein Hyatt Farber Schreck, LLP, and *Frank M. Flansburg, III*, Las Vegas, for Amicus Curiae Golden Entertainment, Inc.

Snell & Wilmer, LLP, and *Patrick G. Byrne*, Las Vegas, for Amicus Curiae Wynn Resorts, Limited.

Kemp Jones, LLP, and *Michael J. Gayan*, Las Vegas, for Amicus Curiae Hilton Worldwide Holdings, Inc.

Messner Reeves LLP and *Renee M. Finch*, Las Vegas, for Amici Curiae Bloomin' Brands, Inc.; Circus Circus LV, LP; Restaurant Law Center; and Treasure Island, LLC.

Before the Supreme Court, EN BANC.

OPINION

By the Court, CADISH, J.:

Real party in interest JGB Vegas Retail Lessee, LLC, owns and operates a retail shopping mall on the Las Vegas Strip. When COVID-19 forced JGB to shut down abruptly, it suffered significant economic losses. It now seeks to recoup those losses under its commercial property insurance policy, arguing that the presence of COVID-19 on the property created the requisite "direct physical loss or damage" covered under the policy. We consider whether that policy provides such coverage. As a matter of law, we conclude it does not.

FACTS AND PROCEDURAL HISTORY

Petitioner Starr Surplus Lines Insurance Co. provides commercial property insurance. JGB, which owns and operates the "Grand Bazaar Shops" (the Shops) on the Las Vegas Strip, is one of Starr's policyholders. The "perils insured against" under the policy's general coverage grant include "all risks of direct physical loss or damage to covered property while at INSURED LOCATIONS occurring during the Term of this POLICY, except as hereinafter excluded or limited."

The policy also includes a business interruption section, providing coverage for "[l]oss directly resulting from necessary interruption of the Insured's NORMAL business operations caused

by direct physical loss or damage to real or personal property covered herein, . . . arising from a peril insured against hereunder" during the term of the policy and while located at insured locations. In addition, the business interruption coverage extends to losses from interruption by civil or military authority, meaning those losses sustained "when, as a direct result of damage to or destruction of property within" one mile of the Shops "by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil or military authority." This business interruption insurance falls within the policy's time element coverage, which generally permits recovery for "loss resulting from the inability to put damaged property to its normal use." *See* 5 *New Appleman on Insurance Law Library Edition*, § 41.01[2][a] (Jeffery E. Thomas, ed., 2022).

Other time element provisions extend coverage even further. Relevant here, this includes coverages like the extra expense, ingress/egress, and rental value endorsements.[1] Though these endorsements provide coverage for various losses, coverage under each one is contingent on the losses being caused by the perils insured against: "direct physical loss or damage to covered property." Moreover, most of these provisions impose a period of indemnity beginning "with the date of direct physical loss or damage by any of the perils covered herein" and ending "on the date when the damaged or destroyed property at the INSURED LOCATION should be repaired, rebuilt or replaced with the exercise of due diligence and dispatch."[2]

Despite broad coverage, the policy also contains multiple exclusions. The pollution and contamination exclusion, for example, bars coverage for "loss or damage caused by or resulting from any of the following regardless of any cause or event contributing concurrently or in any other sequence to the loss":

> 1. contamination;
> 2. the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION during the Term of this POLICY . . . .

Thus, loss or damage caused by pollution or contamination is excluded. And the policy further defines those excluded pollutants or contaminants as including viruses:

---

[1]Some of these endorsements contain coverage provisions for interruption by civil or military authority comparable to that in the business interruption section as well.

[2]The rental value endorsement's measure of recovery mirrors this period of indemnity, in that it is "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property." The ingress/egress endorsement and civil or military authority provisions have specified 14-day time limits.

> The term "POLLUTANTS" or "CONTAMINANTS" shall mean any solid, liquid, gaseous or thermal irritant or CONTAMINANT including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, virus, waste, (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous substances as listed in the Federal WATER Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency.

The COVID-19 pandemic began a few months into the policy term, during which the SARS-CoV-2 virus rapidly spread infection throughout the country. As a result, several of JGB's tenants closed their businesses, and by March 2020, Nevada's Governor mandated that all nonessential businesses close to prevent the virus's spread. (Restaurants, we note, were allowed to provide take-out and delivery services during the shutdown.) By June 2020, the Shops were allowed to reopen, subject to restrictions designed to reduce the spread of the virus. Some of JGB's tenants never reopened.

The closures resulted in economic strife for both JGB and its tenants. Reopening required additional expenses, too: JGB and its tenants installed sanitizer stations, social-distancing signs, and plexiglass and performed regular cleanings to reduce the chance of spreading the virus at the Shops. Amidst the closures and accompanying economic troubles, JGB filed a claim with Starr. It sought coverage for lost business income, extra expenses, and any other applicable coverage "[i]n connection with the recent shutdowns, closures, and other directives."

Starr later responded to JGB's claim with a reservation of rights letter, raising concerns about whether coverage existed. Thereafter, JGB filed suit against Starr for breach of contract, declaratory judgment, violations of the Nevada Unfair Claims Practices Act, and breach of the covenant of good faith and fair dealing. The complaint chiefly alleged that it was "highly likely" that COVID-19 was present on the premises of the Shops, "thus damaging the property that JGB leased to its tenants" and warranting business interruption and other time element coverage under the policy. Meanwhile, Starr formally denied JGB's claim.

Discovery proceeded, revealing (1) how the COVID-19 virus spreads in aerosolized form; (2) that SARS-CoV-2 is a physical particle that can deposit onto property for several days, which can then transmit from the infected property as a "fomite"; (3) confirmed cases of COVID-19 at the Shops and statistical modeling indicating a strong likelihood that individuals with COVID-19 were at the Shops before and after the Governor's first closure order; (4) the associated likelihood that these infected individuals rapidly redeposited SARS-CoV-2 onto the Shops' property; and (5) various

measures used by JGB and its tenants to reduce the chance of catching or spreading the virus. Nevertheless, Starr moved for summary judgment, arguing that the presence of COVID-19 did not amount to the "direct physical loss or damage" needed for coverage as a matter of law. It added that loss of use cannot qualify because it is mere economic loss. Further, Starr argued that coverage for loss or damage caused by a "virus" was precluded under the policy's express exclusions.

In opposition, JGB argued that the plain and ordinary meaning of "direct physical loss or damage" mandated coverage. JGB pointed to its undisputed scientific evidence showing that the SARS-CoV-2 virus is a physical particle that can "land on and attach to property and last for days," can "remain infectious while suspended in air as well as on property," and cannot be removed with routine cleaning. Collectively, it contended that this evidence indicated how the virus both damaged the Shops and rendered the Shops unsafe for their purpose, so as to amount to "direct physical loss or damage."

Following a hearing, the district court granted the motion in part and denied it in part. It concluded that "whether COVID-19, or the virus that causes it, does or does not physically alter property in order to trigger one or more coverages under the Policy is a matter of fact to be determined at trial" and that it had not yet determined whether the pollution and contamination exclusion applies. It rejected JGB's extra-contractual claims as a matter of law and granted summary judgment in Starr's favor on those claims, however, such that only the breach of contract and declaratory relief claims remain. Starr then filed the instant writ petition challenging the denial of summary judgment on the remaining claims.

DISCUSSION

We elect to entertain the petition for a writ of mandamus

In urging the court to entertain the petition, Starr contends that the petition raises legal issues of first impression and fundamental public importance. It emphasizes that it does not dispute JGB's evidence for purposes of resolving these legal issues. Further, Starr underscores the number of pending cases in Nevada district courts addressing these issues, arguing that our review will aid judicial economy. JGB argues that we should deny the petition because fact questions persist.[3]

[3]Starr alternatively seeks a writ of prohibition, but it provides no argument as to why prohibition would be an appropriate remedy. Based on the nature of the relief requested and the district court's jurisdiction over breach of contract matters, this petition does not implicate the standard for prohibition relief. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 649, 331 P.3d 905, 909 (2014) (recognizing that a writ of prohibition is appropriate when a district court exceeds its jurisdiction).

A writ of mandamus is available to correct clear error or an arbitrary or capricious exercise of discretion when there is no other adequate legal remedy. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). It is an extraordinary remedy that "only issue[s] at the discretion of this court." *See State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 146, 42 P.3d 233, 237 (2002). In exercising this discretion, we have established a general policy of declining to consider writ petitions challenging district court orders denying summary judgment. *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 585, 262 P.3d 699, 700 (2011). An exception to this general policy may apply, however, when a writ petition presents an "opportunity to clarify an important issue of law and doing so serves judicial economy." *Canarelli v. Eighth Judicial Dist. Court*, 138 Nev. 104, 106, 506 P.3d 334, 337 (2022). Even so, our review is improper if factual disputes persist. *See Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 684, 476 P.3d 1194, 1199 (2020).

We conclude that this petition falls within the exception to our general policy. Whether all-risk commercial property insurance like that in Starr's policy covers losses arising from the COVID-19 pandemic presents an important legal issue of first impression "likely to be the subject of extensive litigation." *See Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004). In fact, Starr has pointed to several cases involving this question that are pending in Nevada district courts, so our clarification may promote "judicial economy and administration by assisting other jurists, parties, and lawyers." *Walker*, 136 Nev. at 683, 476 P.3d at 1198 (internal quotation marks omitted). Although the district court held that factual issues existed, we discern no such fact issues precluding our review of the coverage questions raised in this petition, especially as Starr does not dispute JGB's evidence. *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 556, 402 P.3d 677, 684 (2017) (entertaining and issuing writ of mandamus where the court considered undisputed material facts in contract interpretation case); *see also Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 965, 339 P.3d 1281, 1284 (2014) (recognizing that categorizing loss under an insurance policy was a legal question, such that "the district court erred in sending it to the jury"). We therefore elect to entertain the petition, addressing these legal questions further below.

Standard of review

We review de novo a district court order resolving a summary judgment motion. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014). Summary judgment is appropriate when there is "no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). If the movant bears its "initial burden of production to show the absence of a genuine issue of material fact," "then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Interpretation of an insurance policy is also a legal question reviewed de novo. *See Nationwide Mut. Ins. Co. v. Moya*, 108 Nev. 578, 582, 837 P.2d 426, 428 (1992).

