IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2494

FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

Petitioner,

vs.

EUGENE A. COX and DEBRA COX,

Respondents.

BRIEF OF *AMICI CURIAE*
AMERICAN INSURANCE ASSOCIATION,
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,
AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
IN SUPPORT OF PETITIONER

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The American Insurance Association ("AIA"), National Association of Mutual Insurance Companies ("NAMIC") and Property Casualty Insurers Association of America ("PCI"), all national trade associations representing property and casualty insurers that write homeowners' insurance in Florida and nationally, submit this brief as an aid in resolving the legal issues presented here that are of great import to the homeowners' insurance market not only in Florida, but nationwide. AIA's, NAMIC's, and PCI's shared interest here is in providing their perspectives on the complete distortion of the VPL that would be necessary to sustain the majority decision below, as well as the severe negative consequences and poor public policy that would result.

SUMMARY OF THE ARGUMENT

Florida's Valued Policy Law ("VPL"), like VPLs across the country, is a liquidated damages statute, designed to fix the measure of damages an insurer must pay when an insured building is totally destroyed by a peril covered by the policy.

Two of three judges of the First District Court of Appeal compounded incorrect *dicta* by two of three judges of the Fourth District Court of Appeal that wrongly transforms the VPL from the intended liquidated damages statute to a coverage statute that would expand an insurer's liability to cover perils expressly excluded under the policy. This interpretation is wholly unsupported by the statute as written and as it has evolved and been construed for over a century. This Court

should correct the distortion of the VPL and restore it to its intended purpose, while upholding the parties' contractual bargain that was based upon the VPL as it had always been understood and interpreted.

ARGUMENT

A. Standard of Review

This case is on review of a majority decision of the First District Court of Appeal on a question certified by the court to be of great public importance:

> DOES SECTION 627.702(1), FLORIDA STATUTES (2004), REFERRED TO AS THE VALUED POLICY LAW, REQUIRE AN INSURANCE CARRIER TO PAY THE FACE AMOUNT OF THE POLICY TO AN OWNER OF A BUILDING DEEMED A TOTAL LOSS WHEN THE BUILDING IS DAMAGED IN PART BY A COVERED PERIL BUT IS SIGNIFICANTLY DAMAGED BY AN EXCLUDED PERIL?

Florida Farm Bur. Cas. Ins. Co. v. Cox, 943 So. 2d 823, 847 (Fla. 1st DCA 2006) ("*Florida Farm*"). The proper interpretation and application of the valued policy law ("VPL") is a legal question, subject to *de novo* review. *See Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 670 (Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994).

This Court accepted jurisdiction of the First District's certification of great public importance, and there are compelling reasons why this Court should resolve this question. In the United States District Court for the Northern District of Florida, Pensacola Division alone, *amici* are aware of three different cases (two of

which were filed as class actions) in which stays have been issued by three different judges, pending resolution of this critical, unsettled issue. *Arenson v. Citizens Prop. Ins. Corp.*, No. 3:05vb154, 2005 WL 2807153 (Judge Vinson's Stay Order, October 26, 2005); *Jones v. Hartford Ins. Co.*, No. 3:05cv00392 (Judge Smoak's Stay Order, May 24, 2006) (filed as class action, certification denied); *Chance v. Auto-Owners Ins. Co.*, No. 3:06cv488, 2007 WL 220415 (Judge Rogers' Stay Order, January 26, 2007) (filed as statewide class action). These stay orders acknowledge hundreds of state and federal lawsuits across Florida that hinge predominantly on the resolution of this issue. *Arenson*, 2005 WL 2807153 *4.

There is a compelling need for this Court to clear up the confusion and legitimate concerns over the VPL's distortion, borne of loose *dicta* by the Fourth District, embraced and expanded by the First District majority in the case below.

B. The VPL: its language and its purpose

Central to this case is an understanding of the more than century-old VPL and the purpose it was designed to serve. The pertinent statutory language in effect when the action below was filed was as follows:

> In the event of the total loss of any building … located in this state and insured by any insurer as to a covered peril, … the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

§ 627.702(1), Fla. Stat. (2004) (emphasis supplied). The emphasized statutory language demonstrates three principles: First, the purpose of the statute is not to fix or change the insurer's liability for the total loss of a building, but rather to fix the amount of money owed to the policyholder if the insurer is liable under its policy for the total loss. Second, the 2004 statute does not expressly contemplate multiple insurers where each insures the risk of loss from separate perils that combine to cause a total loss of a building. The statute is silent in this regard, except to the extent it refers generally to whether the insurer is liable under its policy for such total loss ("the insurer's liability, if any, under the policy for such total loss"). Finally, the last phrase – "and for which a premium has been charged and paid" – is a "benefit of the bargain" test: the VPL is not intended to expand coverage to excluded perils for which a premium has not been charged or paid.

