I. INTRODUCTION

As framed by this Court in its grant for review, the issue on appeal is:

> "[W]hether the weather provision in an all-risk policy, which states that loss caused by weather conditions is excluded only if weather conditions contribute to another excluded peril, violates Insurance Code section 530 and the principle of the efficient proximate cause of loss."

(57 P.3d 362).

California law requires insurance coverage under an all risk first party property policy when the efficient proximate cause (or predominant cause) of loss is a covered peril, regardless of whether other, specifically excluded perils, also contribute to the loss. (Insurance Code §530; Sabella v. Wisler (1963) 59 Cal.2d 21, 33; Garvey v. State Farm and Casualty Co. (1989) 48 Cal.3d 395, 412; Howell v. State Farm Fire and Casualty Co. (1990) 218 Cal.App.3d 1446, 1452).[1]

The efficient proximate cause rule means that when separate and distinct causes, one covered and the other(s) excluded, both contribute to property damage, it is up to the fact finder to determine which cause is the "predominant" cause. (State Farm and Casualty Company v. Von Der Lieth (1991) 54 Cal.3d 1123, 1132, 1133).

The efficient proximate cause rule is codified in Insurance Code § 530, and "deeply entrenched" in California law. (Howell, 218 Cal.App.3d at 1457, fn. 5). This bedrock principle was articulated by this Court over forty (40) years ago in

[1] Insurance Code § 530 reads as follows: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote case."

Sabella: coverage must exist when an insured peril is the proximate cause of loss. (Sabella, 59 Cal.2d at 33).

As the Howell court recognized, a proper coverage analysis under an all risk property policy begins with application of the efficient proximate cause rule. (Howell, 218 Cal.App.3d at 1452). It does not begin with how a property insurer like Hartford decided to write its insurance policy. Hartford knew when it wrote its policy that the language it chose was subject to California law, including the efficient proximate cause rule. All can agree that if Hartford's policy violates the law it should not be enforced.

Hartford and supporting amici argue that insurance companies need to be able to enforce policy language as drafted in order to preserve the elements of certainty and predictability which are so crucial to the business of insurance. Otherwise, premiums go up and, in the long run, all homeowners are damaged.

Amicus agrees that certainty and predictability are desirable for both the insured and the insurer. This is precisely the reason that Section 530 and the efficient proximate cause principle must prevail over contradictory policy language whenever a conflict arises. As the Howell majority understood, this eliminates the possibility that artful drafting by an insurer might enable it to contract around § 530, thereby preserving stability for all:

> "… Justice Barry-Deal chooses to cast the issue as one of contractual interpretation, rather than as one involving the application of a well-established mandatory causation analysis. Although Justice Barry-Deal's analysis might have been necessary before *Sabella*, we believe that *Sabella* itself and the cases applying the *Sabella* rule

> make it clear that section 530 is more than a mere aid to contractual interpretation. As interpreted by *Sabella*, section 530 affirmatively states that an insurer is liable on an "all risk" insurance policy when a covered peril is the "efficient proximate cause" of the loss. (See discussion, pp. 1452-1456, *ante*.)
>
> . . . . .
>
> Nevertheless, we think Justice Barry-Deal is inviting mischief when she states that she does "not agree that ... section 530 ... compels that result in every case regardless of policy language ...." (Conc. opn. of Barry-Deal, J., at pp. 1461-1462, *post*.) In our view, this would be an open invitation to insurance companies to continue tinkering with their policy language in the hope that they will stumble across the magic formula which will absolve them of liability. The approach we take in the majority opinion forecloses this possibility and consequently increases certainty and predictability for both the insured *and* the insurer."

(Howell, 218 Cal.App.3d at 1457, fn. 5).

The common sense logic used by the Howell court has never been criticized and should be applied here. As this Court is well aware, when the language of an insurance contract directly violates a statute, the statutory language controls. (J.C. Penny Casualty Insurance Company v. M.K. (1991) 52 Cal.3d 1009, 1019, fn. 8).