Starr's all-risk policy requires direct physical loss or damage to the covered property, meaning coverage applies when there is a material or tangible destruction of or injury to the covered property itself

Modern commercial property insurance covers either "named perils" or "all risk." 2 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* 1568 (20th ed. 2021). As the name suggests, an all-risk insurance policy is designed to cover "losses caused by any fortuitous peril." *Id*.; *see also Coast Converters*, 130 Nev. at 967, 339 P.3d at 1286 ("It is well recognized that insurable loss of or damage to property must be occasioned by a fortuitous, noninevitable, and nonintentional event." (emphasis omitted)). Still, the coverage grant is not totally unlimited. The touchstone of commercial property insurance is that it insures against the property's "damage or destruction." *See* 2 Jeffrey W. Stempel & Erik S. Knutsen, *Stempel and Knutsen on Insurance Coverage* § 15.01[C] (4th ed. 2019) (explaining how to make out a prima facie case for all-risk coverage).

The parties here contest the reach of coverage in an all-risk policy. While JGB claims coverage under several provisions, the parties' dispute focuses on the phrase "direct physical loss or damage." Starr argues that "direct physical loss or damage" requires either "distinct, demonstrable, physical alteration" to property or "some sort of structural or physical change to a property, actually altering its functionality or use." JGB argues that requiring something like "distinct, demonstrable, physical alteration" is too limiting. It distinguishes between covered damage and loss, maintaining that damage exists where a physical force "alters the surfaces or air of covered property," while loss exists where a physical force, like the COVID-19 virus, is "present on or around covered property, rendering it partially or wholly unusable, unsafe, or unfit for its intended purpose." JGB claims that this latter sort of loss "is recoverable by itself, without need to show 'damage.'"

Resolving this dispute requires that we first assess the policy's text. And we assess language in an insurance policy like we do in any contract; our chief aim is to effectuate the intent of the parties. *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614,

616 (2014); *see also* 16 Williston on Contracts § 49:14 (4th ed. 2014). Where the text reveals clear meaning viewed in its plain, ordinary, and popular sense, the court cannot look beyond the four corners of the policy. *See Casino W.*, 130 Nev. at 398, 329 P.3d at 616. However, where the meaning remains ambiguous, the court construes the policy against the drafter. *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156 (2004). Ambiguity exists if the policy creates "[multiple] reasonable expectations of coverage as drafted." *Casino W.*, 130 Nev. at 398, 329 P.3d at 616 (alteration in original) (internal quotation marks omitted).

Because the policy does not define the term "direct physical loss or damage," we begin with its plain meaning. *See Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 12, 408 P.3d 566, 571 (2018) (consulting dictionary definitions of a term not defined within a statutory scheme); *Casino W.*, 130 Nev. at 400, 329 P.3d at 617 (starting with the dictionary definition in interpreting an insurance policy's exclusionary provision). The word *direct* is commonly defined as "stemming immediately from a result." *Direct*, *Merriam-Webster's Collegiate Dictionary* 353 (11th ed. 2020); *see also Direct*, *Black's Law Dictionary* (11th ed. 2019) (defining *direct* as "[f]ree from extraneous influence" and "immediate"). Indeed, the use of "direct" in commercial property insurance policies "signals 'immediate' or 'proximate' cause, as distinct from remote or incidental causes." *New Appleman on Insurance Law Library Edition*, *supra* § 42.02[3]. *Physical* is defined in part as "having material existence." *Physical*, *Merriam-Webster's Collegiate Dictionary*, *supra* at 935; *see also Physical*, *Black's Law Dictionary* (defining *physical* as "pertaining to real, tangible objects"). *Loss* is defined as "destruction, ruin," and the "act of losing possession." *Loss*, *Merriam-Webster's Collegiate Dictionary*, *supra* at 736. Finally, *damage* is defined as "loss or harm resulting from injury to person, property, or reputation." *Id.* at 314.

Rules of grammar also aid interpretation of this policy language. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) ("Words are to be given the meaning that proper grammar and usage would assign them."). The policy's general coverage grant insures "against all risks of direct physical loss or damage to covered property." The phrase "to covered property" following "direct physical loss or damage" functions as a "postpositive modifier," such that it applies to both loss and damage. *See id.* at 147 ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."). Moreover, as a prepositional phrase, "to covered property" links the object of that phrase "with another part of the sentence to show the relationship between them." *See The Chicago Manual of Style*

¶ 5.172 (17th ed. 2017). With the preposition "to," that relationship is generally one of direction. *See id.* Thus, in context, "to" indicates that the object of the preposition (i.e., property) is "the person or thing affected by or receiving something" (i.e., direct physical loss or damage). *See To*, *Oxford Dictionary of English* 1867 (3d ed. 2010).

"Direct" and "physical" further affect how coverage applies. In the phrase "direct physical loss or damage," both "direct" and "physical" function as prepositive modifiers giving meaning to "loss" and "damage" individually. *See* Scalia & Garner, *supra* 148 (noting that "internal personnel" in the phrase "internal personnel rules and practices of an agency" modifies both "rules" and "practices" (citing *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 764 (D.C. Cir. 1978), *superseded in part by statute as recognized in ACLU of N. Cal. v. FBI*, 881 F.3d 776, 780 n.3 (9th Cir. 2018))). The policy thus establishes two bases for coverage: "direct physical loss" as well as "direct physical damage."

At the same time, "direct" modifies the "idea expressed by the combination of the first adjective and the noun." *See The Chicago Manual of Style*, *supra* ¶ 5.91. Read together, "direct physical loss" and "direct physical damage" then indicate that there are physical losses and physical damages that are *not* direct, but coverage will extend only to those that are direct. *See id.* (using "white brick house" to explain that "a white house could be made of many different materials"). And "[w]hatever is modified" by direct must be direct "[t]o something." *See Jordan*, 591 F.2d at 764. Through the prepositional phrase "to covered property," that something here is the actual property. *See The Chicago Manual of Style*, *supra* ¶ 5.172. Thus, in incorporating the pertinent dictionary definitions and analysis of the phrasing, we conclude that the plain language of "direct physical loss . . . to covered property" requires material or tangible destruction or dispossession as a result of material or tangible impact directed toward the property itself. Meanwhile, the plain language of "direct physical . . . damage to covered property" requires a material or tangible harm or injury directed toward the property itself.[4] *Cf. Uncork & Create LLC v. Cincinnati Ins. Co.*, 27

[4]As previewed above, the other endorsements in the policy, including those that JGB claims coverage under, use identical language—"direct physical loss or damage"—or at least analogous language—"direct result of loss or damage by a peril insured against"—and are dependent on a showing of the peril insured against. Even the interruption by civil or military authority provisions applicable to the business interruption section and other time element endorsements cover only those losses incurred when access to covered property is restricted "as a direct result of *damage* to or *destruction* of property within one (1) statute mile" of the insured property "*by the peril(s) insured against*." (Emphasis added.) In addition, while they are not followed with the prepositional phrase "to covered property," these endorsements again use analogous language: "to real or personal property covered herein," "of real or personal property," or "to property of a type insured against." Taken together, and given

F.4th 926, 931-33 (4th Cir. 2022) (construing the plain meaning of the terms "physical loss" and "physical damage," when used in reference to a defined premises, as "material destruction or material harm" respectively).

Consistent with JGB's argument, "loss" and "damage" here "are not necessarily synonymous." Scott G. Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?*, 54 Tort Trial & Ins. Prac. L.J. 95, 99 (2019). Yet, though the disjunctive "or" directs that each word retains its own meaning, 1A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 21:14 (7th ed. 2009) (discussing how "or" is disjunctive and typically establishes "different meanings because otherwise the statute or provision would be redundant"), they are not wholly "distinct concept[s]," *Uncork & Create LLC*, 27 F.4th at 932 n.8. "Loss" instead "connotes a greater degree of harm than the word 'damage.'" *Id.* "Harm," therefore, is generally a critical feature of both "loss" and "damage."[5] *See Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (reasoning that "direct physical loss or damage" "connote[s] actual, demonstrable harm of some form to the premises itself").

Take "fire, water, or smoke"—classic cases of such loss or damage—for example. *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002). These physical forces constitute a "physical impediment" necessitating repair or remediation. *Cf. Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52, 63-64 (D.C. 2023); *see also Port Auth.*, 311 F.3d at 235 (explaining that damage from these sources "may demonstrably alter the components of a building and trigger coverage"). In contrast, courts assessing early disputes under commercial property insurance denied coverage when there was no "direct invasion" of the property. *See Cleland Simpson Co. v. Firemen's Ins. Co. of Newark, N.J.*, 140 A.2d 41, 44-46 (Pa. 1958) (declining coverage in the insurer's favor, under a named-peril policy, for inability to use the property due to a state of emergency absent "crystallization into damage or destruction" by fire).

And, even in much of the caselaw addressing "loss of use" and "uninhabitability" that JGB and amici curiae direct us to, we dis-

---

that JGB's coverage claim is dependent on "direct physical loss or damage to covered property" as the general peril insured against, the same requirements imposed by this language apply to the endorsements and specified interruption by civil or military authority provisions. *See PHI Grp., Inc. v. Zurich Am. Ins. Co.*, 58 F.4th 838, 842 n.4 (5th Cir. 2023) (applying same coverage analysis to time element and civil authority claims because those provisions also required "physical loss or damage").

[5]This harm prerequisite should not be construed to write out cases of theft. *See Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1274 n.12 (Mass. 2022) ("There can of course be 'physical loss of' property without damage . . . if it is stolen or otherwise disappears.").

cern some physical impact culminating in harm to the property. For example, in a leading case on uninhabitability, the court in *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968), held that "infiltration and contamination of the foundation, walls and rooms of the church building as to render it uninhabitable" was a covered loss. In this way, the building's uninhabitability was contingent on some disabling impact to the property. *See id.* (describing the covered loss of use as not just the loss of use of the church "viewed in splendid isolation," but as the "consequential result of . . . the accumulation of gasoline around and under the church building"). The same defining characteristic—the property's accompanying physical impairment—underscores other instances of uninhabitability. *See, e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *4 (D. Or. June 7, 2016) (holding that coverage existed because an outdoor theatre "sustained 'physical loss or damage to property' when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose"), *vacated by joint stipulation*, No. 1:15-cv-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1061-62, 1069 (D. Haw. 2013) (recognizing that arsenic in flooring materials invaded concrete slab so as to cause a continuous injury of "direct physical loss or damage").

