IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1624

RESTORATION 1 OF PORT ST. LUCIE,
a/a/o John and Liz Squitieri,

Petitioner/Cross-Respondent,

v. L.T. Case No.: 4D17-1113

ARK ROYAL INSURANCE COMPANY,

Respondent/Cross-Petitioner.
_____/

AMICUS CURIAE BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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IDENTITY & INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation is a public-interest law firm and policy center with supporters in Florida and all 50 States. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an *amicus curiae* in this and other state and federal courts in cases of nationwide significance to free enterprise. *See, e.g., DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018); *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007).

WLF agrees that "the right of private contract is no small part the liberty of the citizen." *Baltimore & Ohio Sw. Ry. Co. v. Voight*, 176 U.S. 498, 505 (1900). Under Florida law, the parties' freedom to define their respective rights and duties through voluntary contract has always been the rule, not the exception. Yet the petitioner here invites the Court arbitrarily to limit how far parties in Florida can define, by contract, the duties they owe one another—in other words, to restrain the freedom of contract.

WLF is concerned that a judicially created rule barring *any* contractual condition on the post-loss assignment of insurance benefits will ultimately erode the freedom of contract for all Floridians (and those who contract with them). Not only is such a rule unwise, but deciding major questions of public policy is not part of the judicial function. Under the Florida Constitution, such concerns are the

exclusive province of the Legislature; that is the branch of government invested with the democratic legitimacy that must underlie the crafting of public policy.

STATEMENT OF THE CASE

Ark Royal Insurance Company issued a homeowners insurance policy to John and Liza Squitieri. PNC Bank is a mortgagee named in the policy. An assignment of claim benefits is invalid under the policy unless it includes "the written consent of all 'insureds,' all additional insureds, and all mortgagee(s) named in the policy." Yet following a loss occurrence in August 2016, Mrs. Squitieri hired Restoration 1 of Port St. Lucie for clean-up services and unilaterally signed Restoration 1's Assignment of Insurance Benefits agreement. Neither Mr. Squitieri nor PNC Bank signed the agreement or consented in writing to the assignment, as the homeowners policy requires.

Presented with Restoration 1's claim for $20,305.74, Ark Royal agreed to work with the Squitieris to adjust their claim and to comply with the direct-payment authorization of Restoration 1's Assignment of Insurance Benefits agreement. Ark Royal also agreed to accept a valid assignment of benefits, should the Squitieris provide one. But given the policy's explicit condition on any assignment of claim benefits—which protects the rights of all insureds and mortgagees—Ark Royal would not accept the purported assignment to Restoration 1, which neither PNC Bank nor Mr. Squitieri signed.

As Mrs. Squitieri's purported assignee, Restoration 1 sued Ark Royal for breach of contract. Ark Royal moved to dismiss, contending that without a valid and enforceable assignment, Restoration 1 lacks standing to sue under the policy. In response, Restoration 1 argues that the policy's condition on assignment violates Florida law, which (Restoration 1 claims) prohibits *any* condition on the post-loss assignment of insurance benefits. The trial court disagreed. Finding that Restoration 1 lacks standing to sue without a valid assignment, it dismissed the suit. On appeal, the Fourth District affirmed. It held that the policy's condition on assignment complies with Florida law because that provision does not require *Ark Royal's* consent. Finding Mrs. Squitieri's assignment to Restoration 1 invalid and thus unenforceable, the appeals court agreed that Restoration 1 lacks standing to sue.

SUMMARY OF ARGUMENT

More than a century ago, this Court recognized the "well-settled rule" that an insurance-policy provision conditioned on "the consent of the insurer" will not bar "an assignment after loss." *W. Florida Grocery Co. v. Teutonia Fire Ins. Co.,* 77 So. 209, 210-11 (Fla. 1917). Because an insurer no longer has any interest in the insured's post-loss benefits, the Court explained, an insurer's lack of consent cannot affect an assignment's validity; the condition is "superfluous." *Id.* at 211. Given *West Florida Grocery*'s narrow rationale for its holding, the answer to the

question presented in this appeal is straightforward: the policy's conditions on post-loss assignment are valid and enforceable.

