IN THE SUPREME COURT OF FLORIDA
Case No. SC21-172

JON DOUGLAS PARRISH,

Petitioner,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Respondent.

AMICUS BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF RESPONDENT STATE FARM FLORIDA INSURANCE COMPANY

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. Since its founding, the Institute has advocated for practices that build faith in Florida's court system. It represents a broad range of participants in the business community who share a substantial interest in a balanced litigation environment that treats plaintiffs and defendants evenhandedly.

The Institute submits this amicus curiae brief in support of Respondent to address why the Court should approve the Second District's decision in *State Farm Florida Insurance Co. v. Parrish*, 312 So. 3d 145 (Fla. 2d DCA 2021), which held that a public adjuster who has a contingency interest in an insured's appraisal award or who represents an insured in an appraisal process may not serve as a "disinterested appraiser" under a policy's appraisal provision. This Court should quash the Third District Court of Appeal's decisions in *Brickell Harbour Condominium Ass'n v. Hamilton Specialty Insurance Co.*, 256 So. 3d 245 (Fla. 3d DCA 2018) *Rios v. Tri-State Insurance*

Co., 714 So. 2d 547 (Fla. 3d DCA 1998), and *Galvis v. Allstate Insurance Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998), which ruled to the contrary.

The Institute's members are frequently affected by abusive and excessive litigation in property insurance matters, which is all too often driven by the use of conflicted public adjusters who inflate appraisal awards due to self-interest. Thus, the Institute can offer a unique perspective from insurers and other industries on how abusive insurance litigation, including those driven by public adjusters, financially impacts insurers. This abuse causes skyrocketing rates for policyholders which only adds to the ongoing property insurance crisis in Florida, and ultimately, an adverse and unjust impact on Florida's businesses and citizens.

SUMMARY OF ARGUMENT

This Court should approve the Second District's decision below, quash the Third District's decisions in *Rios*, *Galvis*, and *Brickell*, and hold that a public adjuster who has a contingency interest in an insured's appraisal award or who represents an insured in an appraisal process may not serve as a "disinterested appraiser" under a policy's appraisal provision.

The foundation upon which the *Rios* and *Galvis* decisions rely is gone, to the extent that foundation appropriately applied in the first place. *Rios* and *Galvis*—both decided in 1998—rely on outdated provisions from the first *Code of Ethics for Arbitrators in Commercial Disputes* that went into effect in 1977. The newest version of the Code, approved in 2004, excludes the language at the crux of these decisions and unequivocally imposes a presumption of neutrality.

There have also been significant changes to Florida's legal landscape since *Rios* and *Galvis* were decided more than 20 years ago. Florida's property insurance crisis has worsened and related litigation has been trending steeply upwards. Public adjusters are among the cost drivers contributing to the excessive property insurance lawsuits in Florida, resulting in rising rates and insurers

exiting the state. Consequently, a decision confirming that adjusters may not have conflicting interests in the appraisal process will disincentivize litigation driven by interested appraisers and help stabilize the insurance market.

Thus, this Court should approve the Second District's decision below, quash the Third District's erroneous decisions in *Rios*, *Galvis*, and *Brickell*, and confirm—in line with every other district court of appeal other than the Third to address the question—that disinterested appraisers must truly be disinterested.

ARGUMENT

This Court should hold that a public adjuster who has a contingency interest in an insured's appraisal award or represents an insured in an appraisal process may not serve as a "disinterested appraiser" under a policy's appraisal provision.

Petitioner Jon Parrish has raised two main arguments challenging the Second District's decision finding that his public adjuster's colleague should have been barred from serving as the "disinterested" appraiser under the policy he holds with State Farm Florida Insurance Company. The first argument is that the policy language does not explicitly prohibit Parrish from compensating his appraiser with a contingency fee. (IB at 10-22). Parrish also argues the policy does not prohibit him from appointing his public adjuster as his appraiser because the appraiser does not owe a fiduciary duty to Parrish. According to Parrish, prohibiting such an appointment would result in a significant increase in pre-appraisal litigation and would deny access to appraisal for insureds. (IB at 23-36).

