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IN THE SUPREME COURT OF FLORIDA

STATE FARM FLORIDA INSURANCE COMPANY,

Petitioner,

v.

CHARLES SANDERS and DIANA SANDERS,

Respondents.

______________________________/

Case No. SC20-596

Appellate Case No. 3D9-927

L.T. Case No. 2018-27366 CA 8

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS

On Discretionary Review from the Third District Court of Appeal

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R. Hugh Lumpkin
Florida Bar No. 308196
hlumpkin@reedsmith.com
Matthew B. Weaver
Florida Bar No. 42858
mweaver@reedsmith.com
Garrett Nemeroff
Florida Bar No. 111675
gnemeroff@reedsmith.com
REED SMITH LLP
1001 Brickell Bay Drive
Suite 900
Miami, FL 33131
T: (786) 747-0200
F: (786) 747-0299

Mark A. Boyle
Florida Bar No. 0005886
mboyle@insurance-counsel.com
Molly Chafe Brockmeyer
Florida Bar No. 105798
mbrockmeyer@insurance-counsel.com
E. Alysse Vautier
Florida Bar No. 1003844
avautier@insurance-counsel.com
BOYLE, LEONARD & ANDERSON, P.A.
9111 W. College Pointe Dr.
Fort Myers, FL 33919
T: (239) 337-1303
F: (239) 337-7674

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STATEMENT OF AMICUS CURIAE'S INTEREST

Effectuating the purpose of insurance and interpreting insurance contracts, laws, and regulations requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Florida residents and businesses through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (disaster preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and

videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org.

UP has been serving Florida residents since 1992 when we helped promote fair claim settlements in the aftermath of Hurricane Andrew. Our activities in the Sunshine State have included long-term disaster recovery assistance; consumer advocacy related to homeowners' insurance rates and availability (i.e. depopulating Citizens); promoting preparedness and mitigation; educating and assisting consumers navigating the complicated insurance claims process under wind, flood, and liability policies. State insurance regulators, including the Florida Office of Insurance Regulation, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. Information and arguments in United Policyholders' briefs have been cited by the US Supreme Court as well

as by numerous state and federal appellate courts. *See, e.g.*, *Humana, Inc. v. Forsyth,* No. 97-303, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). United Policyholders has also weighed in on important insurance issues affecting homeowners and businesses in matters adjudicated before this Court, Florida appellate courts, and the United States Court of Appeals for the 11th Circuit.

UP has been engaged for decades in promoting and protecting consumer laws and regulations that aim to dissuade insurers from low-balling and underpaying insurance claims. UP also educates consumers on how to identify these practices. UP seeks to fulfill the "classic role of amicus curiae by assisting in a case of the general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an amicus curiae is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). UP seeks

to assist this Court in helping preserve policyholders' rights and more appropriately level the playing field beyond just this case.

UP has a substantial interest in this appeal because the analysis to be addressed by the Court presents an issue of general application and significance that is expected to impact virtually every insurance policy issued in Florida. Specifically, UP addresses the appraisal process, the relationship between the parties and their respective appraisers, the appraiser's role in the process and his or her relationship to the umpire.

UP can assist the Court in the disposition of this issue by drawing on its knowledge of the challenges policyholders face in the appraisal process…a process that insurers are expert at navigating. Undersigned counsel, representing UP's interests *pro bono* in this matter, have significant experience litigating a wide variety of insurance disputes, and submit that they will be able to provide assistance to this Court in analyzing the key issues and their impact on public policy.

SUMMARY OF THE ARGUMENT

Insurance companies design and control the insurance policy form and the claim process. Property insurance carriers typically, as an element of exercising that control, place appraisal provisions in their policies to resolve disputes over the amount of loss. More recently, insurers have required that party-appointed appraisers be "independent," "impartial," or "disinterested." Such a provision exists in the instant case. As is typical, the appraisal provision in this case makes no reference to the type of authorized compensation a party-appointed appraiser can be paid. Nor does the appraisal provision disallow use of a public adjuster as an appraiser. The absence of such terms is striking given that Florida has over 25 years of uninterrupted case law allowing public adjusters to serve as the appraiser for the insured who hired him or her. Florida's historical treatment of this issue is consistent with authorities from across the country. Many, if not most of these authorities, allow an insured's public adjuster to serve as their party appointed appraiser. The existence of this wide swath of authority is, definitionally, under Florida law, ambiguity that necessarily has to be construed against the insurer as drafter of the policy form.

