IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC06-2494

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FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY,

*Petitioner*,

v.

EUGENE A. COX and DEBRA COX,

*Respondents*.

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# REPLY BRIEF OF PETITIONER FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FIRST DISTRICT

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## ARGUMENT

### I. STANDARD OF REVIEW.

The Coxes do not disagree with Farm Bureau's explication of the governing standard of review. Initial Brief of Petitioner Florida Farm Bureau Casualty Insurance Company (Initial Brief) at 6; Respondents' Answer Brief (Answer Brief) at 6. They do, however, argue that the Court should discharge its review because: (i) Citizens' Property Insurance Corporation (Citizens) reported 314 multiple-peril loss/single-insured-peril claims in 2005, out of almost 30,000 Hurricane Ivan-related claims; (ii) construing the VPL will affect "only 'a single geographic area,'" comprising three counties; and (iii) "the issue will not recur" under the 2005 amendment to the VPL. Answer Brief at 1-3. The certified issue, however, is a classic question of "great public importance." Art. V, § 3(b)(4), Fla. Const.

A certified question, the resolution of which will affect "a large number of insurance policies written in this state which may contain similar language," is properly addressed by this Court. *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 362 (Fla. 4th DCA 2001), *approved*, 819 So. 2d 732 (Fla. 2002); *see Gibson v. Fla. Dep't of Corrs.*, 885 So. 2d 376, 377 n.1 (Fla. 2004) (decision that will affect "numerous" litigants); *Lescher v. Dep't of Highway Safety & Motor Vehicles*, 946 So. 2d 1140, 1142 (Fla. 4th DCA 2006) (certifying question that will affect "a number of petitions raising the issue," which court "anticipate[d] that other districts will also face"), *review granted*, Case No. SC07-32 (Fla. Feb. 9, 2007). The Coxes themselves acknowledge that the universe of insureds who

would be entitled to payment of policy limits under the First District's decision is not limited to the 314 policyholders who filed Hurricane Ivan-related claims as of early 2005. The Coxes concede more such claims "undoubtedly … have been filed against Citizens and other insurers since that date," and suggest only that the ultimate number of claims "seems relatively low compared to the total number of claims from Hurricane Ivan." Answer Brief at 2.[1]

The Coxes' reasoning, *i.e.*, that the 314-plus claims are a small, and therefore inconsequential subset of all Hurricane Ivan-related claims, is a false syllogism. First, the Coxes cannot, and do not, dispute that resolving the certified question "will benefit more parties than simply the present litigants." Raoul G. Cantero, III, *Certifying Questions to The Florida Supreme Court: What's So Important?*, 76 Fla. Bar. J. 40 (2002) (hereinafter *Certifying Questions*). And the Coxes' amicus, Helping Hands Legal Center (HHLC), argues that it is providing legal assistance "for well over 2,100 individuals," many of whom are using the VPL to seek full policy limits for multiple-peril losses, and tells the Court that its decision "will undoubtedly directly impact the claims of [its] clients." *Id.* Brief of Amicus Curiae, Helping Hands Legal Center (HHLC Brief) at 1. Second, resolving the certified question will affect *all* VPL-related claims, not merely

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[1] To be sure, the Court has discharged review when the facts of a particular case are unique, such that the a decision would not provide guidance in future litigation involving different parties. *E.g.*, *Barnett v. Fla. Dep't of Mgmt. Servs.*, 2007 WL 268801*1 (Fla. Feb. 1, 2007); *State v. Brooks*, 788 So. 2d 247 (Fla. 2001). But even the Coxes do not argue that this case presents a question of interest only to the parties in this case.

Hurricane Ivan-related claims in three counties.

Indeed, the Coxes' argument on the sweep of a decision on the certified question is, somewhat ironically, undone by their erroneous assertion that a decision will affect only a "single geographic area," *Certifying Questions*, *supra* at 40. Answer Brief at 2. That the Coxes "are not aware" of similar issues arising beyond the confines of Escambia, Santa Rosa and "possibly" Okaloosa counties, *id.*, is a slender reed on which to reject a certified question. Determining whether the pre-2005 VPL effectively amends any insurance policy that excludes perils will affect claims arising from Hurricanes Francis, Charley, Ivan, and Jeanne, which devastated Florida from the southern tip to the Panhandle in 2004. Willie Drye, *2004 Hurricane Season May Be Costliest On Record*, National Geographic News, September 27, 2004, http://news.nationalgeographic.com/news/2004/09/0927_040927_jeanne.html. And the First District has now extended its interpretation of the VPL in this case to Citizens, *Citizens Prop. Ins. Corp. v. Ueberschaer*, 2007 WL 906448 (Fla. 1st DCA Mar. 28, 2007), Florida's largest homeowner-insurance provider. Resolving the certified question will affect insurance policies, claimants, insurers, and litigants throughout Florida in the disposition of hurricane-related claims. Moreover, deciding the pre-2005 VPL's scope will not only affect hurricane-related claims – there is nothing in the statute that is limited to water or windstorm-caused losses – but any claim for losses to a structure that suffered a total loss, some of which loss is attributable to an excluded peril.