This Court should reject those arguments and rule that the Second District appropriately held that an adjuster is not "disinterested" after entering into a contingent-fee agreement with

the insured or representing an insured in an appraisal process. The Institute encourages this Court to quash the Third District's decisions to the contrary in *Rios*, *Galvis*, and *Brickell*.

A. This Court should quash the Third District Court of Appeal's decisions in *Rios*, *Galvis*, and *Brickell* and approve the Second District Court of Appeal's decision in *Parrish*.

In arguing that the language of his policy with State Farm did not bar him from appointing his public adjuster as his appraiser, Parrish relies heavily on the Third District's decisions in *Rios*, *Galvis*, and *Brickell*. Before explaining why those decisions are erroneous and/or abrogated, we briefly discuss the relevant facts and holdings in each.

In *Rios*, the appraisal clause in the insurance contract required each party to select "a competent, *independent* appraiser" (emphasis added). 714 So. 2d at 548. From there, the two party-designated appraisers were to select a "competent, impartial umpire." *Id.* The insurer moved to dismiss the suit, arguing that the insureds' appraiser was not "independent," as required by the appraisal clause, because the appraiser's compensation was based on a contingency percentage of the insureds' recovery. *Id.* at 549.

In reaching its holding, the Third District looked to the dictionary definition of "independent":

> [T]his language calls for the appointment of an outside appraiser, unaffiliated with the parties. This means that a party cannot appoint himself, herself, or itself, nor can a party appoint the party's employee. If a firm is designated to do the appraisal, it must be unaffiliated with the appointing party, that is, it cannot be a firm in which the appointing party has an ownership interest.

Id.

The court declined to apply out-of-state case law that prohibits the use of contingency fees for a party-appointed appraiser. *Id.* The court reasoned that the language in the contract requiring an "independent" appraiser did not limit the type of compensation an insured may pay the appraiser. *Id.* at 549.

The Third District also applied provisions from the *Code of Ethics for Arbitrators in Commercial Disputes* ("Code") in approving the use of a contingent fee agreement. *Id.* at 550. Canon IIA(1) of the Code states that "persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration." *Id.* Pursuant to Canon VIB(2), a direct or indirect financial interest in the outcome of the arbitration does not require the disqualification of a party-

appointed arbitrator. *Id.* Thus, the court determined that under the Code, an interest in the outcome of an appraisal is not a basis for disqualification of an appraiser, but it must be disclosed. *Id.*

The issue and procedural posture of *Galvis* were identical to those in *Rios*. However, the appraisal clause in *Galvis* required each party to select a "competent and *disinterested* appraiser." 721 So. 2d at 421 (emphasis added). The court rejected the insurance company's argument that this variation in language made any legal difference. *Id.* The court held that the contingent-fee appraiser appointed by the insured was therefore fully qualified under the appraisal clause and directed the parties to make the disclosures required by the Code. *Id.*

In *Brickell*, the insurance policy required each party to select a "competent and *impartial* appraiser." 256 So. 3d at 245 (emphasis added). The insurer appointed an employee of a building consultant that the insurer had also hired, which the insured condominium association challenged as a breach of the policy. *Id.* at 248. The Third District concluded that "'impartiality' means something other than the 'dictionary definition' as it relates to appraisers appointed and paid by the parties," and agreed with the trial court that the insurer's appointment did not warrant disqualification. *Id.* at 249.

As explained below, this Court should quash the Third District's decisions and instead approve the Second District's decision which aligns with both the Fourth District and Fifth District Courts of Appeal.

B. *Rios* and *Galvis* rely on outdated provisions from the *Code of Ethics for Arbitrators in Commercial Disputes.*

The 1998 *Rios* and *Galvis* decisions hinged in large part on the *Code of Ethics for Arbitrators in Commercial Disputes*. But the critical language in the Code upon which the Third District relied has materially changed since *Rios* and *Galvis* were decided, undermining any ongoing value of these decisions.