Taken together, these three aspects of the VPL conform to the purpose for which the statute was designed, as set forth in Florida cases over the last century. As this Court characterized the VPL in *Hartford Fire Ins. Co. v. Redding*, 37 So. 62, 65 (Fla. 1904): "The statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages." (Emphasis supplied). Thus, the VPL was written to address a single issue, the measure of damages, and to remove that issue from dispute.

This singular purpose of the VPL has not changed since *Redding*. In *Springfield Fire and Marine Ins. Co. v. Boswell*, 167 So. 2d 780 (Fla. 1st DCA 1964), the court explained the problem and issue addressed by the VPL:

> [The VPL] serves to remove what would otherwise be a very troublesome and difficult issue to resolve either between the parties by negotiation or by the courts in litigation. This issue is the money loss sustained which the insurer must indemnify. … A solution to this is found in the statute which in effect requires the parties to ascertain and agree in advance what the value is and in the case of total loss **by the insured peril** this amount shall be paid as liquidated damages.

167 So. 2d at 784 (emphasis supplied).

The VPL is a liquidated damages statute. It was never intended to remove any policy defenses an insurer might have, except the single issue of the measure of damages. *Redding, supra*. The VPL was never intended to apply except in cases "of total loss by the insured peril." *Boswell, supra*.

C. *Mierzwa's* narrow, inapposite holding

In *Mierzwa v. Florida Windstorm Underwriting Ass'n*, 877 So. 2d 774 (Fla. 4th DCA 2004), the majority wrote an opinion that could have and should have been harmless, if only the opinion had remained confined to the facts and holding. Instead, the majority espoused ill-conceived *dicta* even though it recognized that the loose language could be a springboard to a "parade of horribles" that the court had "no occasion to consider," 877 So. 2d at 778 n.5.

The narrow holding of *Mierzwa* was simply that an insurer of windstorm-only damage is liable for the face value of insurance for a building that was a total loss, where wind damage alone was the cause of the total loss (even though there was also a lesser amount of flood damage). 877 So. 2d at 779. The insurer's liability for the total loss under its policy triggered the VPL's liquidated damages provision, so that under the VPL the amount of money owed to the policyholder was the face value of the windstorm insurance policy.

This application of the VPL to undisputed facts described by the court in *Mierzwa* is entirely consistent with the VPL's language and purpose: if an insurer is liable for a total loss under its policy, then the VPL fixes the amount of money that the insurer must pay to the policyholder as the face amount of the policy. The premiums charged and paid by the policyholder were based on the face value of the policy and the risk insured (the covered windstorm peril), which was determined to have caused the total loss.

D. Dangerous *dicta* in *Mierzwa*, adopted and compounded in *Florida Farm*, wrongly transform the VPL from a liquidated damages statute to a coverage statute.

1. *Mierzwa*

Although entirely unnecessary to dispose of the case before it, the *Mierzwa* majority contorted the language of the VPL to say that if an insurer "has any liability at all, even a fractional share of the total damage, under the VPL it is liable

for the face amount." 877 So. 2d at 778. The court purported to be interpreting the statutory language "the insurer's liability, if any," but the court misinterpreted it to mean "if the insurer has any liability then it has total liability." But that is not what the statute says; the language "the insurer's liability, if any" cannot be divorced from what follows. The phrase as a whole is: "the insurer's liability, if any, under the policy for such total loss, shall be in the amount of money …" The only interpretation that gives meaning to all of these words is that if the insurer is liable under the policy for such total loss, then the amount of money it must pay to the policyholder is the face value of the policy. This is the only interpretation that is consistent not only with the statutory language, but also, with its legislative history and its purpose as recognized by Florida courts for over a century. It is the only interpretation consistent with the historic purpose, interpretation, and application of VPLs nationwide, as reviewed in petitioner Florida Farm's Initial Brief.

