

No. SJC-13535

**Commonwealth of Massachusetts
Supreme Judicial Court**

ZURICH AMERICAN INSURANCE COMPANY,
Plaintiff-Appellee,

v.

MEDICAL PROPERTIES TRUST, INC.,
Defendant-Appellant.

STEWARD HEALTH CARE SYSTEM, LLC,
Plaintiff-Appellant,

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE CO. AND
ZURICH AMERICAN INSURANCE CO.,
Defendants-Appellees.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF FOR UNITED POLICYHOLDERS AS
AMICUS CURIAE IN SUPPORT OF APPELLANTS**

Michael S. Levine (BBO # 633248)
Nicholas D. Stellakis (BBO # 644981)
HUNTON ANDREWS KURTH LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
mlevine@HuntonAK.com
nstellakis@HuntonAK.com

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 16(a)(2) and Supreme Judicial Court Rule 1:21, United Policyholders states that it is a non-profit 501(c)(3) organization. United Policyholders does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in United Policyholders.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders addresses the question certified by the United States Court of Appeals for the First Circuit:

Whether rainwater that lands and accumulates on either (i) a building's second-floor outdoor rooftop courtyard or (ii) a building's parapet roof and that subsequently inundates the interior of the building unambiguously constitutes "surface waters" under Massachusetts law for the purposes of the insurance policies at issue in this case?

United Policyholders¹ is uniquely qualified to address this question because it speaks on behalf of policyholders, has 32 years of experience reviewing and reporting on policies, claims, and sales transactions, regulations, and laws, and focuses on upholding the indemnification principle that underlies the purchase of insurance. Since 1991, United Policyholders has served as an information resource and voice for individual and commercial insurance consumers throughout the United States. Its work is supported by grants,

¹ Pursuant to Mass. R. A. P. 17(c)(5), United Policyholders confirms that: (a) no party or party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money to fund preparing or submitting the brief; (c) no person or entity other than United Policyholders contributed money that was intended to fund preparing or submitting a brief; and (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

donations, and volunteers. It focuses on three programmatic areas: Roadmap to Recovery (disaster recovery and claim help), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). United Policyholders provides a consumer-oriented voice based on its institutional experience and perspective, which helps to fill a gap that otherwise would exist between the well-organized insurance industry on the one hand and insurance consumers on the other.

Public officials, state insurance regulators, academics, and journalists routinely seek United Policyholders' input on insurance and legal matters. United Policyholders coordinates on a regular basis with state regulators on matters related to policy sales, claims, and consumer rights. Since 2009, its Executive Director has been appointed to represent consumers in the proceedings of the National Association of Insurance Commissioners ("NAIC"). United Policyholders serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

United Policyholders advances sound public policy on insurance matters by submitting *amicus curiae* briefs in numerous federal and

state courts. It has submitted *amicus curiae* briefs in matters before this Court.² The U.S. Supreme Court and state appellate courts have favorably cited United Policyholders' *amicus curiae* briefs.³ These briefs are invaluable because insurers are repeat players in insurance coverage litigation, but policyholders are not.

For all these reasons, United Policyholders respectfully asks this Court to consider this *amicus curiae* brief.

PRELIMINARY STATEMENT

The arguments of Zurich American Insurance Company ("Zurich") are legally wrong and pose a clear and present danger to coverage that

² Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534 (2022); Masonic Temple Ass'n of Quincy, Inc. v. Patel, 489 Mass. 549 (2021); Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 477 Mass. 343 (2017); Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813 (2014); Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621 (2007); John Hancock Mut. Life Ins. Co. v. Banerji, 447 Mass. 875 (2006); Western Alliance Ins. Co. v. Gill, 426 Mass. 115 (1997); Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund, 423 Mass. 165 (1996).

³ See, e.g., Humana Inc. v. Forsyth, 525 U.S. 299, 314 (1999); Sproull v. State Farm Fire Cas. Co., 2021 IL 126446, ¶ 53 (2021); Continental Ins. Co. v. Honeywell Int'l, Inc., 234 N.J. 23, 64 (2018); Allstate Prop. & Cas. Ins. Co. v. Wolfe, 629 Pa. 444, 452-453 (2014); Julian v. Hartford Underwriters Ins. Co., 35 Cal. 4th 747, 760 (2005).

policyholders in Massachusetts reasonably expect—damage from a leaky roof. This Court should answer the First Circuit’s question “No.”