In 1977, the American Bar Association ("ABA") House of Delegates unanimously approved the first version of the Code. Howard M. Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, The Business Lawyer Vol. 33, No. 1, November 1977 at 309. This Code was prepared by a joint committee which included a special committee of the American Arbitration Association ("AAA") and a special committee of the ABA. *Id.* at 309-10.

In 2003, the Code was revised by an ABA Task Force and a special committee of the AAA. *AAA/ABA Revised Code of Ethics*

Provides Important Guidance on Arbitrators' Conduct, Corporate Counsel Business Journal (Jan. 1, 2005), https://ccbjournal.com/articles/aaaaba-revised-code-ethics-provides-important-guidance-arbitrators-conduct. This updated version of the Code was approved by the Executive Committee of the Board of Directors of the AAA in September 200, and it was approved by the ABA House of Delegates in February 2004. *Id.* It became effective in March of 2004. *Id.*

In the 2004 Code, Canon II still requires arbitrators to disclose "[a]ny known direct or indirect financial or personal interest in the outcome of the arbitration." However, it also includes a "Note on Neutrality," stating:

> [I]t is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.
> This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide

> otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality.

The Code of Ethics for Arbitrators in Commercial Disputes 2 (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

This added language establishes a presumption of neutrality for arbitrators that did not exist in 1998 when *Rios* and *Galvis* were decided. This "fundamental change" in the Code destroys the very premise on which the *Rios* and *Galvis* decisions relied, and the Court should affirmatively quash them. *See Fla. Ins. Guaranty Ass'n v. Branco*, 148 So. 3d 488, 495 (Fla. 5th DCA 2014) ("Unlike the Code of Ethics relied upon in *Rios*, the current Code of Ethics establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators. This fundamental change undermines the *Rios* holding . . .").

C. There have been significant changes to Florida's legal landscape since *Rios* and *Galvis* were decided.

When *Rios* and *Galvis* were decided in 1998, Florida's property insurance market was stable. But the current, out of control

insurance litigation climate further underscores why any continual reliance on *Rios* and *Galvis* is untenable.

In recent years, trends in litigation over property insurance claims in Florida have been consistently many times higher than any other state. *See* Letter from David Altmaier, Comm'r of Off. of Ins. Regul., to Rep. Blaise Ingoglia, Chair of House State Affairs Comm. (Apr. 2, 2021), https://floir.com/siteDocuments/ChairIngoglia04022021.pdf.[1] In 2019, Florida accounted for 8.16% of all homeowners' claims opened by insurance companies in the United States. *Id.* However, that same year, Florida accounted for 76.45% of all homeowners' suits filed against insurance companies in the United States. *Id.* This is an astounding disparity, but it's not an anomaly. From 2016 to 2018, Florida had less than 20% of the nation's homeowners' claims, but 65-85% of the lawsuits filed by homeowners. *Id.*

[1] In Commissioner Altmaier's letter to Chair Ingoglia, he wrote: "While we continue to explore these and other possibilities to explain the disparity, [the Office of Insurance Regulation] does not have a readily available explanation for Florida's outlier status other than to simply state that Florida is experiencing far more claims-related litigation than the 47 other reporting states."

In 2021 alone, Floridians filed roughly 100,000 lawsuits against insurance companies, and it is estimated that 90% of those lawsuits are frivolous. *See* Michael Hudak & Matthew Seaver, *Floridians Running Out of Options for Home Insurance,* WINK News, Feb. 17, 2022, https://www.winknews.com/2022/02/17/floridians-running-out-of-options-for-home-insurance/. Insurance companies are not holding up against the litigation abuse. Five insurance companies are pulling out of Florida in 2022, and only 3 of 52 insurance companies made a profit in Florida last year. *Id.* As options shrink and rates rise, homeowners are forced to rely on Citizens Property Insurance Corporation ("Citizens")—the state's insurer of last resort. *Id.* Around 777,000 Floridians now insure their homes with Citizens, which is approximately 222,000 more policies compared to 2020. *Id.*

