S.Ct. Case No.: S259215

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BLAKELY McHUGH, *et al.*
Plaintiffs/Appellants/Petitioners,

vs.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant/Respondent.

After Decision by the Court of Appeal
Fourth Appellate District, Div. One (D072863)
(Superior Court of San Diego County, Hon. Judith F. Hayes
37-2014-00019212-CU-IC-CTL)

PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Cases (continued)

TABLE OF AUTHORITIES
(continued)

Page

Cases (continued)

TABLE OF AUTHORITIES
(continued)

Page

Cases (continued)

Statutes, Codes & Rules

Insurance Code

TABLE OF AUTHORITIES
(continued)

Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively "Petitioners"), hereby submit this Reply Brief on the Merits in proceedings before this Court reviewing the published decision of the Court of Appeal, Fourth District, Division One (per Justices O'Rourke, Huffman, Aaron) issued on October 9, 2019, affirming the trial court's Judgment in favor of Defendant/Respondent, PROTECTIVE LIFE INSURANCE COMPANY ("Protective Life") in the underlying life insurance coverage dispute.[1]

I.

INTRODUCTION

At the heart of this case is the passage of Assembly Bill 1747 ("AB 1747" – 2011-2012 Reg. Sess.), adding sections 10113.71 and 10113.72 to the Insurance Code on January 1, 2013. That legislation was passed to provide consumer safeguards for *existing policyholders* (especially

[1] Unless otherwise indicated, all factual citations in this Reply Brief are to the official citation of the Court of Appeal's Opinion (*McHugh v. Protective Life Insurance* (2019) 40 Cal.App.5th 1166); the Appellant's Appendix, abbreviated as: ([volume] AA [page]); and the exhibits admitted in the underlying trial, abbreviated as: (Exh. [number].)

seniors) who previously purchased life insurance coverage, and to prevent the unintentional lapse of that valuable coverage due to inadvertence or inadequate notice. Specifically, through the addition of sections 10113.71 and 10113.72, the Legislature enshrined protections requiring at least 30-days' notice of a pending lapse before an insurer could legally terminate a life insurance policy, mandated that all life insurance policies "issued and delivered" in California must adhere to at least a 60-day grace period for premium payments, and directed that every policyholder is entitled to designate a secondary individual or entity to receive notice of any pending lapse for non-payment.

The *remedial nature* of that legislation, intended to address the specific threat of existing policyholders inadvertently losing valuable life insurance coverage after making years of premium payments, focuses the lens through which this Court should interpret the specific component parts of sections 10113.71 and 10113.72. Although Protective Life struggles mightily to proffer a construction of those statutes which would have them apply only to new policies issued after January 1 2013, it offers no support for that position in the relevant legislative history, and instead invites this Court to reach a

construction of those statutes completely untethered to the Legislature's unequivocal goal of protecting "existing policyholders" from inadvertent lapses. Indeed, it should be obvious that existing policyholders would *not* be protected by Protective Life's interpretation of those statutes, a result clearly at odds with their overarching policy objectives.

Moreover, Protective Life's proposed interpretation of those statutes also ignores the highly regulated nature of insurance contracts in California. The Legislature retains the plenary power to enact remedial measures meant to protect a vulnerable class of citizenry from present and future harm by requiring that all "in force" insurance contracts in California comply with existing law in the manner in which they are administered. Sections 10113.71 and 10113.72 represent a reasonable exercise of that police power, focused narrowly on what notices insurers must provide (and to whom) before they can lawfully terminate existing policies in this State.

In that respect, those statutes are entirely *prospective* in their application, as they do not attach new legal consequences to past conduct, but instead regulate only future conduct by insurers. But even

assuming for the sake of argument that those statues have some retroactive effect, Protective Life has never demonstrated in the lower courts, or in this Court, that such an impairment is anything but nominal and incidental, implicating only the form and content of notices insurers are already required to provide to their policyholders. Even the Court of Appeal, ruling in Protective Life's favor, could not articulate a hypothetical impairment of Protective Life's contractual rights by the enactment of sections 10113.71 and 10113.72. Instead, that court dubiously relied upon informal and unauthorized communications by Department of Insurance ("DOI") staff, as well as DOI policy form guidelines for new policies, to divine purported "agency expertise" to which it then blindly deferred. The Court of Appeal did so, quixotically admitting that if that agency expertise existed at all, it was directly contrary to the Legislature's intent in enacting AB 1747 in the first place.