Medical Properties Trust (“MPT”) suffered property damage when, *inter alia*, water entered its structure from a leaky roof. That damage is unambiguously covered by Zurich’s Policy, but Zurich wants to squeeze the coverage into the sublimited “Flood” coverage. Zurich argues that “Flood” encompasses rainwater that collects on an enclosed roof one or more stories above the ground, regardless of a property’s proximity to a body of water, because that rainwater is “surface water.” This is contrary to Massachusetts law and the plain meaning of that term and the term “inundation” used by Zurich in the definition of “Flood.”

A ruling in favor of Zurich would also harm millions of Massachusetts policyholders, both homeowners and businesses. That is because standard-form homeowners and commercial-property policies have long distinguished between water intruding from a leaky roof and floods. Water coming in through the roof is generally covered under most policy forms, at least in most instances in which a policyholder would expect coverage. If this Court were to hold that water coming in through a roof is a flood under Zurich’s Policy, these reasonable, and

settled, expectations will be upended. That is because every insurer in Massachusetts will claim that water damage from a roof leak is really damage from “surface waters.”

Nor would policyholders find safe harbor through flood-insurance policies. A policyholder whose dwelling or other structure is far from a body of water might find it shocking to need to seek flood insurance, but the search will likely be fruitless for two main reasons. First, standard flood-insurance policies do not cover leaky roofs—again, because those are not floods under any reasonable interpretation of that word. Second, the flood-insurance marketplace is ill equipped to price the risk from leaky roofs. After all, that marketplace prices risks based primarily on how close the structure is to a water body, not on choice of roof architecture, age of the structure, or other factors inherent to the integrity of the insured structure.

Zurich’s attempt to paint rainwater infiltrating through a roof as “surface waters” that resulted in “inundation” is a hindsight effort to erase the coverage it agreed to provide. Its arguments are legally flawed and harmful. They should be soundly rejected.

ARGUMENT

I. **Rain Coming Through a Roof Is Not a “Flood” Because “Surface Water” Does Not Cause “Inundation.”**

Zurich’s Policy unambiguously covers damage to property caused by water. RAII/0095 (insuring against “direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property”). Water damage is a “Covered Cause of Loss,” defined to be “[a]ll risks of direct physical loss of or damage from any cause unless excluded.”

[RAII/0147.] There is no exclusion or limitation for loss or damage from water. Ordinarily, this coverage includes damage from water that enters through the roof or through windows, just as Zurich originally concluded in this case.

Zurich tries to shoehorn water damage that MPT suffered here under the particularized definition of “Flood,” but under the plain text of Zurich’s Policy, water leaking through a roof is not a “Flood.” That is because water on a roof is not “surface water” and does not result in “inundation.” Because the provision on which Zurich relies is a sublimit on coverage, it is treated as exclusionary and therefore strictly construed against Zurich and in favor of coverage. See, e.g., Nelson v.

Cambridge Mut. Fire Ins. Co., 30 Mass. App. Ct. 671, 671-673 (1991) (interpreting sublimit as an “exclusionary clause”); see also 2 J.R. Plitt, S. Pitt, D. Maldonado & J.D. Rogers, Couch on Insurance § 22:31 (Nov. 2023) (words of limitations construed against insurer); Houston Specialty Ins. Co. v. Five Paces Inn Co., No. 1:19-CV-03319-CAP, 2019 WL 9633224, at *7 (N.D. Ga. Dec. 19, 2019), *aff’d*, 823 F. App’x 897 (11th Cir. 2020) (sublimits, as words of limitation, construed against insurer); New Jersey Transit Corp. v. Certain Underwriters at Lloyd’s London, 461 N.J. Super. 440, 463 (App. Div. 2019), *aff’d*, 245 N.J. 104, (2021) (same).

Zurich’s Policy defines “Flood” in relevant part as follows:

7.23. Flood - A general and temporary condition of partial or complete inundation of normally dry land areas or structure(s) caused by:

7.23.01. The unusual and rapid accumulation or runoff of surface waters, waves, tides, tidal waves, tsunamis, the release of water, the rising, overflowing or breaking of boundaries of nature or man-made bodies of water; or the spray there from all whether driven by wind or not

[RAII/0149.]