The policy language in the instant case makes the Insured "responsible" for the payment of their party appraiser and makes no reference to prohibited types of compensation. In contrast to the absence of terms specifying the methods of compensation of the party appraisers, the policy in this case has very specific limitations and specifications on the compensation of the neutral umpire. If State Farm wanted similar limitations to apply to party appraisers, it should have specified those limitations in its policy. The term "disinterested" and other similar analogues found in property policies should not be interpreted to disallow the appointment of any appraiser unless there can be no question but that the appraiser can exercise no independent judgment.

State Farm is advancing a self-serving view that policyholders should only be able to appoint a party appraiser if they can afford to pay one by the hour. Yet, the policy they drafted does not say that. Hourly compensation does not guarantee neutrality. An appraiser hired by the hour by any person, lawyer, or insurance company is definitionally suspectable to having their judgment influenced by the desire to get future work. No one can seriously argue that an appraiser repeatedly hired by an insurer was completely free of some

level of interestedness favoring the insurer. This possibility has never been enough to disqualify an appraiser under Florida law unless the appraiser, for some legal reason, in incapable of exercising independent judgment. The primary neutrality element in the appraisal process is the umpire not the appraisers appointed by the parties.

The truth of the matter is that if State Farm wanted a truly neutral dispute resolution process, it could have one: Our judicial system where detailed rules of neutrality exist. But that is not the process State Farm specified in the policy it sold to Mr. and Mrs. Sanders.

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND HOLD THAT APPRAISERS ENGAGED ON A CONTINGENCY-FEE BASIS ARE NOT "INTERESTED" AS A MATTER OF LAW.

A. If State Farm Wanted To Impose Restrictions On Appraiser Compensation Arrangements, State Farm Could Have Easily Drafted Language To Achieve That Result.

This Court generally follows the "supremacy-of-text principle." *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The*

Interpretation of Legal Texts 56 (2012)). In furtherance of that principle, this Court has explained that "the goal of interpretation is to arrive at a 'fair reading' of the text" based on "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." *Id.* at 947 (internal quotation marks omitted) (quoting Scalia & Garner, *Reading Law* at 33).

That principle is informed by longstanding Florida law on how insurance policies are to be interpreted. "[I]n construing insurance policies, courts should read each policy as a whole" and "give every provision its full meaning and operative effect." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000); *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 861 (Fla. 3d DCA 2019) (discussing canon that "a single contractual term must not be read in isolation," as "the goal is to arrive at a reasonable interpretation of the entire agreement").

Under these principles and on a fair reading of the appraisal clause at the time the policy was issued, State Farm did not clearly bar insureds from hiring appraisers on a contingency-fee basis. The policy states that "[e]ach party shall be responsible for the compensation of their selected appraiser." *App.* 94. State Farm's

chosen language does not specify any requirements, or impose any restrictions, on the type or amount of compensation that may be paid to an appraiser. The most traditional understandings of the word “responsible” in dictionaries include: “control over”, “accountable for” and “charged with”. Thus the policy makes clear that the Insured may choose the method of payment of the appraiser. If State Farm intended to limit the types of permissible fee arrangements, it could have easily drafted policy language to achieve that result. *See, e.g.*, *Anderson*, 756 So. 2d at 33 (“Clearly, if Auto–Owners had intended to treat the two separately covered vehicles as a single covered automobile when operated in tandem, it could have drafted the policy to achieve that result.”); *see also Rios v. Tri-State Ins. Co.*, 714 So. 2d 547, 549 (Fla. 3d DCA 1998) (explaining that “parties are free by contract to specify the credentials of party-appointed appraisers”).

Indeed, with respect to umpires, the policy at least makes clear that the umpire’s compensation must be “reasonable.” But when it came to compensation of appraisers, State Farm chose not to use any restrictive language whatsoever. That textual distinction cuts against State Farm’s arguments in this case. *See generally Subirats v. Fidelity Nat’l Prop.*, 106 So. 3d 997, 1000 (Fla. 3d DCA 2013) (discussing the

interpretive canon that when certain language is used in one section of the text and omitted from another, courts "must presume that the omission was intentional").

B. STATE FARM DRAFTED THE APPRAISAL CLAUSE IN CONTEMPLATION OF EXISTING FLORIDA LAW—INCLUDING *RIOS* AND *GALVIS*.

Because textual interpretation asks how a reasonable reader would have understood the text "at the time it was issued," *Ham*, 308 So. 3d at 947, it makes no difference that other courts have recently begun to question *Galvis* and *Rios*. "[C]ontracts are made in legal contemplation of the existing applicable law." *S. Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 773 (Fla. 1st DCA 1983); *see also Cenville Invs., Inc. v. Condo. Owners Org. of Century Vill. E., Inc.*, 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990) (noting that "the law imposes upon the marketplace a presumption that parties enter into contracts in contemplation of existing statutory and case law"). In the insurance context, moreover, appraisals are "creatures of contract," *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014), and "an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be construed liberally in favor of the insured and strictly against the insurer," *Washington*

Nat'l Ins. Corp. v. Ruderman, 117 So. 3d 943, 950 (Fla. 2013). This is because "insurance policies are prepared by experts employed by insurance companies," and can be "difficult for laymen to understand or fully appreciate." *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 223 (Fla. 3d DCA 2006) (internal quotation marks omitted).