The *Mierzwa* court also ignored or misinterpreted the singular framework of the VPL, which focuses on "the insurer." The court did not see any ambiguity in the statute as applied to multiple carriers each covering separate perils, which combine to cause a total loss; the court inappropriately relied on other cases in which the VPL statute was applied in the multiple carrier context. But the cases discussed all involved multiple policies insuring the same property for the same peril, not different perils. *See, e.g., Boswell supra* (two policies insured the same

building for loss caused by fire; both insurers liable for the total loss of the property caused by the covered peril, fire; the VPL applies to fix damages each insurer must pay in the amount of the face value of each policy). These cases show adherence to, not distortion of, the VPL's purpose: if insurers allow multiple policies covering the same property and the same risk, and if insurers set premiums based on the face value and the risk covered, then they both have to make good on their bargain to pay the face value where the covered risk causes a total loss.

Without analysis, *Mierzwa* simply equated the situation of multiple carriers insuring a property for the same risk with the very different situation of multiple carriers insuring a property for different risks. This is not requiring an insurer to honor its contractual bargain; this is expanding an insurer's liability to cover losses expressly excluded from the contractual bargain. The distortion of the VPL is plain: the VPL was designed to require insurers to provide the benefit of their bargain by paying the face value of their policies when a covered peril causes a total loss, because the insurers had charged premiums based on the property's face value and the risk assumed under the policy. It would be anomalous to twist the VPL to undermine the purpose for which it was adopted.

The *Mierzwa* majority characterized its VPL interpretation as appropriate to favor greater "indemnity," citing *Inter-Ocean Cas. Co. v. Hunt,* 189 So. 240, 242 (Fla. 1939), in support. However, in that case, the Court stated as follows: "It is a

well recognized rule of construction and interpretation of contracts for insurance that the contract or policy must be liberally construed in favor of the insured so as not to defeat, without plain necessity, his claim to **the indemnity which, in making the contract of insurance, it was his purpose and intention to obtain**." *Id.* (emphasis supplied). No party in *Mierzwa* or in *Florida Farm* has denied that the policyholders are entitled to the windstorm coverage they obtained and paid for, or that they are fully entitled to coverage for losses caused by wind damage. This accurately reflects the contractual principle underlying the parties' entitlement to the "benefit of their bargain" – nothing more and nothing less. Allowing policyholders to obtain a benefit not contemplated in the insurance contract is not "greater indemnity," but an improper, judicially-rewritten insurance policy.

No principle of indemnity or liquidated damages justifies this result. The VPL does not dictate this result. The insurance contracts at issue are undermined by this result.

2. *Florida Farm*

In the *Florida Farm* decision, the majority launched the parade of horribles unnecessarily set in motion by the dangerous *dicta* in *Mierzwa*, by holding that a windstorm insurer was liable for the face amount of its policy when the insured home was a total loss, regardless of whether the damage was "caused primarily by flooding," an excluded peril. 934 So. 2d at 826.

The *Florida Farm* majority firmly lodged its decision on the basis of the VPL words alone: "Our decision rests on the statutory language itself" characterized as "unambiguous." 943 So. 2d at 828, 830 n.4. Yet, despite that bold pronouncement the majority nonetheless proceeded to rearrange the words, examine them in isolation, and pluck out certain phrases to the exclusion of others, in order to convey this "unambiguous" meaning:

> [P]lain language in the 2004 version of the statute makes the insurer liable, if at all, then in the full amount for which the property was insured.
>
> * * *
>
> The statute provides that the insurer's "liability" "if any" is in the amount for which the property is insured.
>
> * * *
>
> "If any" in the VPL means "if there is any obligation to indemnify for loss attributable to the covered peril."

943 So. 2d at 827. Again, compare the actual words of the 2004 VPL:

> … the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.

§ 627.702(1), Fla. Stat. (2004) (emphasis supplied). The majority consciously selected and emphasized certain words while plainly ignoring the other words because those other words muddy the clarity of the so-called unambiguous meaning, or suggest a different meaning entirely.

As the *Florida Farm* majority acknowledges, this result certainly cannot be justified on the basis of fairness, or economics of the insurance industry, or

actuarial principles. 943 So. 2d 826. Instead, the First District majority insists that it is the only possible result from the statute's plain language. To the contrary, this interpretation is unsupportable. It does not give meaning to all words in the statute, and it certainly does not comport with the VPL's historic purpose to operate as a liquidated damages statute.