Water coming through a leaky roof is not “surface water” for the reasons MPT argues in its brief. MPT Br. at 20-50. “Surface waters are waters from rain, melting snow, springs, or seepage, or floods that lie or

flow on the surface of the earth and naturally spread over the ground but do not form a part of a natural watercourse or lake.” DeSanctis v. Lynn Water & Sewer Comm’n, 423 Mass. 112, 115 n.6 (1996); Boazova v. Safety Ins. Co., 462 Mass. 346, 354 (2012) (same); see 5 J.A. Appleman & J. Appleman, Insurance Law and Practice § 3145 (2d ed. 2011) (“‘[S]urface water’ is water which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state, and which follows no defined course or channel, which does not gather into or form a natural body of water, and which is lost by evaporation, percolation, or natural drainage.”).

Nor does water from a leaky roof result in “inundation” of the structure. Cross Queen, Inc. v. Director, Fed. Emergency Mgt. Agency, 516 F. Supp. 806, 807-808 (D.V.I. 1980). “Inundation” in this context means “the total water level that occurs on *normally dry ground* as [the] result of the storm tide, and is expressed in terms of height of water, in feet, above ground level.” National Weather Service, Defining Storm Surge, Storm Tide, and Inundation, https://ocean.weather.gov/defining_storm_surge.pdf. This in-from-below sense is how the term

“inundation” is used in the statutory⁴ and regulatory⁵ context in Massachusetts and throughout the country.⁶ It is also just how Zurich advertises its coverage. MPT Br. at 54.

⁴ G. L. c. 92A 1/2, § 1 (defining “Flood Plain” to be “the land adjoining a tributary, reservoir or surface water, which is subject to inundation from a flood having a 1 per cent chance of being equalled or exceeded in any given year, commonly known as the 100 year flood plain”); G. L. c. 111H, § 14(b)(3) (requiring site selection for radioactive waste to minimize upstream drainage areas “to decrease the amount of run-off which could erode or inundate the waste management area”).

⁵ 302 Code Mass. Regs § 10.03(2) (defining “Inundation Map” to be “[a] map delineating the area that would be flooded by a particular flood event or dam failure”); 310 Code Mass. Regs. § 13.02 (“Flooding means a local and temporary inundation or rise in the surface water level of any inland water such that it inundates or overflows land not usually under water.”); 310 Code Mass. Regs. § 10.57(2)(a) (“Bordering Land Subject to Flooding is an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies; where a bordering vegetated wetland occurs, it extends from said wetland.”); 310 Code Mass. Regs. § 43.02 (defining “Coastal High Hazard Zone” as “coastal zones identified by the Office of Coastal Zone Management which are subject to any inundation caused by coastal storms up to and including that caused by the 100 year storm, surge of record or storm of record whichever is greater including coastal beaches, coastal dunes, barrier beaches, coastal banks and rocky intertidal shores”); see also 302 Code Mass. Regs. § 10.03(2) (defining “Dam Break Analysis” as “determination of a flood hydrograph, resulting flood levels and inundation area resulting from a dam breach”); 310 Code Mass. Regs. § 10.04 (defining “Land Subject to Coastal Storm Flowage” as “land subject to any inundation caused by coastal storms up to and

— *footnote cont’d* —

This is consistent with other provisions in Zurich’s Policy. Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc., 480 Mass. 480, 485 (2018) (interpret policy as a whole and in accord with policyholder’s reasonable expectations). The Zurich policy sets sublimits for Flood coverage that correspond to ratings of the Federal Emergency Management Agency (“FEMA”). [RAII/0099.] For example, the policy sublimits coverage to

including that caused by the 100-year storm, surge of record or storm of record, whichever is greater”); 302 Code Mass. Regs. § 10.11 (requiring a “dam failure inundation” map for high-hazard-potential dams and significant-hazard-potential dams); 310 Code Mass. Regs. § 43.21 (defining exclusion criteria for selection of sites for low-level radioactive waste to include sites where surface runoff could inundate site or areas subject to inundation by dam failure); 310 Code Mass. Regs. § 43.45(9) (“downstream inundation flood zone” from dam for purposes of screening report related to radioactive-waste storage may be determined based on state records); 310 Code Mass. Regs. § 43.61(12) (requiring evaluation of potential radioactive-waste-storage sites downstream of dams for potential risk of inundation); 313 Code Mass. Regs. § 11.03 (defining “Flood Plain”).