Here, Hartford's all-risk property policy does not exclude weather conditions as a distinct peril. Accordingly, under the well-established principles which govern all risk policies, coverage exists when weather conditions act alone or in conjunction with other covered peril(s) to cause a loss. Weather conditions are "only" excluded when they act "in any way" with another excluded peril to produce a loss.

As the Howell court found over thirteen (13) years ago, a purported exclusion which operates to deny coverage regardless of whether the peril actually excluded (earth movement here) is the efficient or remote cause of loss violates Insurance Code § 530. This preserves the bright line rule that coverage is required under an all risk first party property policy whenever loss is proximately caused by a covered peril, regardless of how an insurance company chooses to draft its exclusions.

II. STATEMENT OF THE CASE

The facts and procedural history of this case are well known to the Court, having been fully set forth by the Petitioner and the Respondent. As a result, Amicus hereby incorporates by reference the facts and procedural history set forth in the Opening Brief on the Merits submitted by Frank and Carole Julian and the Answering Brief on the Merits by Hartford.

III. ARGUMENT

A. Loss Caused By Weather Conditions Acting Alone, Or In Combination With Other Covered Perils, Is Covered Under Hartford's Policy; The Julian Majority Erred When It Concluded That Weather Conditions Are Categorically Excluded

1. In An All Risk First Party Property Policy, Coverage Exists Unless A Peril Is Specifically Excluded

It is well-established that under an all risk first party property policy, the policy covers all risks save for those risks specifically excluded. (Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183, 1190, citing Strubble v. United Services Automobile Association (1973) 35 Cal.App.3d 498, 504; see also, State

Farm Fire and Casualty Company v. Von Der Lieth (1991) 54 Cal.3d 1123, 1131). Because coverage is presumed under an all risk first party property policy, "[i]t is also axiomatic that the insurer has the burden of proving that an otherwise covered claim is barred by a policy exclusion." (Travelers Casualty and Surety Company v. Superior Court (Lockheed Martin) (1998) 63 Cal.App.4th 1440, 1453). (Citations omitted).

For instance, in Strubble an earthquake caused a landslide which in turn damaged the plaintiffs' home. (Strubble, 35 Cal.App.3d at 501, 502). Under the all risk policy at issue, earth movement was a specifically excluded peril, but a special endorsement to the policy provided earthquake coverage. (Id., at 502). Despite the fact that earth movement was a generally excluded peril, Strubble held that, due to the nature of an all risk policy, the burden was on the insurance company to prove that the earthquake (a covered peril) did not proximately cause the loss: "In other words, it [the insurance company] had to negative its exception (earthquake) to its exclusion (earth movement) since the burden of proof of its defense of noncoverage of the policy sued on rested on it." (Id., at 504, 505).

The Strubble court rejected the insurance company's argument that the terms of the policy shifted the burden of proof to the insured: "We, therefore, regard the earthquake endorsement as merely narrowing the earth movement exclusion and as not changing the "all risks" nature of the underlying policy. To hold otherwise would be a case of the tail wagging the dog." (Id., at 505, fn. 6).

In Garvey, this Court agreed with Strubble that the exclusions in an all risk property policy are the only limitations on coverage, in contrast with a liability policy where the insured must first affirmatively prove coverage:

> "As the two provisions above illustrate, under the all-risk first party property policy, because generally "all risk of physical loss" is covered, the exclusions become the limitation on loss coverage. Under the liability portion of the policy, on the other hand, the focus is, at least initially, on the insured's legal obligation to pay for injury or damage arising out of an "occurrence." (Id., at 407, 408). (Emphasis added).

Strubble and Garvey instruct that a peril is covered under an all risk property policy unless the peril is excluded. Thus, the only limitation on coverage is the specific wording of the exclusions themselves.

2. Under The Plain Language Of This Insurance Policy, Coverage Exists When Weather Conditions Act Alone Or Combine With Covered Perils To Cause A Loss

The critical portions of the all-risk property policy Hartford sold the Julians are as follows:

> SECTION I – PERILS INSURED AGAINST
>
> We insure against risks of direct physical loss to [covered] property unless the loss is [specifically excluded]:
>
> SECTION I – EXCLUSIONS
>
> . . .
>
> 2. We do not insure against loss to property … caused by any of the following …
>
>   a. Weather Conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1 above to produce the loss.