E. Any fair reading of the legislative history, both old and new, requires rejection of the *Mierzwa dicta* and reversal of *Florida Farm*.

1. Retrospective legislative history

The phrase (or at least select words within the phrase) so heavily dissected in *Mierzwa* and *Florida Farm Bureau* – "the insurer's liability, if any, under the policy for such total loss shall be in the amount of money …" – first appeared in the VPL in 1959,[1] and remained unchanged through 2004. From 1959 through 1981, this language could not have been intended as a springboard to expand coverage to excluded perils. That is because through 1981, the VPL only applied "in the event of total loss by fire or lightning of any building … and insured by any insurer as to such perils[.]" § 627.702(1), Fla. Stat. (1981).

Therefore, if the Legislature ever intended a dramatic expansion of the VPL, from a liquidated damages statute to a coverage expansion statute, it would have had to have been in 1982. The pertinent VPL language, before and after the 1982 amendment, is set forth side-by-side below for comparison:

[1] Ch. 59-205, § 606, at 718, Laws of Fla.

Pre-1982 version of subsection (1)	**1982 version of subsection (1)**
In event of total loss by fire or lightning of any building … located in this state and insured by any insurer as to such perils … the insurer's liability, if any under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which premium has been charged and paid. § 627.702(1), Fla. Stat. (1981) (emphasis supplied).	In the event of the total loss of any building … located in this state and insured by any insurer as to a covered peril … the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which premium has been charged and paid. Ch. 82-243, §539, Laws of Fla. (1982) (emphasis supplied).

Nothing in the 1982 legislative history even remotely hints at an intent to dramatically alter the meaning of this VPL language to become a springboard for expanding coverage to perils that are expressly excluded by an insurance policy. Instead, the legislative history shows the opposite intent:

> Applies the valued policy law to all covered perils, rather than fire and lightning only. Therefore, policy limits would be required to be paid **if there is a total loss to a building as a result of any covered peril.**

HB 4F (1982) Staff Analysis 7 (April 13, 1982) (emphasis supplied), quoted in the dissent below, 943 So. 2d at 845. The 1982 changes were intended to retain the original purpose of the VPL – to act as a liquidated damages clause to fix the damages when there is a "total loss to a building as a result of any covered peril." Another staff report, mentioned by the majority in a footnote, 943 So. 2d at 829, n.3, describes the VPL amendment as follows:

> Under current law the coverage applies only to loss by fire or lightning. At the time the valued policy law was originally written most coverage did just cover those perils. Now coverage is much broader, and to the extent the valued policy law is good public policy it should apply to all covered perils.

Fla. H.R. Comm. on Ins., HB 4-F, as amended by HB 10-G (1982), Bill Analysis 91 (rev. June 3, 1982) (on file with the Fla. State Archives, Dep't of State). This description underscores the absence of any grand legislative design to fundamentally change the purpose of the VPL. Instead, it confirms that the intent was to preserve the VPL's historic purpose that had applied to fire and lightning coverage, and simply extend it to new forms of insurance coverage insuring perils besides fire and lightning. It is impossible to review this legislative history and to attribute to the 1982 Legislature an intent to totally revamp the purpose and design of the VPL to turn it into a coverage expansion mechanism.[2]

The Fourth District did not consider the 1982 legislative history at all; the First District only mentioned part of the legislative history in passing. The dissent

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[2] In *Florida Windstorm Underwriting Ass'n. v. Gajwani,* 934 So. 2d 501, 507 (Fla. 3d DCA 2005), the court upheld a wind insurance policy's clear exclusion for wind-driven rain, noting that this state does not have a public policy that there must be seamless windstorm coverage for all types of windstorm-caused losses:

> We find that, in the absence of clear public policy directive in the language of the statute, it is not our function to extend coverage for wind-driven rain damages to those whose insurance policies exclude such coverage.

Neither the *Mierzwa* majority nor the *Florida Farm* majority recite or even allude to any clear public policy directive in the VPL's language to extend coverage for damages to excluded perils.

in *Florida Farm* provided the only cogent consideration of this important history. 943 So. 2d at 845.