⁶ E.g., N.D. Cent. Code § 61-02-81 (“For purposes of this section, ‘breach inundation zone’ means the area downstream of the dam which would be flooded in the event of a dam failure or uncontrolled release of water.”); Md. Code, Nat. Res. § 3-1001(j) (“‘Sea level rise inundation’ means the inundation of land from a sea level rise of 2 feet”); Or. Rev. Stat. § 401.950(1)(b) (“‘Tsunami inundation zone’ means an area of expected tsunami inundation, based on scientific evidence that may include geologic field data and tsunami modeling”); Va. Code § 10.1-604(b) (“‘Dam break inundation zone’ means the area downstream of a dam that would be inundated or otherwise directly affected by the failure of a dam.”).

\$20 million for locations “with any part of the legal description within a Special Flood Hazard Area (SFHA)” Id. Some locations within the SFHA have an even lower limit of \$10 million. Id. In contrast, locations in a Moderate Flood Hazard Area (“MFHA”) have a \$100 million limit, with specific locations subject to limits of \$20 million and \$10 million. Id.

This makes sense under the traditional understanding of “Flood” as denoting waters that come from the bottom up. FEMA rates flood risk in just this way, as described below. Those rating factors do not take into account the type of roof—because that is not where a Flood comes from. FEMA, Rate Explanation Guide (Mar. 2022), https://www.fema.gov/sites/default/files/documents/fema_rate-explanation-guide.pdf. They account for proximity to bodies of water.

This is also how Zurich has advertised its products. According to Zurich, the three most common types of floods are fluvial (river floods), coastal floods, and pluvial floods (flash floods and surface water floods). Three Common Types of Floods Explained, Zurich, Apr. 20, 2023, <https://www.zurich.com/en/knowledge/topics/flood-and-water-damage/three-common-types-of-flood>. “Surface water floods occur when

an urban drainage system is overwhelmed and water *flows out into streets and nearby structures*” (emphasis added). *Id.* Areas most at risk for surface-water flooding are where there is “run-off from surrounding areas into a central low-lying land.” *The Threat From Above: Pluvial Flooding*, Zurich, July 22, 2020, <https://zurich.com/en/knowledge/topics/flood-and-water-damage/the-threat-from-above>. Similarly, “[c]oastal flooding is the *inundation* of land areas along the coast by seawater. Common causes of coastal flooding are intense windstorm events occurring at the same time as high tide (storm surge), and tsunamis” (emphasis added). *Three Common Types of Floods Explained*, Zurich, *supra*. Water coming through a roof is not even mentioned.

A reasonable policyholder reading Zurich’s definition of Flood would not conclude that it encompass water on a building’s roof. See *Dorchester Mut. Ins. Co. v. Krusell*, 485 Mass. 431, 440 (2020) (“Words are, at least in part, defined by the company they keep . . .”). The terms “surface water” and inundate” as used in the policy do not refer to water that has collected on a roof, but rather to a traditional flood, which comes in from the ground.

II. Denial of Coverage Would Harm Massachusetts Homeowners and Commercial-Property Owners.

Homeowners and commercial-property policies in Massachusetts distinguish between water coming through a leaky roof and floods, covering the former (at least in some circumstances) and excluding the latter. A holding in this case that broadens the definition of “flood” to include water coming through a roof would have the effect of removing coverage for leaky roofs from millions of policyholders in Massachusetts. That is because insurers will argue that leaky roofs are a form of Flood and, for that reason, excluded from coverage. Homeowners and commercial-property owners will then be forced to seek flood insurance for leaky roofs. But the flood-insurance marketplace does not cover this, and it rates flood risk based on proximity to bodies of water, not on architecture. Millions will have their reasonably expected coverage erased.

A. Most Massachusetts property policies cover leaky roofs.

Most homeowners and commercial-property policies in Massachusetts cover water infiltrating through the roof, at least in most circumstances. For example, one commonly used homeowners

policy form covers damage from water coming through the roof under its broad form coverage for “direct physical loss” to insured property. ISO Form HO 00 05 03 22, at 12 (2021). Another commonly used form offers the same coverage to a dwelling or structure but has the following language as to personal property, which has long been understood to cover water coming through the roof when there is damage to the roof:

This peril does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening.

ISO Form HO 00 03 03 22, at 12 (2021). Another form contains essentially the same quoted language, applicable to the dwelling, structure, or personal property. ISO Form HO 00 02 05 11, at 9 (2021).