To make matters worse, cost drivers in a number of industries, including public adjusting, have used abusive solicitation and marketing tactics to manipulate the claims process. *See* Fla. Ass'n of Ins. Agents, *New Resource to Help Consumers Understand the Florida Insurance Market* (Jan. 3, 2022),

https://www.faia.com/blogs/newsroom/january-2021/new-resource-to-help-consumers-understand-the-flor. Litigation with homeowners cost Florida's property insurers $15 billion between 2013 and 2020. *Id.* Only 8% of that amount was paid to consumers. Plaintiffs' lawyers got 71%. *Id.*

Abusive litigation is driving up the cost of property insurance in the state. In 2020, Florida homeowners paid on average $651 more than people in nearby states such as Georgia and Alabama, and that gap was projected to increase to $866 in 2021. *Id.*

In 2021, Governor Ron DeSantis signed Senate Bill 76 in response to skyrocketing property insurance premiums. *See* Ch. 2021-77, § 12, Laws of Fla. (creating § 627.70152, Fla. Stat.). This law provides a new framework for the award of attorney's fees to insureds in lawsuits arising under a property insurance policy. Specifically, the amount of reasonable attorney's fees awarded to an insured are calculated based on a formula that better aligns with the degree of success the insured attained in the suit. *See* § 627.70152(8), Fla. Stat. (providing that if the difference between the amount obtained by the insured and the insurer's pre-suit offer is (1) less than 20 percent of the disputed amount the insured may not be

awarded attorney fees; (2) at least 20 percent but less than 50 percent of the disputed amount, the insurer pays fees equal to the percentage of the disputed amount obtained times the total fees and costs; and (3) at least 50 percent of the disputed amount, the insurer pays the full amount of fees and costs).

Even with the reforms made in 2021, however, Florida's property insurance market is still crashing. Governor DeSantis recently called a special session of the Legislature to address this ongoing crisis. *See* Proclamation, April 26, 2022, https://www.flgov.com/wp-content/uploads/2022/04/SKM_C750i22042614070.pdf. In his proclamation, Governor DeSantis states:

> [I]n 2021, four insurance companies writing homeowners coverage have either gone insolvent or required midterm cancelations, and in the last three months, three insurance companies writing homeowners coverage in Florida have gone insolvent and are either in liquidation or rehabilitation and numerous others have non-renewed policies or ceased writing new business, leaving tens of thousands of policyholders seeking coverage with limited options in the marketplace."

Id.

The session is set to begin in just three weeks as "it is necessary for the State of Florida to act to stabilize the insurance market for

Florida policyholders before the 2022 Atlantic Hurricane Season, which begins on June 1st, 2022 and ends on November 30th 2022." *Id.*

It is against this backdrop that this Court must now resolve the conflict between the Second District's decision below and the Third District's decisions in *Rios*, *Galvis*, and *Brickell*. The legal landscape has drastically changed in the more than two decades since *Rios* and *Galvis* were decided, and public adjusters have been emboldened to drive excessive and abusive litigation at least in the Third District citing *Rios* and *Galvis* (and now *Brickell*) as support. Allowing these decisions to stand in the face of the ongoing crisis is unsustainable.

D. A majority of Florida's District Courts of Appeal agree that an appraiser cannot be "disinterested" after entering into a contingent-fee agreement with the insured or representing the insured in the appraisal process.

To bring further stability to the property insurance market, this Court must resolve the inter-district conflict about party-appointed appraisers by approving the Second District's decision. The Third District's precedent on this issue does not align with that of Florida's other district courts. Every other district court that has addressed a public adjuster's ability to serve as a "disinterested" appraiser has

concluded that they may not serve as one if they are working for the insured under a contingent fee agreement.

The Fourth District considered the issue under facts similar to this case:

> Here, the insured signed a contract with the public adjuster entitling the public adjuster to a portion of any recovery from the insurer and assigning a portion of the claim to the public adjuster. Next, the public adjuster inspected the property and submitted the claim to the insurance company. Later, the public adjuster sent a letter appointing himself the appraiser. On the facts of this case, we easily conclude the public adjuster was not "disinterested" and reverse the circuit court's judgment.

State Farm Fla. Ins. Co. v. Valenti, 285 So. 3d 958, 960 (Fla. 4th DCA 2019) (holding that a public adjuster who entered into a contingency arrangement with the insured was not "disinterested").