(Julian v. Hartford Underwriters Insurance Company, 2002 DJDAR 8555).

How this Court chose to frame the issue on appeal is instructive and worth revisiting:

> "[W]hether the weather provision in an all-risk policy, which states that loss caused by weather conditions is excluded only if weather conditions contribute to another excluded peril, violates Insurance Code section 530 and the principle of the efficient proximate cause of loss."

The Court's characterization of the issue shows immediately that it understands what Hartford, its supporting amici and the Julian majority do not: under the plain language of this insurance policy, coverage exists when weather conditions cause a loss. The "only" time this is not true is when weather conditions "contribute in any way with [an excluded peril] to produce the loss."

For example, under the plain language of this policy, coverage exists when weather conditions like wind, rain or snow act alone to cause resultant property damage. As said in Palub v. Hartford Underwriters (2001) 92 Cal.App.4th 645 when analyzing the identical policy provision: "Hartford would be clearly obligated to pay if appellants' house had been damaged by rain or wind." (Palub, 92 Cal.App.4th at 650).

Coverage also exists under the plain language of this policy when weather conditions contribute with another covered cause to produce a loss. For example, coverage exists when wind and fire act together to cause resultant property damage.

To be effective at all, the exclusion requires that the weather conditions contribute "… in any way …" with some other cause, which is excluded, to produce the loss.[2] The mandatory nature of this provision is made clear by the use of the word "only" in the phrase "… this exclusion only applies." There is quite obviously no exclusion provided under the all risk policy for weather conditions alone or when contributing with another covered cause.

Coverage for loss caused by a particular peril exists under an all risk first party property policy unless the peril is specifically excluded by the policy. Under the plain language of this Hartford policy, weather conditions are covered anytime they "produce a loss" independent of an excluded peril. Accordingly, weather conditions are a covered peril under this Hartford policy.

3. The Julian Majority Erred In Finding That Weather Conditions Are Categorically Excluded Under The Hartford Policy

In reaching its holding, the Julian majority framed the issue as a decision between whether the weather conditions provision is a "coverage provision" or an "exclusion". (Julian, DJDAR at 8557). According to Julian, the first sentence of the weather conditions provision is a blanket exclusion. Relying heavily on two cases analyzing commercial general liability (CGL) policies, Aydin, supra, and St. Paul & Marine Ins. Co. v. T. M. Coss (1978) 80 Cal.App.3d 888, the Julian majority concluded that the second sentence of the provision is an "exception to an

[2] The Julian majority implies that weather conditions must be excluded because it falls within the exclusions section of the Hartford policy. (Julian, at DJDAR 8557). However, it is the function served by the policy language, not its location, which is determinative. (Aydin, 18 Cal.4th at 1191). The fact that the insurance company which drafted the provision couched it as an exclusion does not make it one. Palub, 92 Cal.App.4th at 651.

exclusion" which operates to reinstate coverage where it would not otherwise exist. (Id.).

Notwithstanding the reinstatement of some coverage, of critical importance to the Julian majority is that the weather conditions provision remains an "exclusion" which cannot "operate as a grant of coverage." (Id.). Using this logic, the Julian majority found that weather conditions, like earth movement, are an excluded peril, thereby rendering the efficient proximate cause rule inapplicable. (Id.).

The Julian majority reached the wrong result because it framed the issue improperly. The issue is not whether the weather conditions provision is a "coverage provision" or an "exclusion". Rather, the issue is what coverage the weather conditions provision specifically, and in its entirety, attempts to exclude and if that exclusion violates Insurance Code § 530 by denying coverage when a loss is predominantly caused by a covered peril. (Sabella, 59 Cal.2d 21, 33; Garvey, 48 Cal.3d 395, 412; Howell, 218 Cal.App.3d 1446, 1452).