Finally, that the Legislature has now amended the VPL, rendering the Court's decision inapplicable to claims arising after June 1, 2005, does not defeat

jurisdiction. Respondents cite to no authority for that argument, Answer Brief at 2-3, and with good reason. This Court routinely has accepted questions certified to be of great public importance to resolve issues that will not arise under newly-amended statutes. *E.g., Jones v. Martin Elec., Inc.*, 932 So. 2d 1100, 1104 (Fla. 2006) (jurisdiction accepted to construe Section 440.11, Florida Statutes (2000), which statute had been amended after plaintiffs' claims arose).[2] The issue to be addressed in this case will most certainly recur as cases relating to insurance claims governed by the pre-2005 VPL make their way through the judicial system.

## II. THE VPL CANNOT BE CONSTRUED TO REQUIRE AN INSURER TO PAY POLICY LIMITS FOR TOTAL LOSSES CAUSED BY UNCOVERED PERILS.

### A. The VPL.

The Coxes and HHLC offer a review of VPL-related case law. Answer Brief at 13-23; HHLC Brief at 4-13. In actuality, the Fourth District's decision in *Mierzwa v. Florida Windstorm Underwriting Association*, 877 So. 2d 774 (Fla. 4th DCA 2004), provided the first opportunity for any Florida appellate court to decide whether the VPL conflicts with policy exclusions when concurrent perils combine to cause a total loss. *Mierzwa* misconstrued the VPL, and that erroneous reading has been perpetuated by the First District's majority decision in this case.

The pre-*Mierzwa* case law is entirely focused on the VPL's preclusion of

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[2] *See also Bakerman v. Bombay Co., Inc.*, 903 So. 2d 189 (Fla. 2005) (court accepted jurisdiction, based on conflict of decisions, to address issues that arose under the pre-2003 version of the worker's compensation statutes).

litigation over a structure's value, following a total loss, and it offers little, if any, guidance for the Court in construing the VPL when covered and uncovered perils combine to cause a total loss. The Coxes and HHLC rely primarily on *American Insurance Co. of Newark v. Robinson*, 163 So. 17 (Fla. 1935), Answer Brief at 13-16; HHLC Brief at 8-9, but this Court did not interpret the VPL in that case to require coverage for excluded perils in the event of a total loss. In *Robinson*, which is addressed in Farm Bureau's initial brief at pp. 8 & 13-15, the insurer argued that a building destroyed by fire could not be valued at the policy limits because termites had devalued the building *before* the fire. 163 So. at 19-20. The Court held that the VPL precluded the insurer from contesting value, because the VPL fixed value at the policy limits upon the occurrence of a covered total loss. *Id.* The Court had no occasion to address how a *concurrent*-peril loss should be treated under the VPL. As Farm Bureau has noted, the dispute here does not arise from "the valuation of the policy," but rather from a demand for coverage when "the total loss was caused by flood damage, an excluded peril, which was not at issue in *Robinson*." Initial Brief at 15 (quoting *Fla. Farm Bureau Cas. Ins. v. Cox*, 943 So. 2d 823, 841 (Fla. 1st DCA 2006) (Polston, J., dissenting)).

The Coxes, however, construe *Robinson* to mean that "any attempt by the insurer to pay the insured less than the full policy limits after a total loss amounts to a change in the value of the property stated in the policy." Answer Brief at 15. The distinction that the Coxes ignore, of course, is between challenging a destroyed property's *value* after a total loss *caused by a covered peril* and applying a policy exclusion that bars coverage for the very peril that *caused* the total loss.

*Robinson* did not obliterate that distinction and, indeed, the Court had no occasion even to address it.[3] The decision does not expand the VPL beyond the statutory language's reach.