The Fifth District has—on multiple occasions—addressed the meaning of the term "disinterested" in insurance policies. *See Fla. Ins. Guaranty Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014); *State Farm Florida Insurance Co. v. Crispin*, 290 So. 3d 150 (Fla. 5th DCA 2020); *State Farm Florida Insurance Co. v. Cadet*, 290 So. 3d 1090 (Fla. 5th DCA 2020); *Florida Insurance Guaranty Ass'n v. Hanse*, 150 So. 3d 1272 (Fla. 5th DCA 2014). For example, in 2014, that court held that policy language including the phrase

"disinterested appraiser" barred an insured's attorney from serving in the role because "[t]he policy provision . . . expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested." *Branco*, 148 So. 3d at 496. As noted above, the court also assessed the applicability of the Code:

> Unlike the Code of Ethics relied upon in *Rios*, the current Code of Ethics establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators. This fundamental change undermines the *Rios* holding, particularly when, as here, the contract requires the appointment of "disinterested" appraisers. If an appraiser owes his nominating party a "fiduciary duty of loyalty" or a "confidential relationship," as do attorneys, then "[t]he existence of such a relationship between a litigant and an [appraiser] creates too great a likelihood that the [appraiser] will be incapable of rendering a fair judgment."

Id. at 495.

While *Branco* did not address whether a public adjuster may serve as a "disinterested appraiser," and instead considered whether the insured's attorney may qualify, it is still true that a relationship between the insured and the public-adjuster-turned-appraiser—such as the existence of a contingent fee agreement—creates a possibility that the appraiser "will be incapable of rendering a fair judgment." *Id.*

More recently, in *State Farm Florida Insurance Co. v. Crispin*, the Fifth District considered facts similar to those in *Valenti*, agreeing with the Fourth District's analysis. 290 So. 3d at 153 ("We write to explain though . . . that an appraiser is not disinterested in an insurance claim if the appraiser is entitled to a percentage of the recovery from the same insurance claim."). The court reiterated this decision in *Cadet*, 290 So. 3d 1090.

Florida's federal courts also agree. In *Verneus v. Axis Surplus Insurance Co.*, the Southern District addressed the fundamental change to the Code and the consequent undermining of *Rios*:

> If the Code of Ethics relied upon by *Rios* were still in effect and if the Undersigned's assessment was limited to the one fact of Stellar being paid on a contingency basis, then the answers to all these questions might well be "yes." But the Code of Ethics from 1998 is no longer valid, having been replaced with language evidencing a presumption of neutrality for arbitrators (and, by extension, for appraisers, under the analogy used in *Rios*).

No. 16-21863-CIV, 2018 WL 3417905 (S.D. Fla. July 13, 2018); 2018 WL 44150933 (S.D. Fla. Aug. 29, 2018).

The Middle District followed the same reasoning in disqualifying an appraiser:

> Black's Law Dictionary defines "impartial" as "[n]ot favoring one side more than another; unbiased and

> disinterested; unswayed by personal interest." Black's Law Dictionary (11th ed. 2019). A pecuniary interest in the outcome is by definition a personal interest that favors one side over the other. The Court finds that the Verneus line of cases apply and that disqualification is appropriate."

Landmark Am. Ins. Co. v. H. Anton Richardt, DDS, PA, 2019 WL 2462865 (M.D. Fla. June 13, 2019).

Thus, the overwhelming authority in both state and federal courts across Florida supports barring public adjusters from serving as "disinterested" appraisers when they have a contingency interest. Approving the Second District's decision and aligning the Third District with every other district will provide consistency in property insurance litigation throughout the state.

CONCLUSION

This Court should quash the decisions in *Rios*, *Galvis*, and *Brickell* and approve the Second District's decision in *Parrish*.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 2, 2022, a copy of this amicus brief was served through the Florida Courts E-Filing Portal to counsel listed below.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with rules 9.045 and 9.370(b) of the Florida Rules of Appellate Procedure, and consists of less than 5,000 words.

/s/ Jason Gonzalez