While the Squitieris have every right to assign their policy benefits after a loss, they enjoy an equal right to condition, by contract, that right to do so. Provided it does not require the *insurer*'s consent, a contractual condition on post-loss assignment is fully enforceable under Florida law. As Ark Royal has capably shown—and the Fourth District rightly held—that is precisely the case here. The Squitieris' homeowners policy conditions a post-loss assignment *not* on the *insurer*'s consent, but on the consent of all insureds and mortgagees. Unlike an insurer, both insureds and mortgagees retain a vested interest in the policy's post-loss benefits (and how wisely those monies are spent).

But Restoration 1 disagrees. It asks this Court to extend *West Florida Grocery*'s common-law exception and invent a new public-policy rule that bars *any* condition on post-loss assignment. That result can be accomplished, however, only by rewriting the explicit terms of the parties' agreement. Yet freedom of contract is the rule, not the exception, and it is a "matter of great public concern" that the parties' "freedom of contract be not lightly interfered with." *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944). This Court exercises "extreme caution when called upon to declare transactions void as contrary to public policy." *Id.* In this case, even a modicum of caution mandates affirmance.

The Court should refuse Restoration 1's invitation to rewrite the parties' contract for two more reasons, both of which spring from the Florida Constitution's explicit limits on the Judiciary. First, making public policy is not part of the judicial function. Only the Florida Legislature is able to gather the relevant constituencies, to commence fact-finding, to develop and harness expertise, and to balance competing societal values. Second, and no less important, the Legislature is the only branch of the State's government invested with the democratic legitimacy that must underlie the crafting of public policy.

ARGUMENT

I. CONSISTENT WITH THE PARTIES' FREEDOM OF CONTRACT, THE COURT SHOULD ENFORCE THE POLICY ACCORDING TO ITS PLAIN TERMS.

A. Freedom of Contract Is the Rule, Not the Exception.

Modern contract law "arose in both England and America as a reaction to and criticism of the medieval tradition of substantive justice." Morton J. Horowitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917, 917 (1974). It rejects the medieval notion that "the justification of contractual obligation is derived from the inherent justice or fairness of an exchange." *Id.* Instead, "the source of the obligation of contract is the convergence of the wills of the contracting parties." *Id.* Contracts thus "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are

entitled to rely on them." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

While the feudal system fixed parties' rights and duties according to their status at birth, modern contract law presumes that individuals are, by and large, free and equal. As the English legal historian Henry Maine famously put it, "the movement of the progressive societies has hitherto been a movement from Status to Contract." Henry Maine, *Ancient Law: Its Connections with the Early History of Society and Its Relation to Modern Ideas* 101 (J.J. Morgan ed., J.M. Dent & Sons Ltd. 1917) (1861).

By enabling private parties to join together to pursue mutually beneficial ends with some degree of certainty, the rise of contract "made the modern world possible." Edward Peter Stringham, *How Private Governance Made the Modern World Possible*, Cato Unbound (Oct. 5, 2015), https://perma.cc/2AZN-JCAP. As Judge Posner aptly put it, "Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper." *Original Great Am. Choc. Chip Cookie Co. v. River Valley Cookies Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992). Rather, it simply requires parties to uphold the terms of the deal they bind themselves to.

The American experiment relied on freedom of contract as the "legal underpinning of a dynamic and expanding free enterprise system." E. Allan

Farnsworth, *Contracts* § 1.7 (4th ed. 2004). Legal historians have declared the early years of the republic to be "above all else, the years of contract." *Id.* (citation omitted). The Framers were particularly concerned about laws that threatened the development of a national economy by disfavoring out-of-state interests. *See, e.g., The Federalist* No. 7 (A. Hamilton). Along with the Contracts Clause, which prohibits any State from "impairing the Obligation of Contracts," the Constitution explicitly preserved "[a]ll debts contracted and engagements entered into, before the adoption of this Constitution." U.S. Const. art. I, § 10, cl. 1; art. VI, § 1.

For the founding generation, a party's right to enforce a valid contract was sacrosanct. "They took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." *Sveen v. Melin*, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) (citation omitted). As Madison observed, "impairing the obligation of contracts" is "contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44 (J. Madison).