The Julian majority also made the fundamental mistake of applying third party liability policy analysis to this all risk first party property policy. As stated by this Court in Garvey:

> "The scope of coverage and the operation of the exclusion clauses, however, are different in the separate policy portions and should be treated as such. As one commentator has recently stated: 'Liability and corresponding coverage under a third party insurance policy must be carefully distinguished from the coverage analysis applied in a first party property contract. Property insurance, unlike liability

> insurance, is unconcerned with establishing negligence or otherwise asserting tort liability'."

(Garvey, 48 Cal.3d at 406, citing Bragg, Concurrent Causation and the Art of Policy Drafting, New Perils for Property Insurers, 20 Forum at 386).[3]

Indeed, the difference in the analysis is illustrated by Aydin itself. In Aydin, the issue was whether the insurer or the insured bears the burden of proof in determining coverage under the "sudden and accidental" exception to the pollution exclusion in a CGL policy. (Aydin, 18 Cal.4th at 1185, 1186). Aydin summarized the dispute as a disagreement "as to whether the 'sudden and accidental' exception should be construed as a coverage provision or an exclusionary provision in allocating the burden of proof." (Id., at 1188). (Emphasis added).

In finding that it is the insured who bears the burden of establishing coverage under an exception to an exclusion in a CGL policy, Aydin reasoned: "Because the *insured* bears the burden of establishing coverage under an insurance policy, it makes sense that the insured must also prove that the exception affords coverage after an exclusion is triggered." (Id.). (Emphasis in original). (Citations omitted).

However, in reaching its decision, Aydin made a critical distinction between all risk policy analysis and liability policy analysis, rejecting the insured's attempt to rely on Strubble:

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[3] This Court has been openly critical of the failure to make the distinction between first party and third party policies: "Unfortunately, some courts have failed to draw these crucial distinctions when discussing coverage issues under first and third party insurance cases." (Montrose Chemical Corporation of California v. Admiral Insurance Company (1995) 10 Cal.4th 645, 665).

> "[S]trubble is not instructive here. The Strubble court emphasized that its holding applied *only* to all-risks insurance policies, explaining that 'in an action upon an all-risks policy such as the one before us (unlike a specific peril policy), the insured does not have to prove that the peril proximately causing his loss was covered by the policy. This is because the policy covers *all risks* save for those risks specifically excluded by the policy.' (Citation). Under a comprehensive general liability insurance policy such as the one at issue here, by contrast, the insured clearly bears the burden of establishing coverage (Citation)."

(Aydin, 18 Cal.4th at 1190). (Emphasis in original). (Citing Strubble, 35 Cal.App.3d at 504; and, Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 16).

In analyzing the same issue as in Aydin, the Court of Appeals in Travelers, supra, also recognized this distinction:

> "Since the insured has no initial burden to prove that his first party claim falls within the basic scope of coverage of the all-risks policy, it follows, under Strubble, that the insured has no burden to prove that coverage is restored by an exception to an exclusion. Thus, because only the insurer has a burden of proof regarding coverage under the all-risks homeowners policy at issue in Strubble, it was the insurer who was required to negate the earthquake exception to the earth movement exclusion."

(Travelers, 63 Cal.App.4th at 1454, 1455).

Both Aydin and Travelers show that the issue which the Julian majority thought was so important - whether the weather conditions provision is categorically an "exclusion" or categorically a "coverage provision" - is meaningless when analyzing coverage under an all risk first party property policy. Stated alternatively, it is insignificant whether the weather conditions provision is an "exclusion that restores coverage under certain circumstances" or a "coverage

provision". These labels confuse the issue, because the limits of coverage in an all risk policy are governed solely by the specific words of the exclusions themselves.

Accordingly, when an insurance company like Hartford chooses to draft a limited exclusion, everything not encompassed by that limited exclusion is covered. This is true regardless of whether one characterizes the limited exclusion as a "coverage provision" or as an "exception to an exclusion" which operates to "reinstate" coverage. Instead, as stated in Strubble, any so-called exception to an exclusion merely operates to further narrow both the exclusion itself and any corresponding limitation on coverage.[4] (Strubble, 35 Cal.App.3d at 505, fn. 6).