Whether one calls this a "distinct, demonstrable, physical alteration" as Starr urges, or something else, insurable uninhabitability or loss of use depends on some essential harm—some "detriment, disablement, . . . [or] ruin"—to the property itself. William C. Burton, *Burton's Legal Thesaurus* 472 (6th ed. 2021) (listing synonyms for the word "harm"); *see also Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 404-05 (6th Cir. 2021) (summarizing that coverage in loss of use caselaw exists where the property "became practically useless for anything"). At bottom, "'[p]hysical' has to mean something." *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 549, 552 (Iowa 2022) (interpreting "direct physical loss of or damage to property" in a COVID-19 property insurance dispute and reasoning that such language requires that the property loss have a "physical aspect"). We cannot, therefore, base coverage on economic loss alone. *See Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 456 (5th Cir. 2022). As illustrated, our assessment under the physical loss or damage provisions asks whether the property experienced material or tangible dispossession, destruction, harm, or injury, "rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *See Great N. Ins. Co.*, 17 F. Supp. 3d at 331.

Because the claimed losses stemming from the physical presence of SARS-CoV-2 virus do not fall within the ordinary meaning of the policy's direct physical loss or damage coverage as a matter of law, the district court erred in not granting summary judgment in Starr's favor

Starr contends that JGB does not satisfy the plain meaning of the policy's direct physical loss or damage requirement, as the presence of COVID-19 neither physically alters the property nor requires the intervention that property damage or loss necessitates. Further, Starr argues that coverage cannot stand on JGB's temporary loss of use of the insured premises without any detriment to the property itself. JGB argues that the district court correctly denied the summary judgment motion because it provided substantial evidence that the COVID-19 virus creates loss by rendering the Shops unusable or uninhabitable, or damage by physically altering the property. It also contends that such "direct physical loss or damage" does not require loss or damage visible to the naked eye.

As a threshold matter, the inability to see the COVID-19 virus with the naked eye is not the deciding factor. Both physical loss and physical damage can arise from invisible or microscopic forces, as they have a physical presence and occupy physical space. To hold otherwise would ignore a litany of physical forces, such as odors, noxious gasses, asbestos, or lead, for instance, that can jeopardize the property. *See, e.g.*, *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (recognizing that asbestos and lead were "contaminating conditions" that could cause property loss or damage); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803-05 (N.H. 2015) (explaining that "physical loss" "encompass[es] changes that are perceived by sense of" smell, sight, or touch when assessing whether coverage could exist for cat urine).

However, even taking JGB's unrebutted, scientific evidence as true, it fails to demonstrate how the Shops were subject to the type of material, tangible harm constituting direct physical loss or damage "within the meaning of the policy." *See Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67, 72 (N.H. 2023). First, JGB offers evidence that the COVID-19 virus "is a physical particle that deposits *on* the property and lasts for days." (Emphasis added.) But "direct physical loss or damage to covered property" requires something more involved—the property must receive or be affected by actual physical harm. *See To*, *Oxford Dictionary of English*, *supra*, at 1867; *see also Verveine Corp.*, 184 N.E.3d at 1273 (explaining that the "direct physical loss or damage" language "characterizes what effects the covered causes must have on the property to trigger coverage, not the causes themselves"). SARS-CoV-2's presence on the property, on the other hand, indicates mere placement on the property. *See The Chicago Manual*

of Style, *supra* ¶ 5.172 (stating that "on" indicates the "notion[ ]" of position). Presence of a physical virus on the property, even if it "attaches to" the property, does not give rise to the necessary transformative element of something like "fire, water, or smoke." *See Port Auth.*, 311 F.3d at 236. Otherwise, the alleged presence of a physical force would "render[ ] every sneeze, cough, or even exhale" a qualifying harm. *Cosmetic Laser, Inc. v. Twin City Fire Ins. Co.*, 554 F. Supp. 3d 389, 407 (D. Conn. 2021), *appeal dismissed*, No. 21-2160-CV, 2022 WL 4111813 (2d Cir. Apr. 13, 2022). Ultimately, as the Wisconsin Supreme Court recently observed, "the presence of COVID-19 does not constitute a physical loss of or damage to property because it does not alter the appearance, shape, color, structure, or other material dimension of the property." *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442, 447 (Wis. 2022).

Next, evidence that the virus remains harmful while in the air or as "fomites" is similarly unconvincing because it does not demonstrate that the virus is harmful *to the property*.[6] At most, SARS-CoV-2's virality in the air is evidence of harm imperiling people, not property. Commercial property insurance is concerned with the converse: "[T]he policies insure property, not people." *Schleicher*, 302 A.3d at 756; *see also Tapestry*, *Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1060 (Md. 2022) (explaining that scientific evidence illustrating "how Coronavirus particles[ ] are expelled . . . and are then dispersed more widely into the surrounding air" is not evidence that those same particles "physically damage[ ] air over which [the policyholder] has possessory rights"). JGB's evidence that the virus can spread via harmful "fomites" once it lands on the surface of property suffers from the same problem, as it does not indicate that the property was actually harmed. *Cf. Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 404 (6th Cir. 2022) (utilizing ordinary meaning of "direct physical loss" in dismissing allegations that failed to allege harm). Fomite-based transmission instead typifies another way the virus "pos[es] health risk to humans," as opposed to property. *Tapestry*, 286 A.3d at 1060. Though this evidence shows that the COVID-19 virus is "harmful," it simply does not equate to evidence that any property suffered physical harm. *See Sagome, Inc. v.*

[6]The Oxford Dictionary of English defines *fomite* as "objects or materials which are likely to carry infection, such as clothes, utensils, and furniture." *Fomite*, *Oxford Dictionary of English*, *supra*, at 680. In the COVID-19 context, JGB explained how SARS-CoV-2 "can land on and attach to property," such that the virus is "capable of transmission on property in the form of fomites." And amicus curiae Nevada State Medical Association relied on a scientific article explaining that "transmission via fomites (contaminated surfaces) . . . is possible for SARS-CoV-2." Ana K. Pitol & Timothy R. Julian, *Community Transmission of SARS-CoV-2 by Surfaces: Risks and Risk Reduction Strategies*, 8 Env't Sci. & Tech. Letters, Issue 3, 263, 263 (2021).

Cincinnati Ins. Co., 56 F.4th 931, 935 (10th Cir. 2023) ("[T]he loss or damage itself must be physical, not simply stem from something physical.").

JGB's remaining evidence of its own remediation efforts does not support a coverable loss or damage, either. Both the business interruption section and the extra expense endorsement measure recovery based on the "period of indemnity," which begins at "the date of direct physical loss or damage" and ends "on the date when the damaged or destroyed property . . . should be *repaired, rebuilt or replaced* with the exercise of due diligence and dispatch." (Emphasis added.) The rental value endorsement measures recovery similarly. Yet, JGB and its tenants implemented social-distancing, plexiglass installation, sanitizing mechanisms, and regular cleaning. Such preventive measures do not aim to "repair, rebuil[d], or replace[ ]" the property; they aim to redress the way people pose harm to one another by carrying and transmitting the virus at the property.

The same is still true in view of JGB's and amici's assertions that routine cleaning does not remove the rapidly redepositing SARS-CoV-2 from the property. Even then, the Shops remain "physically intact and functional," and the property is "neither lost nor changed" due to the presence of the virus in the interim. *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 359 So. 3d 922, 927 (La. 2023). Indeed, if direct physical loss or damage to property existed because people on or inside of it may spread illnesses, an insured operating a school, hospital, gym, or dormitory could convert its property insurance policy into a "maintenance contract" for the "inevitable" risk of illness in public spaces. *See Port Auth.*, 311 F.3d at 236. This "cannot be right." *See Cosmetic Laser*, 554 F. Supp. 3d at 407 (rejecting coverage for losses related to COVID-19 under property insurance policy despite "truism that mucus or saliva, ejected from a sneeze, attaches and adheres to surfaces"). Accordingly, just as JGB's claimed remediation efforts fall short of those contemplated in the policy, so does its claimed "physical alteration" fail to constitute that contemplated in the policy. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021).

We recognize that JGB supplied evidence that facially bolsters an uninhabitability or loss-of-use theory of "direct physical loss or damage." Not only did the pandemic lead to the Shops' temporary and even some tenants' permanent closure, but SARS-CoV-2 also at first blush appears to share the "contaminating" nature of physical forces in many uninhabitability cases. *See New Appleman on Insurance Law Library Edition*, *supra* § 46.03[3][a] ("Contamination of property by vapors, bacteria, or other foreign substances has been found to constitute 'physical' loss when it renders the property essentially unusable."); *see also, e.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826 (3d Cir. 2005) (E. coli bac-

teria); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12-cv-04418 (WHW) (CLW), 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (ammonia); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1334 (Or. App. 1993) (methamphetamine odor); *Mellin*, 115 A.3d at 801 (cat urine odor in condominium unit).

Still, this case differs from cases in which potential coverage was found based on uninhabitability or loss of use. Uninhabitability cases are often characterized by a physical force that originates in the property. *See, e.g.*, *Yale*, 224 F. Supp. 2d at 404 (building built with asbestos and lead products causing contamination); *Gregory Packaging*, 2014 WL 6675934, at *1 (refrigerator installed in facility used anhydrous ammonia as refrigerant). These forces were not, as is the case here, merely present at the property by way of people breathing, sneezing, or coughing throughout the property. *Cf. Hardinger*, 131 F. App'x at 827 (well was the source of E. coli bacteria); *Or. Shakespeare Festival Ass'n*, 2016 WL 3267247, at *1 ("smoke from a nearby wildfire filled" the property). And in those cases, even when the force does not originate within the property, it is so connected to the property that the property effectively becomes the source of its own loss or damage. *See, e.g.*, *Mellin*, 115 A.3d at 801 (describing how owners tried several times to eliminate the cat urine odor in the condominium unit to no avail); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32, *1-2 (Ind. Super. Ct. Nov. 30, 2007) (detailing multiple failed attempts to remove brown recluse spiders from the home). The continued livelihood of these forces stemmed from the *property* itself, by physically entering and becoming endemic to the property. But the livelihood of the COVID-19 virus does not stem from the property itself; it stems from the *people* who frequent the property.