2. Prospective legislative history

In 2005, the Florida Legislature considered the dangerous *dicta* in *Mierzwa*, and chose to repair the damage, amending the VPL to make clear, for the first time, when and how the VPL would apply where multiple perils combine to cause a total loss. The result of these amendments is that in Florida, it is once again clear that the VPL is intended to serve only as a liquidated damages statute, and not as a coverage expansion mechanism. While this legislation was expressly made prospective, it is quite clear from the legislative history discussed in Florida Farm's Initial Brief that the intent was to correct the Fourth District's VPL distortion.

The *Florida Farm* majority devotes quite a bit of discussion to the 2005 amendments, offering varying perspectives: "Our decision rests on the statutory language itself. The legislative history of the recent amendment to the VPL leaves many questions unanswered." 943 So. 2d at 830, n.4. "The legislature was, of course, aware of the *Mierzwa* decision when it amended the VPL. … But when several years intervene between the original enactment of a statute and some purportedly clarifying amendment, the courts decline to interpret the amendatory language as clarifying the original intent of the Legislature[.]" 943 So. 2d at 830-31. This statement is curious, because the *Mierzwa* opinion – the first ever to

suggest that a windstorm insurer could be liable under the VPL for a total loss to a building when that loss was caused in part by an excluded peril – was issued just months before the 2005 legislative session.

The real question, never asked or answered by the *Florida Farm* majority, but addressed by the dissent, is whether the 2005 restoration of the VPL to its original purpose as a liquidated damages statute is a fair expression of the meaning apparent from the VPL's language, historic purpose, and evolution. Even if the 2005 Legislature designated the amendments "prospective," the amendments themselves directly speak to what the legislative intent has been all along.

In particular, the 2005 amendments now expressly codify what has been part of the VPL's meaning for over a century, in words virtually identical to those first stated by this Court. Compare the new with the old:

The intent of this subsection is not to deprive an insurer of any proper defense under the policy … § 627.702(1)(b), Fla. Stat. (2005)	**The statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy**, except in respect to the measure of damages. *Hartford Fire Ins. Co. v. Redding*, 37 So. 62, 65 (Fla. 1904)

Thus, although the Legislature expressed an intent not to retroactively apply new section 627.702(1)(b), it is unnecessary to apply the statutory amendment *per se* to conclude that the 2005 amendment is merely a reflection of how prior versions of

the VPL should be interpreted.[3] *See, e.g.*, *Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982) (holding that, despite the fact that amendment was non-retroactive, it was powerful evidence of legislative intent in construing prior version of statute).

There is no interruption in this seamless 100+ year span of interpreting the VPL as a liquidated damages statute. The VPL never has been intended to deprive insurers of total or partial coverage defenses, such as when a total loss is caused in whole or in part by an excluded peril for which there is no coverage.[4]

F. Construing the VPL to require windstorm insurers to cover flood damage is contrary to Florida law and the National Flood Insurance Program.

The potential ramifications of adopting a distorted interpretation of the VPL extend far beyond this case and this appellant, because property insurance

[3] The *Florida Farm* majority assumes that the Legislature must have concluded that its amendments change the law rather than clarify it. The 2005 codification of a century-old VPL interpretation belies this assumption. It is just as likely that the Legislature chose to avoid directly legislating the outcome of the cavalcade of litigation churned up in *Mierzwa's* wake. The Legislature may have been still stinging from this Court's rebuke against legislation that decides rights that should be left to judicial controversies. *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004).

[4] As discussed in the Initial Brief, the VPL cases discussed by the *Florida Farm* majority are properly distinguished in the dissent as not involving a combination of a covered peril and excluded peril to cause a total loss. The only case discussing the scenario of combined covered and excluded perils causing a total loss was *Opar v. Allstate Ins. Co.*, 751 So.2d 758 (Fla. 1st DCA), *rev. den*. 767 So.2d 459 (Fla. 2000). In *Opar*, the court remanded for a determination of whether Allstate could establish in whole or in part its coverage defense that the destruction of Opar's property was caused by an excluded peril, flood, and if so, then Allstate would either not be liable, or would be liable only in part for the damages. 751 So. 2d at 761. The *Florida Farm* majority discounted *Opar* as *dicta*, but that so-called *dicta* served as remand instructions to the trial court to properly resolve the case.

coverage under more than one policy, with each policy covering different perils, is not unique to Florida. Virtually all homeowners' insurance policies exclude flood, which has traditionally been a separately insured risk.