The proper way to analyze Hartford's weather conditions provision is substantive and label-free. No exclusion exists for weather conditions which act alone, or in conjunction with other covered perils, to produce a loss. Weather conditions are therefore a covered peril. The remaining analysis is whether Hartford can lawfully deny coverage when weather conditions, a covered peril, proximately cause a loss. As is demonstrated below, it cannot.

B. The Weather Conditions Provision Violates Insurance Code § 530 And The Principle Of Efficient Proximate Cause

Hartford, and the amicus brief filed on its behalf by Personal Insurance Federation of California (PIFC), offer differing interpretations of the weather

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[4] In an all risk policy context, accepting Julian's analysis would also impermissibly place the burden on the insured to demonstrate that a peril falls within the exception to an exclusion and is covered. For instance, Julian would require the plaintiff here to negate the purported general exclusion of weather conditions by demonstrating that the exception applies, i.e., that no excluded peril combined in any way with weather conditions to produce the loss. This result was specifically rejected by Strubble. (Strubble, 35 Cal.App.3d. at 504, 505).

conditions provision in the Hartford policy. Under Hartford's interpretation, loss caused by weather conditions is excluded if weather conditions combine with a remote excluded concurrent cause, such as earth movement. (Hartford Brief at 15). In contrast, under PIFC's version, the exclusion does not apply if either weather conditions or another excluded peril such as earth movement are truly a remote cause of loss. (PIFC Brief at 7, fn. 3; 9, fn. 4).

Neither interpretation is fully accurate. The exclusion for weather conditions actually applies when weather conditions contribute "… in any way ..." with another cause, which is excluded, to produce loss. Weather conditions acting alone to produce loss are covered. Weather conditions acting with other covered perils to produce loss are also covered. Thus, the exclusion is activated only when weather conditions either remotely <u>or</u> efficiently produce loss in combination with another excluded cause. This demonstrates the true intent of the weather conditions provision, which is to exclude the <u>efficient proximate cause analysis itself</u> whenever weather conditions combines "… in any way …" with an excluded peril to produce loss.

Under this weather conditions provision, Hartford can deny coverage when a loss is 99% caused by the otherwise covered peril of weather conditions and 1% caused by some excluded peril. Moreover, through the phrase "… in any way …", Hartford can deny coverage when weather conditions and another <u>covered</u> peril produce loss, so long as an excluded cause also contributes. This directly violates the rule of efficient proximate cause.

Over forty years ago this Court held that an excluded peril which only remotely contributes to loss cannot be used to bar coverage: "Such a result would be directly contrary to the provision in section 530, in accordance with the general rule, for liability of the insurer where the peril insured against predominately resulted in the loss. . . ". (Sabella, 59 Cal.2d at 33). Since Sabella, this Court has continued to hold that there must be coverage when a covered peril predominately causes loss, regardless of whether an excluded peril remotely contributes to the loss. (Von Der Lieth, 54 Cal.3d at 1132, 1133) (Citing Garvey, 48 Cal.3d at 402).

As correctly stated by Palub, supra, Howell is the case directly on point. (Palub, 92 Cal.App.4th at 650). In Howell, first a fire (covered peril) and then rainfall (excluded peril) created a landslide (excluded peril) to produce loss. (Howell, 218 Cal.App.3d at 1449, 1450). In the policy at issue, the pertinent part of the exclusions section read: "This policy does not insure against loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. . . ." (Id., at 1450).

Arguing that it was free to exclude whatever it wanted, even where excluded perils only remotely contributed to the loss, State Farm won on summary judgment. (Id., at 1448). The appellate court reversed, holding that:

> "In our view, Insurance Code section 530, as interpreted by Sabella and its progeny, requires a property insurer to provide coverage whenever an insured peril is the 'efficient proximate cause' of the loss. . . . Consequently, the exclusionary provisions contained in the contracts at issue are not enforceable to the extent they purport to

> limit the insurers' liability beyond what is permitted by section 530 and it interpreting cases."

(Id., at 1456).

Under Howell, the weather conditions exclusion is unenforceable because its use of the phrase "… in any way …" allows Hartford to deny coverage whenever a remote excluded peril contributes with either weather conditions alone, or in conjunction with weather conditions and other covered perils, to produce loss. This is precisely the kind of provision that was held unenforceable in Howell.