Florida, too, has long cherished the freedom of contract. Like its federal counterpart, the Florida Constitution strictly prohibits any "law impairing the obligation of contracts." Fla. Const. art. 1, § 10. As part of the Florida

Constitution's Declaration of Rights, "this right belongs to the people … as against the government." *Citrus Cty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 150 So. 3d 1102, 1106 (Fla. 2014). It is a "distinct freedom guaranteed to each Floridian." *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992). If anything, "the Florida Supreme Court has signaled its willingness to protect contracts more fully than the federal courts." James W. Ely, Jr., *The Contract Clause: A Constitutional History* 252-53 (2016).[*]

The right to contract "is one of the most sacrosanct rights guaranteed by our fundamental law." *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993). "The right to make contracts of any kind, so long as no fraud or deception is practiced … is an element of civil liberty possessed by all persons who are sui juris." *State v. Ives*, 167 So. 394, 411 (Fla. 1936). This "includes the freedom to make a bad bargain." *Posner v. Posner*, 257 So. 2d 530, 535 (Fla. 1972). "If that right be stricken down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." *Ives*, 167 So. 2d at 412.

[*] The U.S. Constitution sets the floor, but not the ceiling, for Floridians' *state* constitutional rights. Though Florida's Contracts Clause is not at issue here (no party has invoked it), this Court is perfectly free, in the appropriate case, to revisit the wisdom of reflexively following the U.S. Supreme Court's attenuated Contracts Clause jurisprudence when interpreting the full panoply of protections Florida's Contracts Clause accords to Floridians. *See* Jeffrey S. Sutton, *51 Imperfect Solutions* 178 (2018) (arguing that "neglected state constitutional protections remain on the books and provide an alternative theory for relief").

Freedom of contract is the general rule; "restraint is the exception." *Id.* So when parties freely enter into a valid contract, this Court generally enforces the terms of that agreement: "The parties are masters of their own contract, and then servants to its ultimate terms." *Fla. Dep't of Fin. Servs. v. Freeman*, 921 So. 2d 598, 607 (Fla. 2006) (Cantero, J., concurring). The burden here, then, lies not with Ark Royal to convince the Court that the policy's condition on assignment is enforceable according to its plain terms. On the contrary, the burden lies with Restoration 1 to justify any departure from that ancient rule. This is a burden Restoration 1 cannot meet.

B. Because No "Public-Policy" Exception Prohibits the Condition on Assignment, the Provision's Plain Terms Govern.

Under *West Florida Grocery*, both Ark Royal and the Squitieris retain a common-law right to condition, by contract, any post-loss assignment of benefits—so long as that condition is not tied to Ark Royal's consent. For an assignment of claim benefits to be valid under the Squitieris' policy, all named insureds and mortgagees must consent to it in writing. Because the policy does not condition a post-loss assignment on the *insurer*'s consent, *West Florida Grocery* does not apply.

That leaves the default rule that "if [an insurance] policy provision is clear and unambiguous, it should be enforced according to the terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. Sur. Co.*, 675

So. 2d 963, 965 (Fla. 5th DCA 1996). Here, the policy's condition on assignments is neither hidden nor obscure, and no party suggests it is unconscionable. Under the policy's terms, because Mrs. Squitieri's assignment to Restoration 1 lacks the written consent of all insureds and mortgagees as required, that assignment is invalid. As the lower courts aptly recognized, the inquiry should end there.

But Restoration 1 objects to the deal Ark Royal struck with the Squitieris. It asks this Court to impose a different deal—to, in effect, rewrite the contract and, along with it, Florida contract law. Before accepting Restoration 1's invitation to invalidate the policy's conditional assignment provision, it is worth recalling that the "principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises." Restatement (Second) of Contracts, ch. 8, intro. note (1981). As Justice Holmes put it, "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 411 (1911) (Holmes, J., dissenting).