In this vein, where coverage is found, the property typically exhibits some sort of defect jeopardizing the property's habitability or function. *Compare Olmsted Med. Ctr. v. Cont'l Cas. Co*., 65 F.4th 1005, 1009 (8th Cir. 2023) (rejecting the idea that "direct physical loss or damage is established whenever property cannot be used for its intended purpose" (emphasis omitted) (quoting *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co*., 400 F.3d 613, 616 (8th Cir. 2005))), *with* Ostrager & Newman, *supra* 1573 (explaining that some courts may allow coverage "[w]here the loss of use is a result of some physical damage or alteration to the property"). For example, damage from mold contamination was covered where it resulted from "defective workmanship." *See Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *3 (D. Or. June 18, 2002). Carbon monoxide damage was likewise insurable where it stemmed from a dysfunctional chimney. *See Matzner v. Seaco Ins. Co*., No. 96-0498-B, 1998 WL 566658, at *1, *4 (Mass. Super. Aug. 12, 1998) (finding coverage for damage from carbon

monoxide due to faulty chimney). These covered risks arose from the property, even if their secondary effect posed health risks to people at the property. Here, however, both the problem of COVID-19 and its associated health risks are entirely dependent on people being present at the property, rather than arising from any harm to or defect in the property itself. *See Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021) (acknowledging that COVID-19 poses a "mortal hazard to humans, but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another"), *aff'd*, No. 21-1082-cv, 2022 WL 258569 (2d Cir. Jan. 28, 2022).

The absence of a defect both inherent to the property and that compromises the property's essential function reaffirms why summary judgment is appropriate here. There are many ways that real or personal property may cease to be useful. Not all of them are inherent to the property. Here, too, people might be dissuaded from visiting the Shops for a host of reasons: the weather, the market, their preferences, or even their personal health and well-being. None of these reasons show property loss or damage, and JGB likewise has not provided evidence creating a material issue of fact to the contrary.

For these same reasons, we also conclude that coverage cannot exist under the civil or military authority and ingress/egress provisions. Coverage under those provisions depends on restricted access due to "damage to or destruction of property . . . by peril(s) insured against" within one mile of the Shops or as a "direct result of loss or damage by a peril insured against" within one mile of the Shops, respectively. In the same way the Shops did not experience the peril of "direct physical loss or damage," it follows that JGB's evidence does not support that the Shops or the property within one mile of it are subject to the kind of harm contemplated under these policy provisions as a matter of law. *See 10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 837 (C.D. Cal. 2020) (rejecting coverage under a civil authority endorsement "[f]or similar reasons" that the court rejected coverage under a business interruption and extra expense endorsement because the complaint did not allege loss or damage to property).

In sum, we conclude that the district court clearly erred in denying Starr summary judgment on JGB's breach of contract and declaratory relief claims because JGB's evidence in opposing summary judgment does not create a genuine dispute of material fact as to the existence of "direct physical loss or damage" as required for coverage under the policy. The evidence, taken as true, demonstrates only economic loss sustained amidst a worldwide pandemic. Because such economic loss was not caused by direct physical loss or damage to the property, we would turn away from "the North

Star of this property insurance policy" should we uphold the summary judgment denial under these circumstances. *See Santo's*, 15 F.4th at 402. Accordingly, Starr is entitled to summary judgment on these remaining claims in light of JGB's failure to make a showing sufficient to establish coverage. We join a striking majority of our colleagues across the country in reaching this conclusion. *See Or. Clinic, PC v. Fireman's Fund Ins. Co.*, 75 F.4th 1064, 1071 n.1 (9th Cir. 2023) (noting "more than 800 cases nationwide").

The pollution and contamination exclusion also bars coverage because the policy explicitly and unambiguously defines "pollution or contamination" to include a virus

Even if we found JGB's position on the existence of "direct physical loss or damage" persuasive here, Starr maintains that the pollution and contamination exclusion otherwise bars coverage because the definition of "pollutants or contaminants" in the policy undisputedly includes "virus." JGB contends that the COVID-19 virus does not fall within the type of virus referenced in that definition, as the definition's surrounding context shows that the exclusion is intended to preclude coverage only for "traditional environmental pollution." Situated in this context, JGB argues that "virus" is intended to exclude coverage only for viruses stemming from pollution, such as "when a wastewater treatment plant releases virus-containing waste into the water supply."

An exclusion "must be narrowly tailored so that it 'clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered.'" *Casino W.*, 130 Nev. at 398, 329 P.3d at 616 (quoting *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 485, 133 P.3d 251, 255 (2006)). Therefore, the onus falls on the insurer to use "obvious and unambiguous language" in drafting the exclusion, indicative of the "only reasonable interpretation." *Id.* at 399, 329 P.3d at 616. An insurer also carries the burden of "establish[ing] that the exclusion plainly applies to the particular case before the court." *Id.*; *see also* Stempel & Knutsen, *supra* § 15.01[C] ("[E]stablished coverage can be defeated or reduced only if the insurer shoulders the burden of persuasion to establish the applicability of an exclusion . . . that reduces or restricts coverage.").

Thus, analysis of the exclusion here must begin with the plain text. In interpreting policy language in its "ordinary and popular sense," the court must step into the shoes of "one not trained in law or in insurance." *Casino W.*, 130 Nev. at 398, 329 P.3d at 616 (internal quotation marks omitted). Nevertheless, "[o]ne should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise." *See* Scalia & Garner, *supra*, at 70; *see also Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 310, 301 P.3d 364,

367 (2013). If two reasonable interpretations exist, the exclusion is ambiguous, and the court should construe the ambiguity "against the drafting party and in favor of the insured." *See Farmers Ins. Grp. v. Stonik By & Through Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994). We look to the policy language as a whole in our assessment, seeking to avoid absurd results. *Casino W.*, 130 Nev. at 398, 329 P.3d at 616.

The initial question here—a question of law—is then whether the meaning of "virus" as used in the pollutants or contaminants definition clearly encompasses SARS-CoV-2 and thereby bars coverage under the exclusion. *See Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (addressing extent of coverage as a legal question). We conclude it does. The definition explicitly lists "virus" as one of the excluded pollutants or contaminants. *Virus* is commonly defined as "the causative agent of an infectious disease" or "any 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." *Virus*, *Merriam-Webster's Collegiate Dictionary*, *supra* at 1397-38. It is undisputed that SARS-CoV-2 is a virus. Thus, an ordinary and popular understanding from "one not trained in law or insurance" of the word "virus" extends to the SARS-CoV-2 *virus*. *See Casino W.*, 130 Nev. at 398, 329 P.3d at 616.

Our decision in *Casino West* does not compel a different result. There, we held that an "absolute pollution" exclusion in a commercial general liability policy that defined *pollutant* as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste" was susceptible to more than one reasonable interpretation. *Casino W.*, 130 Nev. at 399-400, 329 P.3d at 616-17. One interpretation included carbon monoxide as part of those excluded pollutants, while the other limited the exclusion to only traditional environmental pollution. *Id.* at 399, 329 P.3d at 616-17. These competing interpretations required that we construe the provision against the insurer and hold that the exclusion would not bar coverage for injuries caused by carbon monoxide. *Id.* at 401, 329 P.3d at 618. Crucially, our conclusion warned insurers that they "must plainly state" the outer bounds of an exclusion with "obvious and unambiguous language." *See id*. at 401, 329 P.3d at 618 (second clause quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 164, 252 P.3d 668, 674 (2011)). In *Casino West*, the insurer failed to do so. Here, Starr has; it unambiguously listed "virus" as an excluded pollutant or contaminant. *See Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1042 (W.D. Mo. 2020) (rejecting policyholder's reading of a similar pollution and contamination exclusion that would cabin the excluded viruses to those of traditional environmental pollution because such a read-

ing "requires overlooking the word 'including'" preceding a list of excluded contaminants). This makes *Casino West* fundamentally different from the case at hand.

True, the exclusion and definition here parrot some of the same language of that in *Casino West* giving rise to ambiguity. *See* 130 Nev. at 400, 329 P.3d at 617. Yet, the Starr policy also includes the word "virus." While the other listed substances might be indicative of "traditional environmental pollution" themselves, the addition of "virus" transforms the clause into one excluding both a "health-harming contaminant[ ]" like a virus "*and* environmental pollutants." *See Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021), *aff'd*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022). Other courts have held similarly under analogous circumstances. *See, e.g.*, *Zwillo V, Corp.*, 504 F. Supp. 3d at 1042-43; *Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 121 (S.D.N.Y. 2021) (rejecting a construction of "contamination" that would exclude "one of the terms in its contractual definition"). In fact, a court interpreting the same exclusion in a Starr policy held that it precluded coverage for similar alleged loss or damage. *See Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.*, No. CV 21-858, 2021 WL 5415846, at *10-11 (E.D. La. Nov. 19, 2021).

No doubt, context is important in interpreting policy language. *See Galardi*, 129 Nev. at 310, 301 P.3d at 367. In that regard, JGB points to *C.J. Segerstrom & Sons v. Lexington Insurance Co.*, No. 8:22-cv-00466-MEMF-JDEx, 2023 U.S. Dist. LEXIS 33293 (C.D. Cal. Feb. 27, 2023), which held that the surrounding language in a pollution and contamination exclusion like that in this case was enough to supply a reasonable interpretation of coverage limiting "virus" to that of traditional environment pollution. Still, *Segerstrom* is otherwise distinguishable. The court there was also "guided" by an express coverage grant for outbreaks of communicable diseases. *Segerstrom*, 2023 U.S. Dist. LEXIS 33293, at *19-20. Here, the policy contains no such coverage grant.

Even if we could not distinguish *Segerstrom*, context does not write out explicit terms. *See Farmers Ins. Grp.*, 110 Nev. at 67, 867 P.2d at 391 (explaining that this court will neither "rewrite contract provisions that are otherwise unambiguous" nor "increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). In particular, though we must import context into our interpretation, embracing JGB's reading of "virus" would ignore our equally compelling directive to adopt the viewpoint of "the layperson untrained in the law or the insurance business." 44A Am. Jur. 2d *Insurance* § 2038 (2013); *see also Casino W.*, 130 Nev. at 398, 329 P.3d at 616. Given that the defined pollutants or contaminants in this policy expressly include "virus," we are not prepared to say that someone untrained in law or insur-

ance would think that the ordinary and popular meaning of a virus, even situated among other pollutants, would refer only to viruses such as the suggested wastewater-based viruses. *See Casino W.*, 130 Nev. at 399, 329 P.3d at 616-17; *Williston on Contracts*, *supra* § 49:17 ("[A] policy is not ambiguous simply because creative possibilities as to its meaning can be suggested by the parties." (internal quotation marks omitted)).