Neither does *Netherlands Insurance Co. v. Fowler*, 181 So. 2d 692 (Fla. 2d DCA 1966), upon which both the Coxes and HHLC rely. Answer Brief at 17-18; HHLC Brief at 11-13. That decision addressed the situation in which a partial loss to a structure becomes a constructive total loss when municipal codes prevent reconstruction. 181 So. 2d at 693. The policy in *Fowler* excluded "law and ordinance"-type losses, and the insurer sought to limit its coverage to the partial loss caused by the covered fire peril. *Id*. The court held that, because the fire was the *only* cause of the loss, *i.e.*, it was the fire that caused the building's condition, which in turn led to its condemnation, that the VPL required payment of the policy limits. *Id*. The Second District's decision does not even touch upon the

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[3] In an apparent fallback argument, the Coxes contend that *Robinson* restricts insurers to two defenses under the VPL, *i.e.*, criminal conduct and fraud. Answer Brief at 16. There is no such holding in *Robinson*: the Court held only that the VPL precludes an insurer from raising defenses other than criminal acts or fraud with respect to the insured property's *value.* 163 So. at 19. Once again, the Coxes are conflating value and causation. For its part, HHLC argues that this Court would have reached the same result in *Robinson* if the policy had excluded tidal surge rather than termite damage. HHLC Brief at 9. That would be true if tidal surge had damaged the Coxes' property *before* the windstorm *alone* had caused the total loss and Farm Bureau was seeking to devalue the property based on that damage. HHLC's argument thus suffers from the same basic flaw as the Coxes' misapplication of *Robinson.*

concurrent-peril issue under the VPL.[4]

Rather, *Fowler* stands for the unexceptional proposition that the VPL prohibits an insurer from avoiding liability for losses incurred by an insured as a direct result of a covered peril.[5] The Coxes' interpretation of the VPL and *Fowler* to require an insurer to pay out policy limits for losses caused by both covered and uncovered perils would lead to a truly curious result: insurers would be responsible for losses caused by wholly uncovered perils.[6] The Legislature could

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[4] This Court has granted review in *Citizens Property Insurance, Corp. v. Ceballo*, 934 So. 2d 536 (Fla. 3d DCA ), *review granted*, 940 So. 2d 1124 (Fla. 2006), in which oral argument was heard on February 15, 2007, to consider the VPL's application to "law and ordinance" coverage. The Third District held in *Ceballo* that the VPL does not allow an insured to recover under "law and ordinance" coverage without having actually incurred that covered expense. *Id.* at 537-38. Although a decision in Farm Bureau's favor in the present case could be of consequence in *Ceballo*, a decision in the insured's favor in *Ceballo* would not require upholding the First District's decision for the Coxes. *Ceballo*, like *Fowler*, involved no question of coverage for *uncovered* perils. The proposition upon which Farm Bureau relies – that the VPL requires only that all losses flowing *directly* from a *covered* peril, including those that result in a constructive total loss, are recoverable – would not be undercut by a ruling for the insured in *Ceballo*.

[5] The same is true of other constructive total-loss cases upon which the Coxes rely, *Citizens Ins. Co. v. Barnes*, 124 So. 722 (Fla. 1929); *Regency Baptist Temple v. Ins. Co. of N. Am.*, 352 So. 2d 1242 (Fla. 1st DCA 1977), which also involved losses caused by *covered* perils, which led to a municipality's invocation of an ordinance that prohibited repairs. Answer Brief at 21. Like *Fowler*, neither decision addresses the convergence of a covered peril and an uncovered peril to cause a total loss.

[6] The Coxes attempt to rationalize their reliance on *Fowler* by analogy. Answer Brief at 21-22. They construct a hypothetical, involving identical structures located on a floodplain. Under 44 C.F.R. § 59.1 (2004), a (continued . . .)

not have intended that result in adopting the VPL.

### B. Interpreting the VPL to Require an Insurer to Pay Policy Limits for a Total Loss Caused Only in Part by a Covered Peril Is an Untenable Construction of the Statute.

The Coxes essentially urge the Court to adopt an interpretation of the VPL that swaps the words "if any" for the language "if liable in part, then liable for all." Such a construction would take the Court far beyond the bounds of proper statutory interpretation, and would convert the VPL from a valuation statute to an anti-apportionment provision.

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structure on a floodplain that incurs a 50% or greater loss, regardless of the cause, is a constructive total loss and must be torn down. The Coxes posit a factual scenario in which the two homes are destroyed by a hurricane, but windstorm damage causes 49% of the loss for one house and 50% for the other, and call it "arbitrary" that an insurer would pay out policy limits only for the residence that suffers a 50% loss. Answer Brief at 22. But the hypothetical breaks down where, as here, a hurricane *alone* causes the *total* loss. That is, there is nothing anomalous if a structure suffers a total loss, 50% of which is attributable to flood and 50% of which is attributable to windstorm and the windstorm insurer pays out 50% of its policy limits, while paying 49% of its limits if windstorm caused that percentage of a loss. The Coxes' hypothetical makes sense – and supports a ruling for Farm Bureau – only if the facts are changed, such that one home suffers a 50% loss, half of which is attributable to windstorm, while the other suffers a 49% loss, half of which is also attributable to windstorm. A windstorm insurer would be liable for half of its coverage, as opposed to one-quarter thereof, for the constructive total loss to the first house. Because the second house was not a constructive total loss, however, the insurer would be responsible for only one-half of the 49% loss. But there is, once again, no anomaly: the second home is not a total loss, *i.e.*, it still *exists* because the regulation did not require its removal.