Exercising one's freedom to cabin one's freedom is nothing new. Parties are free to contract away all manner of rights under Florida law. One party may release another from future liability for injuries resulting from the latter's own negligence. *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256 (Fla. 2015). An employee

may bargain away her right to earn a living for a given "time, area, and line of business." Fla. Stat. § 542.335(1) (2018). A party may contract away its right to sue within the time provided by Florida's relevant statute of limitations. *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985). A party may contract away its right to have any dispute arising from the contract decided in U.S. courts. *Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986). Parties may even deliberately circumvent, by contract, Florida's usury laws. *Morgan Walton Props., Inc. v. Int'l City Bank & Trust Co.*, 404 So. 2d 1059 (Fla. 1981). Given this broad array of contractual freedoms, surely a party may condition its right to assign post-loss insurance benefits on the consent of all named insureds and mortgagees.

True, "there is no such thing as an absolute freedom of contract." *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). A contract may be void or voidable for any number of reasons, including incapacity, fraud, duress, illegality, or impossibility. *See Pino v. Union Bankers Ins. Co.*, 627 So. 2d 535, 536 (3d DCA 1993). But Restoration 1 claims none of those defects here. "Courts typically do not strike down a contract, or any portion of a contract, based on public policy grounds except in extreme circumstances." *City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 15 (Fla. 2017). Above all, courts do not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Hagen*, 675 So. 2d at 965.

Even in "extraordinary" cases, this Court exercises "extreme caution when called upon to declare transactions void as contrary to public policy." *City of Largo*, 215 So. 3d at 16 (internal quotations and citations omitted). It will "refuse to strike down contracts" without a showing of "some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties." *Id.* (internal quotations and citations omitted). This is not an extraordinary case, and Restoration 1 makes no great showing.

Public policy "is a very unruly horse," and "when once you get astride it you never know where it will carry you." *Story v. First Nat'l Bank & Trust Co.*, 156 So. 101, 103 (Fla. 1934) (citing *Richardson v. Mellish*, [1824] 130 Eng. Rep. 294, 303, 2 Bing. 229, 252). Restoration 1 invites this Court to kick over the traces—to gallop aimlessly into unknown and hazardous country, where parties can have no assurance that their clear contractual expectations will be enforced, despite one side's full performance.

But courts often find, on close inspection, that the privately suffered penalty of non-enforcement of contracts far exceeds any benefit to the public. "If contractual protections are illusory, people will be reluctant to make contracts." *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (Posner, J.). And if legitimate expectations arising from promises are no longer protected by

law, we risk the same fate as Montesquieu's Troglodytes, who perished because they failed to keep their promises. *See* E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Columbia L. Rev. 576, 578-79 (1969).

One of Restoration 1's *amici*, the Florida Justice Association, complains that Ark Royal's policy is a "contract of adhesion," that is, a "standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms." (Fla. Justice Ass'n Br. at 4, 7.) But this argument is little more than "a throwback to the era of exaggerated concern with the supposed one-sidedness of form or standard contracts." *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir. 2003) (Posner, J.). Simply put, "[t]here is no 'mere boilerplate' defense to a suit for breach of contract (or a defense to a defense to such a suit), any more than there is a 'fine print' or 'I didn't read it' defense." *Id.* at 667 (internal citations omitted).

Even so, a party who signs such a contract "has manifested its consent to be legally bound to perform that commitment." Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627, 634 (2002). So-called contracts of adhesion are ubiquitous in the modern digital marketplace:

> When one clicks "I agree" to the terms on the box, does one usually know what one is doing? Absolutely. There is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them. The same observation applies to signatures on form contracts. Clicking the button that says "I agree," no less than signing one's name on the dotted line, indicates

> unambiguously: I agree to be legally bound by the terms in this agreement.

Id. at 635. The only true "contract of adhesion" here is the one Restoration 1 and its *amici* urge this Court to impose—by dictating to the parties precisely what their contract must and must not say.