Also telling, many of the cases that JGB points to in arguing that COVID-19 causes "direct physical loss or damage" are often labeled "contamination" cases. *See New Appleman on Insurance Law Library Edition*, *supra* § 46.03[3][a]; *see Rose's 1*, 290 A.3d at 64. The provision here is a contamination exclusion. Therefore, under JGB's direct-physical loss-or-damage theory, arguing that the presence of SARS-CoV-2 physically affects the property, its "claims allege contamination and fall within this exclusion." *Lindenwood Female Coll. v. Zurich Am. Ins. Co.*, 61 F.4th 572, 574 (8th Cir. 2023).

Finally, the International Organization for Standardization's (ISO) standardized "absolute virus exclusion" provides only tangential support for JGB's position. Though ISO began recommending that insurers incorporate this exclusion following the 2006 SARS outbreak, its existence does not prove that the word "virus" in this policy must be limited to that stemming from pollution events. Instead, the ISO recommendation simply reveals a better practice for excluding a COVID-19-type claim than what the parties have done here. *See* ISO Form CP 01 40 07 06(C) ("With respect to any loss or damage subject to the exclusion in Paragraph B., *such exclusion supersedes any exclusion relating to 'pollutants.'*" (italics added)). A more ideal approach, however, does not render the plain language used here moot or subject to a different interpretation. *See Restatement (Second) of Contracts* § 212 cmt. b (Am. Law Inst. 1981) ("[W]ords of an integrated agreement remain the most important evidence of intention.").[7] We thus conclude that the exclusion stands as an independent basis warranting summary judgment in Starr's favor.

CONCLUSION

We conclude that the district court erred in denying summary judgment because JGB's claims cannot stand as a matter of law. In opposing summary judgment, JGB did not make a showing of

[7]We are not persuaded by the other caselaw JGB offers as supplemental authority, as JGB overreads the cases' holdings. *See, e.g.*, *Novant Health Inc. v. Am. Guarantee & Liab. Ins. Co.*, 563 F. Supp. 3d 455, 460-62 (M.D.N.C. 2021) (denying motion to dismiss where there was a question as to whether the exclusion was jurisdictionally applicable); *Sacramento Downtown Arena LLC v. Factory Mut. Ins. Co.*, 637 F. Supp. 3d 865, 871 (E.D. Cal. 2022) (refusing to apply the pollution and contamination exclusion because the policy contained a communicable disease endorsement).

the "direct physical loss or damage to covered property" required to establish coverage under Starr's commercial property insurance policy. The fact that the COVID-19 virus was present in or on the property does not establish that there was any physical harm to the property as required. Moreover, because the policy's pollution and contamination exclusion applies to a "virus," even if they would otherwise be covered, JGB's claims for losses resulting from COVID-19 are excluded from coverage. While we are sympathetic to the economic woes JGB—and so many other businesses in Nevada—suffered as a result of the COVID-19 pandemic, its claim for coverage under this type of insurance policy falls short. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order denying Starr's motion for summary judgment on the breach of contract and declaratory relief claims and enter an order granting summary judgment in Starr's favor.[8]

Stiglich, C.J., and Pickering, Herndon, Lee, Parraguirre, and Bell, JJ., concur.

---

[8]In light of this decision, we lift the stay of proceedings imposed by our July 29, 2022, order.

THE STATE OF NEVADA, Appellant, *v.* DANIEL ADRIAN GONZALEZ, Respondent.

No. 85399

THE STATE OF NEVADA, Appellant, *v.* DANIEL ADRIAN GONZALEZ, Respondent.

No. 85400

September 14, 2023 535 P.3d 248

Consolidated appeals from a district court order granting respondent's motion to dismiss a criminal complaint. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Reversed and remanded.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, and *Marilee Cate* and *Kevin P. Naughton*, Appellate Deputy District Attorneys, Washoe County, for Appellant.

Evelyn Grosenick, Public Defender, and *Kathryn E. Reynolds*, Chief Deputy Public Defender, Washoe County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, C.J.:

In this opinion, we consider whether the dismissal of a criminal complaint against respondent Daniel Adrian Gonzalez was an appropriate remedy for the violation of his due process rights arising from a delay in competency restoration treatment pending trial. After the State charged Gonzalez with sexual assault, the district court found him to be incompetent to stand trial and ordered him remanded to a psychiatric hospital for competency restoration treatment. Gonzalez remained in jail for 160 days before being transferred to the hospital. After being transferred to the hospital, Gonzalez moved to dismiss the complaint, arguing that his continued detention in jail after the district court's order and before being transferred to the hospital violated his due process rights. The district court agreed and granted the motion to dismiss.

The State appeals. The State concedes that Gonzalez's due process rights were violated but argues that the district court abused its discretion in granting the extreme remedy of dismissal under the facts of this case. We agree. Although we acknowledge the gravity of Gonzalez's situation, this court's precedent does not support the

district court's conclusion that aggravated circumstances warranted dismissing the complaint against Gonzalez with prejudice. Furthermore, the district court neglected to balance the deterrent objectives of dismissal against society's interest in prosecuting criminal acts. We conclude the district court therefore abused its discretion in dismissing the complaint with prejudice, and we reverse and remand this case for further proceedings.

FACTS AND PROCEDURAL HISTORY

The State charged Gonzalez by way of complaint with one count of sexual assault, a category A felony. During the proceedings, Gonzalez was assessed for competency and received two psychiatric evaluations, each of which concluded that Gonzalez was not competent to proceed with adjudication and recommended that he receive inpatient competency restoration treatment. After a hearing on the matter, the district court found Gonzalez to be incompetent, that he may pose a danger to himself and to society, and that commitment was necessary to determine his ability to attain competency. To that end, the court ordered Gonzalez remanded to Lake's Crossing Center, a psychiatric hospital, for restorative treatment.

Gonzalez remained in custody at the Washoe County jail for 160 days before being transported to Lake's Crossing. Lake's Crossing reported that staffing shortages, a lack of available beds, and COVID-19 protocols contributed to the delay. Because of the delay, the Division of Mental Health and Developmental Services of the Department of Human Resources (the Division) notified the district court that its initial competency reports, mandated by NRS 178.450(2), would not be timely submitted.

Gonzalez moved to dismiss the criminal complaint, arguing that his continued detention in jail prior to being transferred to Lake's Crossing constituted a violation of his due process rights. The district court granted Gonzalez's motion to dismiss. The court relied on *Jackson v. Indiana*, 406 U.S. 715 (1972), and its progeny to conclude that Gonzalez's detention before being transferred to Lake's Crossing was not reasonably related to his receiving competency restoration treatment and therefore violated his due process rights.

On appeal, the State concedes that the district court's conclusion as to the due process violation was correct. The legal basis justifying dismissal, however, is somewhat less evident from the district court's order. The district court concluded that "it is obvious that the 160-day delay and the Division's failure to comply with its mandatory reporting requirements is 'shocking and outrageous' and warrants dismissal." The district court invoked *State v. Babayan*, 106 Nev. 155, 787 P.2d 805 (1990), acknowledging that dismissal is an extreme remedy. After balancing deterrent interests against the violation of Gonzalez's due process rights, the district court

found that the "aggravated circumstances" warranted dismissal.[1] The State appeals.

DISCUSSION

The State argues that the district court abused its discretion in granting Gonzalez's motion to dismiss the criminal complaint based on circumstances outside a prosecutor's control—a lack of space at Lake's Crossing. The State argues that the penalty for a due process violation must match the nature of the violation and that the district court failed to consider the effect dismissal would have on society's interest in prosecuting crimes. We agree.

Standard of review

We review a district court's order dismissing a charging document for an abuse of discretion. *Morgan v. State*, 134 Nev. 200, 205, 416 P.3d 212, 220 (2018). A district court abuses its discretion if its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

The district court abused its discretion in ruling that dismissal with prejudice was warranted

"Dismissal is an extreme sanction . . . ." *Morgan*, 134 Nev. at 205, 416 P.3d at 220. Dismissing a criminal complaint with prejudice "is most appropriate upon a finding of aggravated circumstances and only after a balancing of its deterrent objectives with the interest of society in prosecuting those who violate its laws." *Babayan*, 106 Nev. at 173, 787 P.2d at 818. For the reasons articulated below, we conclude that the district court abused its discretion both in finding aggravated circumstances and in neglecting to apply this balancing test.

---

[1]The parties dispute whether the district court ordered dismissal with prejudice or without. Where a district court does not specify whether dismissal is with or without prejudice, we would generally presume that dismissal is without prejudice. *See, e.g.*, *District of Columbia v. Whitley*, 934 A.2d 387, 388 n.1 (D.C. 2007) (noting that where dismissal of criminal charges is not on the merits "and the trial court does not specify whether dismissal is with prejudice, dismissal is presumed to be without prejudice"); *State v. Hunter*, 968 N.E.2d 585, 589 (Ohio Ct. App. 2012) (explaining that dismissal of a criminal complaint is presumed to be without prejudice unless the trial court specifies otherwise). However, here, the district court referred to the dismissal it was ordering as "an extreme measure," and it applied the test for dismissal with prejudice as laid out in *Babayan*, 106 Nev. at 173, 787 P.2d at 818. Therefore, upon the facts before us, we infer that the district court intended to dismiss the charge with prejudice.

The district court failed to apply the appropriate standard in finding aggravated circumstances

In *Babayan*, we considered the dismissal of criminal charges with prejudice for due process violations. There, the district court dismissed multiple indictments against Ruben Babayan with prejudice for prosecutorial misconduct before the grand jury. 106 Nev. at 163-65, 787 P.2d at 812. This court reversed the district court's dismissal of the indictments with prejudice. *Id.* at 176, 787 P.2d at 819-20. In so doing, we explained that dismissal without prejudice is appropriate "to eliminate prejudice to a defendant and to curb the prosecutorial excesses of a District Attorney or [their] staff." *Id.* at 173, 787 P.2d at 818. Conversely, dismissal with prejudice is an extreme remedy "warranted when the evidence against a defendant is irrevocably tainted or the defendant's case on the merits is prejudiced to the extent that notions of due process and fundamental fairness would preclude reindictment." *Id*. (internal quotation marks omitted); *cf. Langford v. State*, 95 Nev. 631, 635-36, 600 P.2d 231, 234-35 (1979) (concluding that, absent a showing of bad faith by the State or unalleviated prejudice to the defendant, the trial court properly denied the motion for a mistrial). Accordingly, this court held that dismissal with prejudice was not warranted, despite the due process violation. *Babayan*, 106 Nev. at 173-74, 787 P.2d at 818.