The Zurich policy at issue here—which covers water coming through the roof under its broad-form coverage for physical loss of or damage from any cause unless excluded—is similar to standard forms covering commercial properties in Massachusetts. ISO Form CP 10 30 09 17 (2016). Other policies cover water damage through a provision stating that the policy covers:

Windstorm or Hail, but not including:

. . .

Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters

ISO FORM CP 00 99 10 12, at 3 (2011).

B. Most Massachusetts property policies exclude floods.

Neither standard homeowners policies nor standard commercial-property policies cover “flood” understood in its conventional sense, i.e., waters that build up from the ground (rather than intrude from above). Standard homeowners forms exclude “Water,” defined in relevant part to be: “Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge.” E.g., ISO Form HO 00 05 03 22, supra pp. 14-15; see ISO Form HO 00 03 03 22, supra pp. 14-15; ISO Form HO 00 02 05 11, supra p. 11. To a similar effect are the commercial property water exclusions. E.g., ISO Form CP 10 30 09 17, supra p. 2; ISO Form CP 00 99 10 12, supra p. 11; see generally Massachusetts Division of Insurance, Is My Flood Damage

Covered?, <https://www.mass.gov/info-details/is-my-flood-damage-covered>.

Thus, to accept Zurich's argument would turn these coverage on their head at the expense of Massachusetts policyholders. Ordinarily covered water loss from water through the roof would become excluded "flood," grossly expanding those policies' previously narrow categories of excluded water.

C. A ruling denying coverage in this case would erase coverage for leaky roofs from millions of Massachusetts homeowners and commercial-property owners.

If this Court were to agree with Zurich, that water coming through a leaky roof is a "flood," millions of homeowners and commercial-property owners in Massachusetts will lose coverage for roof leaks. That is because insurers will doubtless argue that the same or similar language in their standard-form policies requires the same result.

Take, for example, a homeowner whose structurally sound, well-maintained roof suffers water intrusion when roofing shingles are blown off during a microburst. That homeowner, under standard policy forms, would reasonably anticipate coverage for the resulting damage

emanating from above. If, however, this Court accepts Zurich's argument, that homeowner will be out of luck. The insurance company will doubtless claim that coverage is excluded because the homeowner suffered a "flood" because water landed on the surface of the roof before infiltrating into the home.

This holds true even for those homeowners forms that explicitly refer to rain entering through roof damage. Insurers will cite the principle that exceptions to exclusions do not affirmatively create coverage. Donovan v. Commercial Union Ins. Co., 44 Mass. App. Ct. 596, 602 (1998). Under this principle, because exclusions "*subtract* from coverage rather than grant it," an exception just prevents the exclusion from applying under stated circumstances. Id., quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979). Insurers can be expected to use this principle to argue that the water or flood exclusion applies notwithstanding the exception to the exclusion.

D. A denial of coverage will result in leaky roofs becoming practically uninsurable.

If coverage is denied in this case, leaky roofs will become uninsurable under policies commonly used today. That is because flood coverage is written to apply to "floods" in the conventional sense, not

leaky roofs. And even if that were otherwise, insurance companies could not possibly write conventional flood coverage to cover the millions of new entrants to that marketplace under current flood-rating rules.

1. Flood insurance will not cover leaky roofs.

Flood insurance generally does not cover leaky roofs.

The FEMA Standard Flood Insurance Policy defines “Flood” in relevant part as follows:

1. A general and temporary condition of partial or complete inundation of two or more acres of normally dry land area or of two or more properties (one of which is your property) from:

- a. Overflow of inland or tidal waters,
- b. Unusual and rapid accumulation or runoff of surface waters from any source,
- c. Mudflow.

FEMA, Standard Flood Insurance Policy, Dwelling Form (F-122), at 1 (Oct. 2015), https://www.fema.gov/sites/default/files/2020-05/F-122_Dwelling_SFIP_102015.pdf.