What's more, the Florida Justice Association's critique implies that *every* term in a homeowners insurance policy is dictated to consumers, on a take-it-or-leave-it basis, by the insurer. Yet homeowners' insurance rates, premiums, and deductibles are all set by the forces of supply and demand—not invented by insurers. That is why many state supreme courts hold that a contract is not adhesive if the purported adherent has an alternative source for the contracted good or service. *See, e.g., Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 687-88 (Tenn. 1996) ("There is no showing that … banking services could not be obtained from other institutions."); *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1067 (Wyo. 1988) ("There must be a showing that … there was no opportunity for negotiation for a service which could not be obtained elsewhere."); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924-25 (Minn. 1982) ("There must be a showing that … the services could not be obtained elsewhere."); *Clinic Masters, Inc. v. Dist. Ct.*, 556 P.2d 473, 475-76 (Colo. 1976) (en banc) ("Respondent does not show … that petitioner's services could not have been obtained elsewhere."). Here, the Squitieris were perfectly free to shop around for a policy more to their liking.

In all events, "suspicion of the form contract," the "dreaded 'contract of adhesion,'" has "never crystallized … in a rule making such contracts unenforceable." *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (Posner, J.). Instead, the relevant question is whether one party "was prevented from reading the contract" or otherwise "induced by statements of the other party to refrain from reading the contract." *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347-48 (Fla. 1977). Otherwise, no party in Florida may avoid any part of a contract "on the sole ground that he signed it without reading it." *Id.* at 348.

As we have seen, it is a "matter of great public concern" that the parties' "freedom of contract be not lightly interfered with." *Bituminous Cas. Corp.*, 17 So. 2d at 101. But here it is Restoration 1, not Ark Royal, who seeks to impair the Squitieris' contract. The policy explicitly conditions any post-loss assignment on the mortgagee's consent, which is conspicuously lacking here. Only by enforcing that condition, rather than excusing or overriding it, can this Court "recognize the legitimate expectations of contracting parties." *Manrique*, 493 So. 2d at 440.

In sum, Restoration 1 invites a radical new rule of decision to address a problem that does not exist. But courts must not "rewrite contracts or interfere with freedom of contracts or substitute [their] judgment for that of the parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain." *Freeman*, 921 So. 2d at 607 (Cantero, J., concurring).

II. IT IS FOR THE FLORIDA LEGISLATURE, NOT THE JUDICIARY, TO MAKE PUBLIC POLICY.

Unlike the U.S. Constitution, which merely implies that the three branches of government are separate, Article II, Section 3 of the Florida Constitution expressly prohibits any branch of the state government from usurping the powers of the other two branches. Fla. Const. art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). Under this tripartite separation of powers, "no branch may encroach upon the powers of another." *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 264 (Fla. 1991).

"The Legislature has the final word on declarations of public policy." *Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993). But Restoration 1 asks this Court to circumvent that final word by extending the narrow holding of *West Florida Grocery* to bar *any* contractual condition on the post-loss assignment of insurance benefits. The Court should refuse to do so for two reasons.

First, creating a public-policy exception to Florida's substantive contract law would carry the Court far beyond its proper role. Such policy choices are solely part of the legislative function. Deferring to the Legislature ensures that courts adhere to the judicial function, resolving discrete and tractable disputes rather than trying to manage wider social ills. Second, recourse to the Legislature ensures that

the people themselves, through their democratic representatives, make the State's major policy decisions.

A. Crafting Public Policy Is Not Part of the Judicial Function.

"The legal adage that hard cases make bad law is never more true than when a court attempts, on a particular set of facts, to resolve all controversy in an entire field of law." *Carter v. City of Stuart*, 468 So. 2d 955, 958 (Fla. 1985) (Ehrlich, J., concurring). A court that rewrites a contract regardless of the parties' reliance on agreed terms and settled law becomes a vehicle for overseeing public policy. That is not a role any judge on this Court should embrace.

The Judiciary lacks the institutional competence to decide broader questions of public policy. "Deciding which laws are proper and should be enacted is a legislative function." *Id.* at 957. The "judicial branch should not trespass into [that] decisional process." *Id.* Unlike the Florida Legislature, Florida judges sitting in adversary proceedings are confined to rendering opinions based on the limited parties and evidence before them. They cannot commission studies, consult experts, or conduct public hearings to gather input from all relevant constituencies. Nor can they balance the competing interests of stakeholders by making compromises with the benefit of comprehensive, legislative fact-finding.