When State Farm issued the policy in 2017, Florida law **allowed** insureds to retain appraisers on a contingency-fee basis under nearly identical policy language. Under *Galvis*, a "contingent-fee appraiser" was **not** per se barred from serving as a "disinterested appraiser." *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421, 421 (Fla. 3d DCA 1998) (Schwartz, C.J.). And the Third District's earlier decision in *Rios*—which approved contingency-fee appraisers albeit under the term "independent" rather than "disinterested"—emphasized that the insurer failed to "limit the type of compensation which may be paid" and reiterated that policies "must be read favorably to the insured." *See Rios*, 714 So. 2d at 549.[1] These cases have remained good law

[1] It is true that *Rios* also relied on the since-amended Code of Ethics for Arbitrators, which required only that arbitrators disclose their financial interests prior to serving. But the court's decision was not based solely on the Code of Ethics. *See id.* at 449–50 (discussing

since they were decided in 1998.[2] Indeed, the conflict cases were not decided until well after the policy was issued in this case. *See* I.B. at p. 8 (citing *State Farm Fla. Ins. Co. v. Cadet*, 290 So. 3d 1090 (Fla. 5th DCA 2020); *State Farm Fla. Ins. Co. v. Crispin*, 290 So. 3d 150 (Fla. 5th DCA 2020); *State Farm Fla. Ins. Co. v. Valenti*, 285 So. 3d 958 (Fla. 4th DCA 2019)).

Thus, even if the Court were to disapprove *Rios* and *Galvis*, the "disinterested" appraiser clause should still be construed against State Farm. State Farm was free to amend its policy language if it wanted to avoid these cases—for example, by limiting appraisers to hourly fees, or as with umpires, to "reasonable" compensation. But State Farm sold a different policy to Mr. and Mrs. Sanders. And

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lack of contractual limitations on compensation arrangement as well as dictionary definitions before addressing Code of Ethics).

[2] The Fifth District's 2014 decision in *Branco* made much of the 2004 revisions to the Code of Ethics in questioning *Rios*'s "continued viability." *See Branco*, 148 So. 3d at 495 (discussing the "presumption of neutrality" under the 2004 edition of the Code of Ethics and finding that this "presumption of neutrality" "undercut[s] the continued viability of . . . *Rios*"). But unlike *Rios* and *Galvis* (and this case), *Branco* involved a party's **own attorney** attempting to serve as a disinterested appraiser. *Branco* is therefore not on point and did not directly conflict with these cases at the time the policy was issued.

having made that drafting decision in 2017, State Farm should be held to that choice here.

The construction of the policy in *Rios* and *Galvis* is also consistent with a construction of the entire policy being read as a whole. While the policy in this case does require that the party appraiser be "disinterested" the policy also provides that "[e]ach party shall be responsible for the compensation of their selected appraiser." *App*. 94. State Farm's chosen language does not specify any requirements, or impose any restrictions, on the type or amount of compensation that may be paid to an appraiser. The most traditional understandings of the word "responsible" in dictionaries include: "control over", "accountable for" and "charged with". DICTIONARY.COM, https://www.dictionary.com/browse/responsible (last visited Mar. 29, 2021). Thus the policy makes clear that the Insured may choose the method of payment of the appraiser. If State Farm intended to limit the types of permissible fee arrangements, it could have easily drafted policy language to achieve that result. *See, e.g.*, *Anderson*, 756 So. 2d at 33 ("Clearly, if Auto–Owners had intended to treat the two separately covered vehicles as a single covered automobile when operated in tandem, it could have drafted

the policy to achieve that result."). Thus the words "disinterested" and "responsible" are easily harmonized so long as either party appraiser is free to make an independent judgment- meaning not under a legal compulsion to reach a specific result such as the attorney appraiser in *Branco.*

C. PAYING AN APPRAISER A CONTINGENCY FEE DOES NOT PRECLUDE AN APPRAISER FROM BEING DISINTERESTED AS A MATTER OF LAW.

State Farm contends that any adjustor who is engaged on a contingency fee basis is not qualified to serve as a public adjuster because he or she is not "disinterested." I.B. at p. 11. This is peculiar because since 1998, the controlling law in Florida has been that the terms "disinterested," "impartial," and "independent" can't preclude an insured from paying its appraiser a contingency fee (as discussed above). *See Rios*, 714 So. 2d at 549; *Galvis,* 721 So. 2d at 421; *Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018). Moreover, courts across different jurisdictions that conducted a policy interpretation analysis have arrived at the same conclusion as *Rios*, *Galvis,* and *Brickell.* The existence of these competing authorities are definitionally ambiguity under Florida Law.