The heart of the argument for that result, which would make insurers liable for losses they did not contract to insure against, is that the 1959 amendment to the VPL – which added the words "if any" to the statute – purportedly shows that the Legislature intended the VPL to be an "all or nothing statute." Answer Brief at 12; HHLC Brief at 6-7. That argument is baseless.

The VPL, as originally enacted, and as amended in 1959, was intended only to resolve recurring insurance dilemmas for losses caused by fire and lightning, *i.e.*, to set the value of a destroyed building at the policy limits, because it is difficult, if not impossible, to determine the pre-loss value of a totally destroyed structure. *Hallcom v. Allstate Ins. Co.*, 654 So. 2d 245, 247 (Fla. 1st DCA 1995); *Underwriters Ins. Co. v. Kirkland*, 490 So. 2d 149, 153 (Fla. 1st DCA 1986); *Millers' Mut. Ins. Ass'n of Ill. v. La Pota*, 197 So. 2d 21, 23-24 (Fla. 2d DCA 1967); *Springfield Fire & Marine Ins. Co. v. Boswell*, 167 So. 2d 780, 784 (Fla. 1st DCA 1964). Initial Brief at 7-10.[7] The Coxes would subvert that intent by

[7] As noted in Farm Bureau's initial brief, the cases cited in the text address the VPL's application to multiple insurers providing coverage for the *same* peril. Initial Brief at 8-9. HHLC relies on those decisions to argue that *any* liability on the part of an insurer requires payment of policy limits. HHLC Brief at 9-10. The Coxes appear to adopt that argument. Answer Brief at 41-42. Both the Coxes and HHLC are reading more into *Boswell* than that decision holds: the insurer in *Boswell* attempted to set the covered structure's value and then split each insurer's liability for the peril that destroyed the structure. 167 So. 2d at 783-84. The court held that in the event of a total loss, the VPL sets value as the total value of all insurance coverage for the structure, even when there are multiple policies. *Id*. at 783-85. To the same effect is *La Pota*, in which the insurer also argued that liability for a total loss should be split between two insurers providing (continued . . .)

rewriting the VPL to require that every insurer that provides property coverage implicity contracts to cover excluded perils when a total loss is caused, in part, by a covered peril. But there is a bright-line difference between futile attempts to ascertain a building's *value* after a total loss – which is all that the VPL was intended to prohibit – and apportioning *causation* for such a loss. The addition of the words "if any" in 1959 did not eradicate that line, but instead served only to preserve *coverage defenses*, which is entirely consistent with construing the VPL as not requiring insurers to pay out for uncovered losses. Initial Brief at 15-17.[8]

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(. . . continued)

coverage for the destroyed structure and the court held the VPL requires the value of the home to be set at the combined policy limits. 197 So. 2d at 24-25 & n.3. Those decisions are entirely in line with Farm Bureau's interpretation of the VPL as barring an insurer from challenging a structure's value in the event of a total loss, but have no bearing on the question whether the VPL requires insurers to pay out policy limits when a total loss is caused by multiple perils, only *one* of which is covered.

[8] The Coxes argue that the words "if any" cannot be interpreted as preserving coverage defenses because the VPL requires payment of policy limits "in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault" on the insured's part, § 627.702(1), Fla. Stat. (2004). Answer Brief at 11-12. According to the Coxes, "the insurer's defenses under the VPL are limited" to the quoted provision, such that the addition of the words "if any" in 1959 could not have been intended to preserve coverage defenses. Here, as elsewhere, the Coxes are conflating an insurer's limited right to contest *value,* following a total loss, and the question whether an insurer can be required to pay out policy limits for losses caused by *uncovered* perils. Allowing an insurer to raise "fraudulent or criminal fault" in the event of a total loss caused by a *covered* peril has nothing to do with the threshold question whether a loss is covered in the first instance. And the Legislature made it plain in 1982, when the VPL was extended to all covered perils, that the words "if any"