In *Morgan*, as similar here, the district court ordered John Demon Morgan to be transferred to Lake's Crossing. 134 Nev. at 202, 416 P.3d at 217. After a delay of over 100 days, Morgan filed a motion to dismiss. *Id.* Although the time frame for transferring Morgan to Lake's Crossing had not been met, the district court denied Morgan's motion. *Id*. at 202, 416 P.3d at 217-18. Instead, the district court ordered that Morgan be transferred to Lake's Crossing within seven days. *Id*. at 205, 416 P.3d at 220. In considering the direct appeal of Morgan's eventual conviction, this court held that the district court did not abuse its discretion in denying Morgan's motion to dismiss. *Id.* at 205-06, 416 P.3d at 220. We noted that dismissal with prejudice is an extreme sanction and that after balancing dismissal's deterrent objectives with society's interest in prosecuting crimes, the facts of the case did not amount to aggravated circumstances warranting dismissal. *Id.* at 205, 416 P.3d at 220.

Babayan and *Morgan* comport with this court's precedent related to the dismissal of charging documents in other situations where a defendant's due process rights may not specifically be at issue. For dismissal to be an appropriate remedy, these cases require some misconduct on the part of the prosecution or some extended prejudice to the defendant. For example, in *State v. Tapia*, the State charged Peter Tapia with embezzlement. 108 Nev. 494, 495, 835

P.2d 22, 23 (1992). After the State failed to immediately provide Tapia with a document it intended to use at trial, the district court found that the State had violated a discovery order permitting Tapia to examine everything in the State's file and excluded the document. *Id.* at 495-96, 835 P.2d at 23. Without the document, the district court believed the State's case was too weak and dismissed the case. *Id.* On appeal, this court reversed. *Id.* at 498, 835 P.2d at 24. We held that the district court acted within its discretion in determining that the State had violated the court's discovery order. *Id.* at 497, 835 P.2d at 24. We nevertheless concluded that "dismissal was an extreme remedy unwarranted under the circumstances." *Id.* at 498, 835 P.2d at 24. Specifically, we held that "where the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to protect the defendant against prejudice, there is no error justifying dismissal of the case." *Id.* at 497, 835 P.2d at 24.

Relatedly, this court has addressed the circumstances under which the prosecution may recharge a defendant if a case is dismissed for the prosecution's failure to comply with procedural rules. Explaining "that criminal accusations should proceed or terminate on principles compatible with judicial economy, fair play[,] and reason," *McNair v. Sheriff*, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973), this court has held that reprosecution is barred only where "the prosecution has wilfully disregarded or displayed a conscious indifference to procedural rules," *State v. Lamb*, 97 Nev. 609, 610-11, 637 P.2d 1201, 1202 (1981). Conscious indifference does not require a showing of "intentional acts or calculated bad faith by the prosecution." *Id.* at 611, 637 P.2d at 1202 (internal quotation marks omitted). It does, however, require something more than mishandling the case or exercising poor judgment. *Id.* at 611, 637 P.2d at 1202-03.

In light of the foregoing authority, we now clarify that "aggravated circumstances" may take the form of misconduct on the State's part, *cf. Babayan*, 106 Nev. at 173, 787 P.2d at 818, or unalleviated prejudice to the defendant, *cf. Langford*, 95 Nev. at 635-36, 600 P.2d at 234-35. Here, without apportioning blame to the State or pointing to any prejudice Gonzalez suffered as to his ability to receive a fair adjudication, the district court summarily ruled that the due process violation in and of itself constituted aggravated circumstances warranting dismissal. The district court thus neglected to apply the standards demanded by our precedent. Given that the district court did not address these highly fact-bound inquiries in the first instance, however, we express no opinion as to whether the situation here amounted to aggravated circumstances. We conclude that its ruling exceeded the bounds of the law and therefore constituted an abuse of discretion.

The district court failed to balance dismissal's deterrent objective with society's interest in prosecuting criminal acts

Even where aggravated circumstances favor dismissal with prejudice, a district court's inquiry is not complete. Rather, the district court may dismiss a charging document with prejudice only after balancing the deterrent objectives of that sanction against society's interest in prosecuting criminal acts. *Babayan*, 106 Nev. at 173, 787 P.2d at 818.

In *United States v. Lawson*, the United States District Court for the District of Maryland balanced the deterrent objectives of dismissing an indictment with prejudice against society's interest in prosecuting defendants charged with distributing controlled substances. 502 F. Supp. 158, 161, 172-73 (D. Md. 1980). The court found that a prosecutor deliberately misled the grand jury in obtaining an indictment against the defendants. *Id.* at 163. As for the remedy for such misconduct, however, the court concluded that dismissal without prejudice was more appropriate. *Id.* at 172-73. Specifically, the court noted that the misconduct was committed by a single prosecutor, who was no longer associated with the case, and that there was not a pattern of widespread or continuous prosecutorial misconduct in the district. *Id.* The court explained that "[w]hile [the] defendants [were] entitled to the remedy of dismissal for violations of their constitutionally protected rights, they [were] not entitled to the reward of permanent immunity respecting their alleged criminal conduct." *Id.* at 173. Rather, on balance, the court concluded that the costs to society of dismissing the indictments with prejudice were "simply too high." *Id.*

Here, the deterrent objective of dismissal with prejudice is not evidenced in the record. Indeed, the district court did not articulate any behavior on the prosecutor's part that it intended to deter with dismissal or how dismissal would accomplish such deterrence. Instead, the district court balanced the State's interest in prosecuting Gonzalez against Gonzalez's due process rights. As explained, this is not the inquiry used for determining whether dismissal with prejudice is warranted.

As to society's interest in prosecuting Gonzalez, although presumed innocent, Gonzalez is charged with sexual assault—a crime so serious the Legislature has approved of life with the possibility of parole as a punishment for it. *See* NRS 200.366(2)(b). On balance, society's interest in prosecuting sexual assault outweighs any deterrent effect dismissal with prejudice may have had under the facts of this case. And we conclude that the district court abused its discretion in ruling otherwise.[2]

[2]Gonzalez avers that dismissal was consistent with NRS 178.425(5). However, the district court did not dismiss the criminal complaint pursuant to NRS 178.425(5), nor did it make the required finding that there was no substantial

We acknowledge that dismissal with prejudice was the only remedy that Gonzalez sought for the due process violation. Gonzalez languished in jail for five months before being transferred to Lake's Crossing for court-ordered competency restoration treatment. This is a troubling situation that, as the State concedes, violated Gonzalez's due process rights. We stress that difficulties involving the availability of beds, staffing shortages, or other logistical challenges cannot justify detaining an individual in jail for month after month without recourse. It is well established that district courts enjoy inherent powers to control proceedings before them, *see Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 646-47, 818 P.2d 844, 846-47 (1991), and a lesser sanction may have been more appropriate to ensure Gonzalez's prompt transfer to Lake's Crossing, *see, e.g.*, *Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health v. Eighth Judicial Dist. Court (Aliano)*, 139 Nev. 254, 256-59, 534 P.3d 706, 711-12 (2023) (concluding that the district court did not err in holding Division of Public and Behavioral Health in contempt for failing to comply with court orders requiring that criminal defendants found to be incompetent be admitted for psychiatric care and imposing monetary sanctions); *Morgan*, 134 Nev. at 204-06, 416 P.3d at 219-20 (holding that a district court did not abuse its discretion in denying a defendant's motion to dismiss and instead ordering that the defendant be transferred to a psychiatric hospital within seven days). Regardless, the fact that dismissal was the only remedy sought does not justify the district court in dismissing with prejudice.[3]

CONCLUSION

We conclude that the district court abused its discretion in finding aggravated circumstances without articulating some misconduct by the State or prejudice to Gonzalez's case and without balancing the relevant interests discussed above. Thus, the district court abused its discretion in granting the extreme remedy of dismissal with prejudice under the facts of this case. Accordingly, we reverse and remand this case for further proceedings in light of this opinion.

Cadish, Pickering, Herndon, Lee, Parraguirre, and Bell, JJ., concur.

---

probability that Gonzalez would attain competency in the foreseeable future under the statute. Indeed, the district court specifically stated at a hearing on the motion that it could not make such a finding because Lake's Crossing had not yet submitted a report as to Gonzalez's status. Accordingly, NRS 178.425(5) does not provide a basis for affirming the district court's order.

[3]In light of our disposition, we decline to reach the State's argument that the district court lacked inherent authority to enter an order of dismissal.

SHARI KASSEBAUM, Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS, Respondent.

No. 83942

September 21, 2023 535 P.3d 651

Appeal from a district court order denying a petition for judicial review in an administrative action. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Affirmed.

Law Office of Daniel Marks and *Daniel Marks* and *Adam Levine*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, and *Michelle Di Silvestro Alanis*, Supervising Senior Deputy Attorney General, Carson City, for Respondent.

Before the Supreme Court, Stiglich, C.J., and Lee and Bell, JJ.

OPINION

By the Court, Stiglich, C.J.:

When a state employee requests a hearing to challenge the reasonableness of a disciplinary action under NRS 284.390, the Nevada Administrative Code (NAC) requires the employee to attach a copy of the written notification of the discipline to the appeal form. *See* NAC 284.6562(2)(b). In this appeal, we consider whether that requirement is jurisdictional or procedural. After examining the rule's language, we conclude that the requirement is not jurisdictional but is instead a procedural claim-processing rule. Furthermore, because the rule provides that an employee "must" comply with the attachment requirement, the rule is mandatory. Thus, when an employee requests a hearing to challenge a state employer's disciplinary decision pursuant to NRS 284.390 and fails to comply with NAC 284.6562's attachment requirement, the appeal is defective and may be dismissed. Because the appellant here failed to comply with the attachment requirement when filing her appeal form and did not seek leave to amend or otherwise cure that omission, we conclude that the hearing officer did not err by dismissing her appeal, and we therefore affirm.[1]

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

FACTS AND PROCEDURAL HISTORY

After she was suspended for two days from her position as a correctional officer with respondent State of Nevada Department of Corrections (NDOC), appellant Shari Kassebaum administratively appealed by requesting a hearing on the reasonableness of the suspension. The appeal form Kassebaum completed explained that it "***must be accompanied by the written notification of the appointing authority's decision regarding the proposed action***." Notwithstanding this clear directive, Kassebaum did not attach a copy of NDOC's letter informing her of the suspension. NDOC moved to dismiss Kassebaum's appeal, arguing that the requirement to attach the written discipline notification was jurisdictional and that Kassebaum's failure to attach the notification to the appeal form divested the hearing officer of jurisdiction to consider her appeal. In response, Kassebaum conceded that NDOC would likely prevail on its motion but disagreed with certain factual allegations in NDOC's motion; she did not seek leave to amend or otherwise cure her failure to comply with NAC 284.6562(2)(b).