In *Owners Insurance Company v. Dakota Station II Condominium, Association, Inc.*, 443 P.3d 47, 2019 WL 2571645 (Colo. 2019), the Colorado Supreme Court considered whether a contingency fee agreement rendered an appraiser partial as a matter of law. *Id.* at *7-8. The Colorado Supreme Court "decline[d] to hold that [contingency fee incentives] render appraisers partial as a matter of law." *Id.* at *8.

In *White v. State Farm Fire & Casualty Company*, 809 N.W.2d 637 (Mich. Ct. App. 2011), State Farm, like it does here, argued that an insured's appraiser was not "independent" because the insured paid the appointed appraiser a contingency fee. *Id.* at 421. In *White*, the appointed appraiser was a public adjuster that had a signed agreement with the insured for ten (10) percent of the overall amount paid by State Farm. *Id.* at 424. The court looked to other jurisdictions for assistance, and turned to *Rios* and *Galvis*. *Id.* at 426. The *White* Court cited *Rios* and *Galvis* as cases where the terms "independent" and "disinterested" did not prevent an appraiser from receiving a contingency fee for the appraisal. *Id.* The *White* Court stated that an appraiser who is "capable of exercising his own judgment regarding the value of the loss in this proceeding and should not be disqualified

to serve as plaintiffs' appraiser." *Id.* at 428. The *White* Court followed *Rios* and held "that a contingency-fee arrangement does not prevent an appraiser from being 'independent' . . . ." *Id.*

Collectively, *Rios*, *Galvis*, *Brickell Harbour*, *Branco*, *White*, and *Dakota Station* are harmonized to hold that the dispositive question in determining partiality or interestedness is **whether the appointed appraiser can exercise his or her independent judgment in rendering the value of the loss.** Each of these cases recognize that compensation on a contingency fee basis, even if undesirable, does not, in and of itself, render an appointed appraiser partial, interested, or incompetent as a matter of law.

Thus, even State Farm's preferred hourly-only approach involves some level of bias because an individual or company hired by the hour necessarily has their judgment influenced by the possibility of future work. *Id.* An inherent bias is always present when fees are paid for services, regardless if those fees are on an hourly basis or contingent. Insurance companies regularly contract with vendors for bulk services and this extensive financial relationship incentivizes a vendor to produce results favorable to their client to maintain this relationship. "The more extensive the financial

relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing." *See Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997 (Fla. 1999). Any type of financial incentive can be argued to create potential bias. Even a party appraiser hired as a one off has an interest in doing a good job for the person who hires them for no other reason than to affect their business relationship. That indirect financial incentive has never been enough to disqualify an appraiser under Florida law. There is no evidence of persons being willing to conduct appraisals for free out of the goodness of their hearts, thus payment is always going to be an issue. This issue was injected into the process by the carrier whose appraisal provision required payment to be handled by the respective parties to the appraisal. In short you can never take monetary interest out of the appraisal process because of this. Changing the payment structure to a fee only paradigm, which is a modality that is not required by the policy, will not resolve this alleged issue.

D. A Public Adjustor's Contractual Relationship with an Insured Does Not Create a Fiduciary Relationship.

The certified question incorrectly assumes that public adjustors are fiduciaries. They are not. *Home Ins. Co. v. Crawford & Co.*, 890 So. 2d 1186 (Fla. 4th DCA 2005), *abrogated on other grounds by Westgate Miami Beach, LTD. v. Newport Operating Corp.*, 55 So. 3d 567 (Fla. 2010), states as much when discussing the nature of the relationship between an insured and a public adjustor:

> In this case, the contract between the parties imposes contractual duties upon Crawford. **It did not impose any fiduciary duties**. The parties were dealing at arm's length. Neither can be considered unsophisticated. There was no evidence that the failure to notify Home of the verdict for sixty-six days was anything other than negligent. A final judgment in the amount obtained was not going to be concealed.

Home, 890 So. 2d at 1188 (emphasis applied).