In attempting to salvage its exclusion for weather conditions, Hartford argues that Howell is distinguishable because nothing in Howell prohibits an insurance company from utilizing "multiple exclusions that exclude perils that are the efficient proximate causes of loss as is the case here."[5] Hartford Brief at 23. Of course, an exclusion which denies coverage where a covered peril efficiently causes the loss is exactly what is prohibited by Howell and every other California case interpreting Insurance Code § 530. (E.g., Sabella, at 59 Cal.2d at 33; Sauer v. General Insurance Company of America (1964) 225 Cal.App.2d 275, 279; Garvey, 48 Cal.3d at 402; Von Der Lieth, 54 Cal.3d at 1132, 1133; Howell, 218 Cal.App.3d at 1456). That Hartford has chosen to apply the exclusion to only one covered peril, as opposed to all covered perils as in Howell, does not change the analysis.

[5] The Julian majority did not distinguish or even cite to Howell in its substantive discussion of the weather conditions provision.

The dissent in Julian articulated this well:

> "Since there can only be one 'efficient proximate cause,' these two events [weather conditions and earth movement] cannot be an efficient proximate cause. They are different concurring causes producing the loss. Weather and earth movement cannot be merged into a single 'efficient proximate cause' to avoid providing coverage. Hartford, in drafting its policy, is attempting to rewrite the law of causation as well as the law itself."

(Julian, DJDAR at 8560).

Coverage exists when the efficient proximate cause of loss is covered. Any insurance policy provision which nullifies this principle violates California law and is unenforceable.

C. Statements Made By The Julian Majority, Hartford, And Supporting Amici Regarding The Purported Interests Of The General Public In The Future Are Irrelevant To Interpret The Language Of The Julians' Contract With Hartford

Just one month ago, on June 12, 2003, this Court stated emphatically that while insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. (Rosen v. State Farm General Insurance Company (2003), 30 Cal.4th 1070). Accordingly, Rosen directs that courts interpreting insurance policies should perform conventional contract analysis. Courts should not engage in evaluating unsupported "sky is falling" arguments. Random conjecture about long-term fears has no place in the application of well-established rules of construction. Adhering to traditional rules of contract interpretation will promote certainty and predictability valuable to both the insured and the insurer.

In this case, Hartford, its supporting Amici, and the Julian majority all violate the principles enunciated in Rosen. In substance, each suggests a finding of coverage here would unnecessarily force all insurance companies to exclude weather conditions altogether. Perhaps some will and some will not. Perhaps an insured may be able to choose between real weather conditions coverage or exclusion. Perhaps, as it is also claimed, the proper application of the law here might somehow drive up premiums. Perhaps not. Regardless, the point made in Rosen is that we do not know. (Rosen, 30 Cal.4th at 1078).

Instead, Rosen instructs that these "social and economic considerations" have nothing whatsoever to do with the real issue in this case: whether the plain language of Hartford's all risk policy conflicts with the mandatory rule of efficient proximate cause set forth in Insurance Code § 530 and the cases interpreting it.

Amicus submits that the protracted public policy analyses offered by Hartford's supporting Amici suggest insecurity with Hartford's position. They do not squarely address either the plain language of the weather conditions provision or Insurance Code § 530. Instead, they rely on statistics, empirical data and predictions about the future. However, Rosen makes clear that statistics, empirical data and future predictions play no part in the analysis. (Rosen, 30 Cal.4th at 1078). Courts are ill suited to amass and analyze that sort of data, and should refrain from doing so. (Id.).

What Courts are well suited for is determining the plain meaning of the Julians' contract with Hartford, and whether that contract comports with

California law. The Court should reject all arguments that would have it go beyond well-established contract interpretation procedure and substantive California law.

IV. CONCLUSION

For the reasons set forth above, Hartford's weather conditions provision violates Insurance Code § 530 and the principle of efficient proximate cause of loss. Accordingly, Julian should be reversed.

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Respectfully submitted,

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