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Construing the words "if any" as the Coxes argue those words should be read would lead to confounding results when, for example, flood waters destroy a building's entire interior structure, while windstorm destroys only the roof, by requiring the windstorm insurer to pay out policy limits for the uncovered loss to the interior. The Coxes dismiss such scenarios as a "[p]arade of [h]orribles," and suggest that it is for the Legislature to redress an inequitable statutory distribution of rights. Answer Brief at 26-27. But Farm Bureau is not asking the Court to take on the Legislature's role. The VPL does not expressly make an insurer liable for uncovered losses and even the Coxes do not say that it does.[9] Rather, the question is whether certain language should be interpreted as requiring that reading. Where an egregiously unjust result would flow from a suggested reading of a statute, the courts should invoke the basic principle that "statutory provisions should not be construed in a manner that would lead to an absurd result." *State v. Presidential*

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(. . . continued)

cannot carry the weight that the Coxes would have those words bear. The Legislature declared that, under the amendment, "policy limits would be required to be paid *if there is a total loss to a building as a result of any covered peril*." *Cox*, 943 So. 2d at 841, 845 (Polston, J., dissenting) (citation omitted; original emphasis). See Initial Brief at 14.

[9] The Coxes reliance on Section 627.702(2), Florida Statutes (2004), which the Coxes mistakenly labeled as a "partial loss" provision, Answer Brief at 20-21, shows only the untenable nature of their argument. Section 627.702(2) addresses only an insurer's liability for a less-than-total loss, and adds nothing to a proper construction of subsection (1). If anything, the existence of Section 627.702(2) favors Farm Bureau's interpretation of the VPL, because it reflects the Legislature's overarching intent to hold insurers liable only for covered losses, whether total or partial.

*Women's Ctr.*, 937 So.2d 114, 119 (Fla. 2006) (citation omitted).[10]

Finally, the Coxes urge a "liberal construction" of the VPL, suggesting that the statute is ambiguous, based on "[t]hree presumably reasonable interpretations of the same statute by six distinguished appellate court judges." Answer Brief at 28-30. But whether a statute is ambiguous presents a question of of law for the Court, and "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1000 (Fla. 2003) (citation omitted).

## III. LEGISLATIVE HISTORY SHOWS THAT THE FIRST DISTRICT'S INTERPRETATION OF THE VPL IS UNTENABLE.

The Coxes contend that the Legislature's failure to adopt a proposed bill that would have included a provision declaring that the present VPL was intended to "clarify" legislative intent, is evidence that the "[t]he 2005 amendments … did not merely clarify prior legislative intent." Answer Brief at 32-35. This is a classic "straw man" argument: Farm Bureau has never suggested that the 2005 amendment was intended merely to "clarify prior legislative intent." See Initial

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[10] Even if as the Coxes suggest, Answer Brief at 27, a scenario in which windstorm causes a small percentage of a total loss and tidal surge causes a far greater percentage of the loss is unlikely to occur, that the Coxes' interpretation of the statute would nonetheless require a windstorm insurer to tender its policy limits in such a scenario shows the unreasonableness of their interpretation.

Brief at 18-23.

Rather, the 2005 version of the VPL is indeed a material change in the statute's operation, creating a true apportionment procedure for multiple-peril losses – but the Legislature plainly announced that the pre-2005 VPL was *never* intended to require insurers to pay out for uncovered perils. That pronouncement of legislative intent should be given its due weight. Initial Brief at 18-25.

Because Senate Bill 1486 was folded into Senate Bill 1488, which legislation was enacted, the legislative history of Senate Bill 1486 is relevant to interpreting the current VPL. See Initial Brief at 20. And the staff analysis of Senate Bill 1486, which analysis properly is considered in interpreting legislative intent, *see Speights v. State*, 414 So. 2d 574, 576 (Fla. 1st DCA 1982), Initial Brief at 20 n.7, makes it clear that the pre-2005 VPL was never intended to require that insurers would be liable for uncovered perils. Fla. S. Comm. on Banking & Ins., CS for SB 1488 (2005), Staff Analysis and Economic Impact Statement (Apr. 7, 2005). Initial Brief at 20-22. The Coxes and HHLC ignore the deference to which such legislative declarations of intent are entitled. *See Palma del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc.*, 586 So. 2d 315, 317 (Fla. 1991); *State v. Lanier*, 464 So. 2d 1192, 1193 (Fla. 1985). Initial Brief at 22-24.

## CONCLUSION

Based on the foregoing, Farm Bureau requests the Court to quash the First District's decision, to remand with directions to reverse the trial court's judgment, and to grant such other and further relief as the Court shall deem appropriate.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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