A court that radically rewrites Florida law for *all* insurance contracts acts in defiance of many blind spots. "The omnipresence of unintended consequences" for

any public policy "can be attributed, in large part, to the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86. Only the Legislature can "collect dispersed knowledge" and "bring it to bear on official choices." *Id.* at 88.

Put another way, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Fla. Patient's Comp. Fund v. Von Stetina*, 474 So. 2d 783, 785 (Fla. 1985) (internal quotation and citation omitted). Without this venerable constraint,

> judges are nothing more than politicians in robes, free to tackle the social problems of the day based on avant-garde constitutional theory or, worse yet, their own personal preferences. While such jurists may often be well meaning, their approach is inconsistent with our government's history, structure, and framework.

Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 Va. L. Rev. Online 31, 33 (2015). Any decision to extend the common-law rule recognized in *West Florida Grocery* must come from the Legislature, not this Court.

B. Only the Legislature Has the Democratic Legitimacy to Make Substantive Law.

Judicial policymaking also raises the question of democratic legitimacy. The corollary to the rule that courts should not rewrite substantive law is that the political branches may do so when necessary:

> When there is a hot political issue, an interested citizen can elect representatives that support his or her cause. Or, he or she can gather up like-minded citizens, perhaps form a coalition, and storm the state capitol to seek change. Or, in a state like [Florida], he or she can use the process of referendum and initiative to enact law by plebiscite. By taking any of these conventional routes, however, the concerned citizen takes the risk that equally dedicated citizens of opposing views will challenge, and perhaps thwart that effort. But this potential for opposition and defeat is the price of participation in the majoritarian political process. In fact, this is the essence of our political process.

Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*, 33 Okla. City U. L. Rev. 263, 283 (2008).

"The judge's power to write law mirroring the judge's sense of justice belongs to an era that lacked a popular branch of government." *Lemy v. Direct Gen. Fin. Co.*, 884 F. Supp. 2d 1236, 1239 (M.D. Fla. 2012) (Merryday, J.). Today, the branch that makes the laws is the one most accountable to the citizenry. That is why "courts do not substitute their social and economic beliefs for the judgment of legislative bodies which are elected to pass the laws." *Askew v. Schuster*, 331 So. 2d 297, 300 (Fla. 1976). This ensures that the people themselves, through their democratic representatives, make the State's major policy decisions.

"Our preference for liberty and self-rule is undermined when the courtroom is opened as an alternative venue for *lawmaking*." O'Scannlain, *supra*, at 34. As three Florida district courts of appeal have recognized, whether to extend *West Florida Grocery*'s narrow common-law exception to all post-loss assignments "is for the legislature to decide." *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins.*

Co., 185 So. 3d 638 (Fla. 2d DCA 2016); *Sec. First. Ins. Co. v. State, Office of Ins. Reg.*, 177 So. 3d 627, 630 (Fla. 1st DCA 2015); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015).

Recourse to the courts is often the last resort for special interests that lost out in the democratic process. Restoration 1 invites this Court to wrest control of public policy away from the Legislature, to whom the Florida Constitution exclusively assigns that role, and to hand it to the restoration industry, which seeks to accomplish in court what it has so far failed to achieve democratically. So rather than having to persuade a majority in each house of Florida's bicameral legislature, the Governor, and the public constituencies they represent, Restoration 1 and its counsel would prefer to rewrite Florida contract law simply by persuading four of seven Justices on this Court. The Court should decline that invitation.

CONCLUSION

The Fourth District Court of Appeal's opinion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Under Rule 2.516(1), Florida Rules of Judicial Administration, I certify that a true and correct copy of the *Amicus Curiae Brief of Washington Legal Foundation in Support of Respondent/Cross-Petitioner* was served electronically on all counsel of record listed below through the Florida ePortal Court System on this 15th day of March, 2019:

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CERTIFICATE OF COMPLIANCE

Under Rule 9.210(a)(2), Florida Rules of Judicial Administration, I certify that the *Amicus Curiae Brief of Washington Legal Foundation in Support of Respondent/Cross-Petitioner* satisfies the font requirements of that Rule because it contains Times New Roman, 14-point font.

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