This language does not encompass rainwater infiltrating a structure from above. Flamingo S. Beach I Condominium Ass’n, Inc. v. Selective Ins. Co. of Southeast, 492 F. App’x 16, 20 (11th Cir. 2012)

(“Although it is not defined in the policy, the term ‘surface waters’ is not

ambiguous because it has a generally accepted meaning. Legal treatises uniformly define ‘surface waters’ as waters that ‘fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground, following in no defined course or channel’ ” (citation omitted.); Cross Queen, Inc., 516 F. Supp. at 807-808 (“Since flood waters did not rise from the ground floor to reach the upper floors of plaintiff’s hotel, the water which affected the upper floors did not emanate from the ‘inundation of normally dry land areas,’ as required by the [standard flood insurance policy].”).

This is the exact position that FEMA takes:

Your flood insurance policy only covers physical damage directly caused by a flood. For example, an NFIP policy covers damage caused by water entering your home from the ground up due to storm surge, heavy rainfall or the overflow of a body of water, such as a lake or river.

...

However, if rain is propelled into a covered structure by wind, that is considered **wind-driven rain** and is not covered under your flood insurance policy. The same is true if your roof is damaged and water enters through the ceiling. That is **water damage as a result of wind damage** and is not covered under your flood insurance policy.

FEMA, Wind Damage Versus Floodwater Damage: What You Need to Know When Filing a Claim (updated May 10, 2023),

<https://www.fema.gov/fact-sheet/wind-damage-versus-floodwater-damage-what-you-need-know-when-filing-claim>.

Policyholders turning to the flood-insurance marketplace for damage from leaky roofs will face a dead end.

2. Flood insurance is not equipped to cover leaky roofs.

Even if flood insurance could cover leaky roofs, the flood-insurance market is not equipped to take in the millions of new policyholders who will now need that coverage. This is for the simple reason that flood insurance is not priced based on roof architecture or geometry but on proximity to water. Flood insurers would have no means to measure the risk and will almost certainly decline to take on unknown liability such as this.

The federal government has been the primary provider of flood insurance for 60 years, and has been so because of private insurers' exodus from the market. While private flood insurance was common between 1895 and 1927, the private market all but dried up in response to extensive flooding around the Mississippi River in 1927. S.G. Knowles & H.C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 *J. Policy History* 327,

332 (2014) (“Troubled Waters”). Private insurers determined that “the flood peril was uninsurable because of the catastrophic nature of flooding, the difficulty of determining accurate rates, the risk of adverse selection, and the concern that they could not profitably provide risk-based flood coverage at [an affordable] price” D.P. Horn & B. Webel, Congressional Research Service, R45242, Private Flood Insurance and the National Flood Insurance Program, at 10 (updated Jan. 9, 2023), <https://crsreports.congress.gov/product/details?prodcode=R45242>.

In the years following the 1927 floods, political leaders like President Eisenhower called for a national system of flood insurance. *Troubled Waters*, *supra* p. 327. In 1956, the Federal Flood Insurance Act was passed, but the program was defunded in 1957. *Id.* at 332. Then, in 1965, Hurricane Betsy inundated New Orleans, becoming the country’s first billion-dollar hurricane. National Association of Insurance Commissioners & Center for Insurance Policy Research, CIPR Study: Flood Risk and Insurance, at 23 (Apr. 2017), https://content.naic.org/sites/default/files/inline-files/cipr_study_1704_flood_risk.pdf.

Enter the National Flood Insurance Act of 1968. In recognition of the lack of coverage offered by the private market and in the face of Hurricane Betsy and other natural disasters, the U.S. Congress established the NFIP. *Trouble Waters*, supra p. 327. The NFIP aims “to provide access to primary flood insurance” while also mitigating “the nation’s *comprehensive* flood risk through the development and implementation of floodplain management standards.” D.P. Horn & B. Webel, Congressional Research Service, R44593, Introduction to the National Flood Insurance Program (NFIP), at 2 (updated Jan. 25, 2024), <https://crsreports.congress.gov/product/details?prodcode=R44593>. And an essential component of the NFIP’s mission is developing flood maps.

FEMA, NFIP’s administrator, is responsible for developing nationwide flood maps that identify areas with special flood, mudslide, and flood-related erosion hazards. Supra p. 3. In coordination with participating communities, FEMA develops Flood Insurance Rate Maps (“FIRMs”) that depict an area’s flood risk and flood plain. As the name suggests, the FIRM, in part, establishes the premium to be charged for flood insurance in a particular area.