The hearing officer granted NDOC's motion, finding that NAC 284.6562(2)(b) was a jurisdictional requirement that could not be cured because the time for Kassebaum to file an appeal had expired. *Cf.* NRS 284.390(1) (providing that an employee must file an appeal from a disciplinary decision within 10 working days of the effective date of that decision). Kassebaum petitioned the district court for judicial review, arguing that the hearing officer erred in dismissing her appeal because NAC 284.6562(2)(b) is a nonjurisdictional claim-processing rule. The district court denied Kassebaum's petition and agreed with the hearing officer that the rule is jurisdictional. Kassebaum now appeals to this court.

DISCUSSION

We review an "administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014). In doing so, we review questions of law de novo, "without deference to an agency['s] determination." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784-85, 312 P.3d 479, 482 (2013) (quoting *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011) (internal quotation marks omitted)). Because the issue here—whether the requirement in NAC 284.6562(2)(b) is jurisdictional—is a question of law, our review is de novo. *See Washoe County v. Otto*, 128 Nev. 424, 430-31, 282 P.3d 719, 724 (2012) (applying de novo review to questions involving statutory construction and jurisdictional issues).

Kassebaum argues that the hearing officer erred by determining that NAC 284.6562(2)(b) is a jurisdictional rule, urging that it is

instead a procedural claim-processing rule.[2] NDOC contends that the rule is jurisdictional such that Kassebaum's failure to follow its requirements within the time to file her appeal divested the hearing officer of jurisdiction to hear her challenge.

To resolve whether the attachment requirement is a jurisdictional rule, we first consider the difference between jurisdictional rules and nonjurisdictional claim-processing rules. Then, we consider the statutory scheme and regulations governing Kassebaum's administrative challenge to her suspension.

Jurisdictional rules concern a tribunal's power to act

"Jurisdictional rules go to the very power of [the] court to act." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). *See Jurisdiction*, *Black's Law Dictionary* (11th ed. 2009) (defining "jurisdiction" in part as "[a] court's power to decide a case"); *see also Reno Sparks Convention Visitors Auth. v. Jackson*, 112 Nev. 62, 65-67, 910 P.2d 267, 269-70 (1996) (concluding that a hearing officer lacked jurisdiction over a party's challenge because the party did not comply with the "jurisdictional and mandatory" rule setting a time limit to request a hearing). In *Fitzpatrick v. State ex rel. Department of Commerce, Insurance Division*, we held that "the time allotted by statute for taking an administrative appeal is jurisdictional" such that only a timely appeal invokes administrative appellate jurisdiction.[3] 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991). *See also State v. Bronder*, 136 Nev. 650, 652, 476 P.3d 866, 868 (2020) ("[A] rule providing a time limit for filing an administrative appeal is not procedural but *jurisdictional*."); *Seino v. Emp'rs Ins. Co. of Nev.*, 121 Nev. 146, 150, 111 P.3d 1107, 1110 (2005) (noting that the "[s]tatutory periods for requesting administrative review of workers' compensation determinations are mandatory and jurisdictional").

Claim-processing rules concern the procedural steps a party must take

In contrast to jurisdictional rules, claim-processing rules "seek to promote the orderly progress of litigation by requiring that the

[2]Although Kassebaum failed to make this argument before the hearing officer, we may consider the issue because it goes to the hearing officer's jurisdiction to adjudicate Kassebaum's appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, *unless it goes to the jurisdiction of that court*, is deemed to have been waived and will not be considered on appeal." (emphasis added)); *State, Dep't of Emp't, Training & Rehab., Emp't Sec. Div. v. Sierra Nat'l Corp.*, 136 Nev. 98, 101 n.5, 460 P.3d 18, 22 n.5 (2020) (applying *Old Aztec* when a party failed to raise an argument in administrative proceedings).

[3]The parties do not dispute that Kassebaum timely filed her appeal form.

parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *see also Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (providing that certain bankruptcy rules were claim-processing rules where they did "not delineate what cases bankruptcy courts are competent to adjudicate"); 36 C.J.S. *Federal Courts* § 8 (2014) ("[J]urisdictional rules govern a . . . court's adjudicatory authority while nonjurisdictional claim-processing rules do not."). Although a rule may provide that something "shall" or "must" occur, not all such mandatory rules are jurisdictional. *See Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012); *Henderson*, 562 U.S. at 435 ("Other rules, even if important and mandatory, . . . should not be given the jurisdictional brand."). Thus, while jurisdictional rules may not be waived, parties must timely raise concerns about violations of claim-processing rules. *Compare Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (noting that claim-processing issues "may be forfeited if they are not timely raised"), *with Jasper v. Jewkes*, 50 Nev. 153, 156, 254 P. 698, 699 (1927) (explaining that jurisdictional requirements cannot be waived).

NAC 284.6562's attachment requirement is a nonjurisdictional mandatory claim-processing rule

When interpreting a statute or rule, "we begin with the text of the [rule] to determine its plain meaning and apply 'clear and unambiguous' language 'as written.'" *Locker v. State*, 138 Nev. 653, 655, 516 P.3d 149, 152 (2022) (quoting *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)); *see also Mahaffey v. Inv'rs Nat'l Sec. Co.*, 102 Nev. 462, 463-64, 725 P.2d 1218, 1219 (1986) (examining the language of a rule to determine whether it is jurisdictional). Here, the Nevada Legislature created the Personnel Commission, *see* NRS 284.030, and authorized it to appoint "hearing officers to conduct hearings and render decisions" regarding certain public employment actions, NRS 284.091. NRS 284.390(1) allows certain state employees to challenge an employer's disciplinary decision by, "[w]ithin 10 working days after the effective date of" the discipline, filing a written request for a hearing before a Commission hearing officer "to determine the reasonableness of the [discipline]." *See also O'Keefe v. State, Dep't of Motor Vehicles*, 134 Nev. 752, 759, 431 P.3d 350, 356 (2018) (describing the process the hearing officer should employ in applying NRS 284.390(1)). That statute thus sets forth the hearing officer's authority. It does not require that the employee attach anything to the written request for a hearing officer to determine the reasonableness of the discipline imposed. That requirement instead appears in a regulation adopted by the Commission pursuant to NRS 284.065(2)(d) (authorizing the Com-

mission to "[a]dopt regulations to carry out the provisions of [NRS Chapter 284]").

The regulation at issue, NAC 284.6562, begins by echoing NRS 284.390(1)'s language that an eligible employee may request a reasonableness hearing only by submitting a written request within 10 working days of receiving notice of the challenged discipline. *Compare* NAC 284.6562(1), *with* NRS 284.390(1). The request must be "submitted on the form provided by the Division of Human Resource Management," as set forth in NAC 284.778(1), and NAC 284.6562(2)(b) requires it to be "[a]ccompanied by the written notification of the" subject discipline.

The language of NAC 284.6562(2)(b) does not speak to the hearing officer's adjudicatory power. *See Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 882 (11th Cir. 2017) ("[W]hen, as here, a statute 'speaks . . . not to a court's power,' it should be treated as non-jurisdictional." (quoting *United States v. Wong*, 575 U.S. 402, 410 (2015))). Nothing in the rule suggests that attaching a copy of the written notification is necessary to invoke the hearing officer's authority to review the challenged discipline. Indeed, another provision in the rule suggests the contrary by addressing when the written notification "need not accompany the request for a hearing."[4] NAC 284.6562(3). It thus appears that the purpose of the requirement is to facilitate the hearing officer's review rather than to restrict the officer's authority.

Because the rule's language does not clearly indicate that it should "be treated as having jurisdictional attributes," *Henderson*, 562 U.S. at 439, we conclude that the rule is nonjurisdictional and the hearing officer erred in concluding otherwise. Accordingly, Kassebaum's failure to attach the written notice did not divest the hearing officer of jurisdiction to consider her appeal.[5] *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81-82 (2009) (explaining that failure to adhere to nonjurisdictional filing requirements cannot deprive a tribunal of jurisdiction).

Kassebaum failed to comply with NAC 284.6562(2)(b), and therefore, the district court did not err in dismissing her appeal

Having concluded that the hearing officer had jurisdiction over Kassebaum's case, we nonetheless conclude that the hearing offi-

[4]The parties agree that the exceptions to the attachment requirement do not apply in this case.

[5]While we have held that "the proper and timely filing of a notice of appeal is jurisdictional," *Rust*, 103 Nev. at 688, 747 P.2d at 1382, we have not held that a party's failure to comply with claim-processing rules within the time provided by statute deprives a tribunal of jurisdiction to consider an appeal in all circumstances, as NDOC suggests.

cer properly dismissed the appeal. This court reviews an agency's decision granting a motion to dismiss based on construction of a statute de novo. *Elizondo*, 129 Nev. at 784-85, 312 P.3d at 482; *see also Otto*, 128 Nev. at 430-31, 282 P.3d at 724 (reviewing de novo whether a statutory provision required dismissal). We also recognize that, when administrative regulations are "mandated by the [L]egislature and adopted in accordance with statutory procedures," as NAC 284.6562(2)(b) was here, they "have the force and effect of law." *Turk v. Nev. State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978); *cf. Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) (providing that "[w]hen the [L]egislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling"). Further, "[a] timely objection to a claim-processing defect can, in some cases warrant dismissal of the case." *United States v. Bastide-Hernandez*, 39 F.4th 1187, 1191 (9th Cir. 2022), *cert. denied*, ___ U.S. ___, 143 S. Ct. 755 (2023); *see also Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (explaining that "failure to comply with [a claim-processing] rule may be grounds for dismissal of the case").