Florida law expressly authorizes insurers to issue residential property insurance policies that provide "hurricane coverage or windstorm coverage," but exclude flood coverage. § 627.0629(6), Fla. Stat. (residential property insurance policy must provide windstorm coverage or hurricane coverage as defined in s. 627.0425"); § 627.0425(2)(a), (b), Fla. Stat. (defining "hurricane coverage" and "windstorm coverage," without including flood).

Based on findings that private insurers were not providing flood insurance and could not feasibly provide coverage for flood risks at reasonable rates, since 1968 the federal government has assumed the responsibility for providing subsidized flood-only insurance through the National Flood Insurance Program ("NFIP"). *See Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386 (9th Cir. 2000), *cert. den.*, 531 U.S. 927 (2000) (discussing NFIP background and policies promoted thereby); 42 U.S.C.A. § 4001, et seq., and 44 C.F.R. Part 61.

The federal government recognized the impossible burden of expecting insurers to offer flood coverage when that could not be done at reasonable premium rates. It is absurd to conclude that a more appropriate solution than that

crafted by the federal government is to make insurers pay for flood damage anyway, when they never even charged or collected premiums for that huge risk.

G. Dangerous consequences of expanding insurer liability

The extraordinary VPL expansion suggested in *Mierzwa dicta* and expanded by *Florida Farm* would have a significant impact on the insurance market for what was Florida's worst hurricane year ever, in terms of breadth and scope. Judicially rewriting the 2004 property insurance policies to require insurers to cover losses from expressly excluded perils would dramatically increase the liability of all property insurers for the 2004 hurricane year, when insurers whose policies excluded flood or other perils suddenly find themselves bearing huge losses caused by what they thought were excluded perils. As learned after Hurricane Andrew, insurers have finite risk-bearing capacity, making it critical that insurers carefully plan for and select the risks assumed. A decision that effectively transfers huge amounts of liability for risks that policyholders knew were contractually excluded from coverage undercuts the basic tenets of insurance. Insurer insolvencies could result and insurer confidence in Florida's regulatory environment to uphold the sanctity of contract would be instantly eroded. As shown by legislative findings in section 215.555(1), Florida Statutes, when Florida's property insurance business climate suffers and insurers cannot count on a stable regulatory environment, Florida's property owners suffer, and Florida's economy suffers.

The Florida Legislature has sorted out difficult competing interests when it comes to property insurance in this hurricane-prone state, and it has made the policy judgment that it is permissible for property insurance policies to exclude certain perils. This policy judgment may create some difficult issues in determining the extent of a property insurer's liability under a policy that excludes a peril that contributes to damaging the insured property, but that difficulty does not justify defying contractual bargains by ignoring clear exclusions

The *Florida Farm* majority deflected criticism by noting that the 2005 amendments has corrected the problems: "Because the VPL has been amended …, there is no danger that people will rush out to cancel their flood insurance, counting on windstorm insurers to cover any total loss." 943 So. 2d at 835. This makes clear that as of 2004, the majority's decision would have been absurd, giving rise to absurd, unintended consequences that smack of poor public policy. It is no answer that the decision would not have long-term absurd consequences, particularly in light of the many pending cases from the 2004 hurricane year.

CONCLUSION

For all of the foregoing reasons, *amici curiae* AIA, NAMIC, and PCI urge the Court to answer the certified question in the negative, reverse the majority decision in *Florida Farm*, and disapprove the contrary *dicta* in *Mierzwa*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a correct copy of this Brief was sent by facsimile and U.S. Mail this 15th day of February, 2007, to **Gregory M. Shoemaker**, P. O. Box 13510, Pensacola FL 32591-3510; **Louis K. Rosenbloum**, 4300 Bayou Blvd., Suite 36, Pensacola, FL 32503; **Mark J. Upton**, P. O. Box 1800, Daphne, AL 36524: **Elliot H. Scherker and Elliot B. Kula**, 1221 Brickell Ave., Miami, FL 33131-3224; **Charles F. Beall, Jr.,** P. O. Box 13290 Pensacola, FL 32591-3290; and **Elizabeth K. Russo,** 6101 S.W. 76th St., Miami, FL 33143.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Fla. R. App. P. 9.210(2), in that it has been typed in the Times New Roman 14-point font.