The FIRM delineates the Special Flood Hazard Area (“SFHA”)—that is, an “area that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year.” FEMA, Flood Zones, <https://www.fema.gov/glossary/flood-zones>. Within the SFHA, areas are divided into zones based on the type of flood risk, e.g., tidal flooding, mudslides, and undetermined risks. Horn & Webel, Introduction to the National Flood Insurance Program (NFIP), *supra* pp. 3-4. Critically, FIRM data is used by the private insurance industry to assess risk and establish premiums. R. Williams, L. Medders, D. Marlett, C. Lattimore & D. Evans, Flood Insurance Redesign: Regulatory Considerations for a Viable and Sustainable Private Market, Appendix B J. Ins. Regulation (2023), <https://content.naic.org/sites/default/files/cipr-jir-2023-1.pdf>.

Flood risk is determined primarily by a property’s location and how it is built, through variable inputs that have changed over time. FEMA, Rate Explanation Guide, *supra*. The property’s physical location is used to determine (1) its proximity relative to flood sources including the coast, ocean, rivers, and Great Lakes, (2) ground elevation, i.e., where the building is located relative to the elevation of the

surrounding area and nearby flood sources, and (3) other factors such as whether the property is located on a barrier island or situated near a dam or levee. Additionally, some building characteristics are also important to determining flood risk. Among the building properties that FEMA considers are: (1) the type and use of the building, (2) the foundation type, (3) first-floor height, (4) number of floors, (5) unit location, (6) construction type, (7) flood openings, and (8) whether machinery and equipment are located on the ground floor.

Insurers do not consider roof type or geometry. Policyholders would be seeking flood insurance for a risk—roof leaks and the like—for which flood insurers have no experience and thus no way to evaluate and price. The result would be either that insurers would decline to issue flood policies covering such risks, or, if they do, the market for flood insurance will be turned upside down when insurers’ methods of rating flood risk are tossed out the window.

E. Policyholders reasonably expect their policies to cover water intruding from the roof.

Most policyholders in Massachusetts would be shocked to learn that water infiltration from a leaky roof was excluded as a “flood.”

Neither Zurich’s Policy nor the standard forms cited above unambiguously require that result. See Dorchester Mut. Ins. Co. v. Miville, 491 Mass. 489, 494 (2023) (considering insured’s reasonable expectations as to coverage when provision was ambiguous).

Homeowners, businesses, and other policyholders will suddenly be without coverage for damage from a leaky roof because the standard language—understood for decades to cover leaky roofs—is suddenly not enough. The disruption to the insurance marketplace and policyholders’ reasonable expectations will be immense.

If Zurich wanted to exclude coverage for water infiltrating from a roof, it was required to do so clearly and unambiguously. Liquor Liab. Joint Underwriting Ass’n of Massachusetts v. Hermitage Ins. Co., 419 Mass. 316, 322 (1995). This Court should not rewrite the Policy for Zurich and, in the process, through precious coverage and long-settled policyholder expectations into doubt.

CONCLUSION

For the foregoing reasons, this Court should answer “No” to the question certified by the First Circuit.

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Respectfully submitted,

/s/Nicholas D. Stellakis

Michael S. Levine (BBO # 633248)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
mlevine@HuntonAK.com

Nicholas D. Stellakis (BBO # 644981)
HUNTON ANDREWS KURTH LLP
60 State Street, Suite 2400
Boston, Massachusetts 02109
(617) 648-2800
nstellakis@HuntonAK.com

Of counsel:

Lorelie S. Masters
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
lmasters@HuntonAK.com

Torrye N. Zullo
HUNTON ANDREWS KURTH LLP
200 Park Avenue
New York, NY 10166
(212) 309-1277
tzullo@HuntonAK.com

*Counsel for Amicus Curiae, United
Policyholders*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of this Court that pertain to the filing of *amicus* briefs, including, but not limited to, Rule 16, 17, and 20. This brief complies with the length of Rule 20(a)(3)(E) because it is set in 14-point Century Schoolbook font, and contains 3,930 non-excluded words using Microsoft Word for Microsoft 365 MSO (Version 2308 Build 16.0.16731.20542) 32-bit.

/s/Nicholas D. Stellakis
Nicholas D. Stellakis (BBO # 644981)

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Mass. R. A. P. 13(e) on this 14th of March, I served this *amicus* brief in support of Appellants by directing an electronic copy of the foregoing brief to the counsel of record via Odyssey eFILE MA and electronic mail.

/s/Nicholas D. Stellakis
Nicholas D. Stellakis (BBO # 644981)