***Home* held that a fiduciary relationship does not exist between an adjuster and person or entity by operation of law**. That *Home* resorted to a contractual analysis shows the failings in State Farm's reliance on Florida's Administrative Code or the Ethical Requirements for All Adjusters.[3] As such, a public adjustor is a not

[3] The regulations do not describe: (i) the insurance adjuster as an "agent" of the insured, (ii) recognize the insured as being the "weaker party" in the insured/insured adjuster relationship, or (iii) otherwise describe the insurance adjuster's role as one of dispensing advice or

fiduciary to the insured.

CONCLUSION

WHEREFORE, United Policyholders respectfully request this Court answer the certified question in the affirmative and hold that a public adjustor engaged on a contingency basis are not "interested" as a matter of law.

DATED March 31, 2021.

Respectfully submitted,

/s/ R. Hugh Lumpkin
REED SMITH LLP
1001 Brickell Bay Drive
Suite 900
Miami, FL 33131
T: (786) 747-0200
F: (786) 747-0299
R. Hugh Lumpkin
Florida Bar No. 308196
hlumpkin@reedsmith.com
Matthew B. Weaver
Florida Bar No. 42858
mweaver@reedsmith.com
Garrett Nemeroff
Florida Bar No. 111675
gnemeroff@reedsmith.com

/s/ Mark A. Boyle
BOYLE, LEONARD & ANDERSON, P.A.
9111 W. College Pointe Dr.
Fort Myers, FL 33919
T: (239) 337-1303
F: (239) 337-7674
Mark A. Boyle
Florida Bar No. 0005886
mboyle@insurance-counsel.com
Molly Chafe Brockmeyer
Florida Bar No. 105798
mbrockmeyer@insurance-counsel.com
E. Alysse Vautier
Florida Bar No. 1003844
avautier@insurance-counsel.com

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counsel. The regulations do not demand the insurance adjuster's loyalty to an insured, or even prioritization of the insured's interests, but, rather, only mandates a fair and honest treatment of the insured.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2021, a true and correct copy of the foregoing has been served via the Court's electronic filing system upon the following:

Anthony M. Lopez, Esq.
Joe De Prado, Esq.
Steven Gurian, Esq.
MARIN, ELJAIEK, LOPEZ & MARTINEZ, P.L.
2601 South Bayshore Drive
18th Floor Coconut Grove,
Florida 33133
T:(305) 444-5969
F: (305) 444-1939
eservice@mellawyers.com
rn@mellawyers.com
Counsel for the Respondent

Kara Berard Rockenbach, Esq.
David Noel, Esq.
LINK & ROCKENBACH, P.A.
1555 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
T: (561) 847-4408
Kara@linkrocklaw.com
David@linkrocklaw.com
Michelle@linkrocklaw.com
Counsel for the Petitioner

Wilbur E. Brewton, Esq.
Kelly B. Plante, Esq.
BREWTON PLANTE, P.A.
215 South Monroe
Suite 825
Tallahassee, FL 32301
T: (850) 222-7718
F: (850) 222-8222
wbrewton@bplawfirm.net
kbplante@bplawfirm.net
atriplett@bplawfirm.net
mprice@bplawfirm.net
Counsel for Amicus Curiae FAPIA

Paul B. Feltman, Esq.
Brian C. Costa, Esq.
ALVAREZ, FELTMAN, DA SILVA & COSTA, PL.
2525 S.W. 27th Avenue Suite 200
Coral Gables, FL 33133
T: 786-409-6000
F: 786-362-5175
pfeltman@afdc.legal
bcosta@afdc.legal
cosegueda@afdc.legal
Counsel for Amicus Curiae Phyllis Long

Kansas R. Gooden, Esq.
BOYD AND JENERETTE, P.A.
11767 S. Dixie Hwy., #274
Miami, FL 33156
T: (305) 537-1238
kgooden@boydjen.com
Counsel for Amicus Curiae FDLA

Nate Wesley Strickland, Esq.
L. Michael Billmeier, Jr., Esq.
COLODNY FASS 119 East Park Avenue
Tallahassee, Florida 32301
T: 850 577-0398
wstrickland@colodnyfass.com
mbillmeier@colodnyfass.com
Counsel for Amici Curiae FPCA and PIFF

Michael A. Cassel, Esq.
Hillary B. Cassel, Esq
CASSEL & CASSEL, P.A.
4000 Hollywood Blvd.
Suite 685-S
Hollywood, FL 33021
T: (954) 589-5504
F: (954) 900-1768
pleadings@cassel.law
Attorneys for Amicus Curiae FPC

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Bookman Old Style font and contains 3,733 words as required by the Florida Rules of Appellate Procedure.