Here, the attachment requirement provides that an employee's hearing request "*must be* . . . [a]ccompanied by the written notification of the" disciplinary action being challenged. NAC 284.6562(2)(b) (emphasis added). "The word 'must' generally imposes a mandatory requirement." *Otto*, 128 Nev. at 432, 282 P.3d at 725. And "[t]hough not jurisdictional, mandatory claim-processing rules remain mandatory." *Donnelly v. Controlled Application Review & Resolution Program Unit*, 37 F.4th 44, 56 (2d Cir. 2022); *see also Bastide-Hernandez*, 39 F.4th at 1191 (recognizing that claim-processing rules can still be mandatory); *accord* 36 C.J.S. *Federal Courts* § 8 (2014) ("Calling a rule nonjurisdictional does not mean that it is not mandatory . . . ."). Based on the foregoing, it is clear that NAC 284.6562(2)(b) is a mandatory rule.

Because NAC 284.6562(2)(b) is mandatory, we conclude that the hearing officer did not err in dismissing Kassebaum's request for a hearing for failing to comply with that rule.[6] Indeed, Kassebaum conceded below that NDOC would likely prevail on its motion to dismiss based on her failure to comply. And although Kassebaum argues that the appeal form was misleading because it stated that "evidence and back-up documents need not be provided at th[at] time," she concedes that it also stated that she must attach a copy of the written notice of discipline. We therefore reject any argument that the appeal form's language excused Kassebaum's compliance with NAC 284.6562(2)(b). We further note that Kassebaum did not

[6]The parties do not dispute that NDOC timely raised its concern that Kassebaum did not comply with the attachment requirement. *See Dill*, 525 F.3d at 618-19.

seek leave to amend her appeal form to attach the notice of discipline even after NDOC filed its motion to dismiss pointing out Kassebaum's omission.

In sum, because the attachment requirement is a mandatory requirement that "ha[s] the force and effect of law," *Turk*, 94 Nev. at 104, 575 P.2d at 601, and because Kassebaum concedes her failure to comply with that rule, her appeal was defective and dismissal was appropriate. Therefore, we conclude that the hearing officer reached the correct result when he dismissed Kassebaum's appeal and, in turn, the district court properly denied her petition for judicial review.[7] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (explaining that this court "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason").

CONCLUSION

NAC 284.6562(2)(b) is a nonjurisdictional claim-processing rule. Compliance with the rule nonetheless is mandatory. Thus, although the hearing officer had jurisdiction to adjudicate Kassebaum's disciplinary appeal, the hearing officer ultimately reached the right result when he dismissed the appeal based on Kassebaum's failure to comply with NAC 284.6562(2)(b). Accordingly, we affirm the district court's order denying Kassebaum's petition for judicial review.

Lee and Bell, JJ., concur.

---

[7]Given our conclusion, we need not reach Kassebaum's other arguments, including her argument that the hearing officer denied her due process by failing to conduct a hearing on her appeal. *See Cortes v. State*, 127 Nev. 505, 516, 260 P.3d 184, 192 (2011) ("Constitutional questions should not be decided except when absolutely necessary to properly dispose of the particular case." (internal quotation marks omitted)).

KELLY WAYNE PATTERSON, Petitioner, *v.* LAS VEGAS MUNICIPAL COURT; and THE HONORABLE CEDRIC A. KERNS, Respondents, and CITY OF LAS VEGAS, Real Party in Interest.

No. 86108

September 21, 2023 535 P.3d 657

Original petition for a writ of mandamus challenging a municipal court order denying a motion for attorney fees and litigation expenses under NRS 41.0393.

Petition denied.

[Rehearing denied October 20, 2023]

Stephen P. Stubbs, Henderson, for Petitioner.

Bryan K. Scott, City Attorney, and *Bobby Anderlik*, Deputy City Attorney, Las Vegas, for Real Party in Interest City of Las Vegas.

American Civil Liberties Union (ACLU) of Nevada and *Christopher M. Peterson*, Las Vegas, for Amicus Curiae ACLU of Nevada.

Randolph M. Fiedler, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before the Supreme Court, Stiglich, C.J., and Lee and Bell, JJ.

OPINION

By the Court, Stiglich, C.J.:

NRS 41.0393 permits the award of attorney fees and litigation expenses to a criminal defendant, as the prevailing party, in limited circumstances. Petitioner Kelly Patterson faced criminal charges in Las Vegas Municipal Court. After the charges were dismissed and withdrawn, Patterson sought attorney fees and litigation expenses as the prevailing party under NRS 41.0393. The municipal court denied that request, concluding that it lacked authority to award such fees and expenses. Because NRS 41.0393(8) specifically defines the courts that may award such fees and expenses as district courts and justice courts, we agree with the municipal court that it lacked authority to award attorney fees and litigation expenses. Accordingly, we deny Patterson's writ petition challenging the municipal court's decision.[1]

[1]Patterson additionally brought this petition against the Las Vegas Metropolitan Police Department. We previously denied the petition as to that party.

FACTS AND PROCEDURAL HISTORY

Patterson runs a website that posts videos of Las Vegas police officers performing their duties. While filming a police officer, Patterson was arrested and charged with obstructing a police officer and a traffic violation. Patterson successfully moved to dismiss the obstruction charge, and thereafter, real party in interest City of Las Vegas withdrew the traffic violation charge.

Patterson then filed an application for attorney fees and litigation expenses under NRS 41.0393, which the City opposed. The municipal court denied Patterson's request, concluding that municipal courts lack authority to award fees and expenses under NRS 41.0393. Patterson appealed the decision to the district court, which agreed with the municipal court and denied Patterson's appeal. Patterson filed the immediate writ petition, and the City filed an answer in opposition.[2] Additionally, the American Civil Liberties Union of Nevada and Nevada Attorneys for Criminal Justice were permitted to brief the issue as amici curiae, and we considered that briefing in resolving this matter except to the extent that amici raised issues that were not raised in Patterson's writ petition.

DISCUSSION

We exercise our discretion to entertain the writ petition

"This court has original jurisdiction to issue writs of mandamus." *Gardner v. Eighth Judicial Dist. Court*, 133 Nev. 730, 732, 405 P.3d 651, 653 (2017) (internal quotation marks omitted). A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. "Writ relief is an extraordinary remedy that is only available if a petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law." *In re William J. Raggio Family Tr.*, 136 Nev. 172, 175, 460 P.3d 969, 972 (2020) (internal quotation marks omitted); *see also* NRS 34.170. "This court has considered writ petitions when doing so will clarify a substantial issue of public policy or precedential value, and where the petition presents a matter of first impression and considerations of judicial economy support its review." *Washoe Cty. Human Servs. Agency v. Second Judicial Dist. Court*, 138 Nev.

[2]Patterson's petition for a writ of mandamus also addresses a vindictive-prosecution claim that he raised in district court. Given that the criminal case against him has been dismissed, we conclude that no further remedy is available to Patterson as to the vindictive-prosecution claim. *See People v. Kun Lee*, 954 N.E.2d 338, 342 (Ill. App. Ct. 2011) ("A finding of prosecutorial vindictiveness is remedied through dismissal of the criminal charges brought against a defendant.").

874, 876, 521 P.3d 1199, 1203 (2022) (internal citations and quotation marks omitted).

Patterson availed himself of an available alternative remedy—an appeal to the district court. In similar circumstances, we generally have declined to entertain a writ petition so as not to undermine the district court's appellate jurisdiction. *See State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). Nevertheless, we have considered such petitions in limited circumstances, particularly when a significant issue otherwise will evade this court's review. *See Hildt v. Eighth Judicial Dist. Court*, 137 Nev. 121, 123, 483 P.3d 526, 529 (2021). We conclude that the issue of first impression raised by Patterson's petition—whether municipal courts can award fees and expenses under NRS 41.0393—presents such a circumstance and, thus, judicial economy supports our consideration of this petition.

Municipal courts cannot award fees and expenses under NRS 41.0393

When interpreting a statute, we first look to its plain language. *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021). "[I]t is well settled that where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction." *Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 721, 429 P.3d 658, 662-63 (2018) (internal quotation marks omitted).

The plain language of NRS 41.0393 is clear and unmistakable. NRS 41.0393(1) provides that "[a] court may, in a criminal action, award to a prevailing party, other than the State, reasonable attorney's fees and litigation expenses incurred by the party in the criminal action if the court finds that the position of the State was vexatious, frivolous or in bad faith." NRS 41.0393(8) further provides that, as used in this statute, "'[c]ourt' means a district court or justice court." Accordingly, under the plain language of NRS 41.0393, the authority to award attorney fees and litigation expenses to the prevailing party in a criminal action is specifically limited to district courts and justice courts. As a result, we need not look past the plain language of the statute to the legislative history or public policy in our interpretation of NRS 41.0393, as Patterson requests. *See, e.g.*, *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123-24, 159 P.3d 239, 241 (2007) (explaining that this court need only consider legislative intent and public policy in interpreting a statute if the statute is ambiguous).

Further, we are not persuaded by Patterson's argument that other statutes compel a different result. In particular, Patterson points to NRS 5.073 and NRS 266.550. NRS 5.073(1) provides that "[t]he practice and proceedings in the municipal court must conform,

as nearly as practicable, to the practice and proceedings of justice courts in similar cases. . . . The municipal court must be treated and considered as a justice court whenever the proceedings thereof are called into question." NRS 266.550(1) provides that "[t]he municipal court shall have such powers and jurisdiction in the city as are now provided by law for justice courts . . . ." These two statutes generally treat the municipal courts the same as justice courts and address the powers of municipal courts in general, but they do not control whether municipal courts have authority to award attorney fees and costs to the prevailing party in a criminal action because the more specific statute, NRS 41.0393, governs this issue. *See State, Tax Comm'n, ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011) ("A specific statute controls over a general statute."). Thus, we cannot look past the plain language of NRS 41.0393 to either NRS 5.073 or NRS 266.550 for a different result.

CONCLUSION

The plain language of NRS 41.0393 limits the courts that may award attorney fees and litigation expenses in a criminal action to district courts and justice courts. Municipal courts were not included in NRS 41.0393(8)'s definition of the term "court." Thus, we conclude that municipal courts lack authority under NRS 41.0393 to award attorney fees and litigation expenses to the prevailing party in a criminal action. Therefore, the municipal court correctly denied Patterson's request for fees and expenses, and the district court properly denied Patterson's appeal.[3] Accordingly, we deny Patterson's petition for a writ of mandamus.

Lee and Bell, JJ., concur.

---

[3]This opinion does not foreclose any other remedies that may be available to Patterson, as it impacts only the relief he sought under NRS 41.0393.