While Protective Life has doubled-down on that approach – attempting to muddy the waters further by asking this Court to take judicial notice of various materials that do not (and under existing law *cannot*) represent the official position of the DOI on the application of

the statutes in question – Petitioners take this opportunity on reply to return to first principles. Specifically, Petitioners further explain here how (A) the undisputed remedial purpose the Legislature furthered by enacting sections 10113.71 and 10113.72 should drive this Court's construction of those statutes. Next, Petitioners detail how (B) application of sections 10113.71 and 10113.72 to existing in force policies does not implicate principles of retroactivity and does not impose a substantial impairment of contractual rights on insurers like Protective Life. Petitioners then describe further how (C) Protective Life continues to misplace reliance on unofficial communications from DOI employees – as well as on policy form notices for new policies – although neither represent official, authorized positions of that agency as defined by statute and this Court's own precedent.

Accordingly, Petitioners respectfully request the Court to reverse the Court of Appeal's erroneous construction of those statutes, and to direct the Court of Appeal to enter a new disposition, confirming the application of those statutes to McHugh's Protective Life insurance policy in question. Only in doing so will this Court confirm what the Legislature clearly intended by its enactment of sections 10113.71 and

10113.72: to prevent decades of premium payments and commensurate life insurance benefits from being inadvertently forfeited by requiring insurers to provide minimum grace periods, and adequate notice, before they can lawfully terminate those policies for nonpayment.

II.

DISCUSSION

A. The Undisputed Remedial Purpose the Legislature Furthered by Enacting Sections 10113.71 and 10113.72 Should Drive This Court's Construction of Those Statutes.

1. The Legislature's Intent Was Unequivocal: to Protect Existing Policyholders from Inadvertent Lapses.

In interpreting any statute, this Court's paramount duty is to glean, and then to follow, the Legislature's intent. (*Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 381 ["Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose"].) In doing so, the Court does not examine statutory language in isolation, but views it in the context of the statutory framework as a whole in order to determine its scope and purpose, and to harmonize the various parts of the enactment.

(*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Where that purpose is remedial in nature, the Court further interprets statutory language liberally to effectuate that remedy and to deter or prevent the harm that statute was intended to address. (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1025; see *Tetra Pak, Inc. v. State Bd. of Equalizat*ion (1991) 234 Cal.App.3d 1751, 1756 [observing that when examining a remedial statute, courts must construe that statue to suppress the mischief it was meant to address, to advance or extend the remedy provided, and to bring within the scope of the law every case that comes clearly within its spirit and policy]; see also *Allstate Ins. Co. v. Smith* (1970) 9 Cal.App.3d 898, 902 [confirming that when changes to the Insurance Code are remedial in nature, they should be liberally construed to most broadly carry out the Legislature's remedial goals].)

As Petitioners previously detailed in their Opening Brief, the overarching public policy embodied in the enactment of sections 10113.71 and 10113.72 was to prevent "existing policyholders" from losing life insurance coverage through inadvertence or inadequate

notice before termination. The legislative history of sections 10113.71 and 10113.72 leads to no other reasonable conclusion.

Specifically, in a May 2, 2012 hearing before the Assembly Committee on Insurance considering the enactment of AB 1747, its purpose was succinctly described as providing "consumer safeguards from which *people who have purchased life* insurance coverage (past tense), especially seniors, would benefit." (1 AA 610-611 [emph. added]; see *ibid.* [further describing those to be protected as "policyholders" who might inadvertently lose their existing life insurance coverage].) Similarly, the Senate Insurance Committee in a June 13, 2012 hearing also viewed the purpose of AB 1747 to prevent existing policyholders, especially seniors, from inadvertent lapses in their coverage. (1 AA 614-617 [also noting how there was no opposition to that legislation and that in addition to numerous consumer and senior groups, it was also supported by the "California Department of Insurance"].) A further Senate reading of AB 1747 confirmed that the 30-day grace period the bill intended to enlarge to 60-days was "set in regulation but not in statute," and that the legislation would therefore benefit and apply to existing policyholders. (1 AA 618-621; see also *id.* at 622-625 [same]; *id.*

at 627 [describing how the changes the bill contemplated would apply to existing "policyholders"]; *id.* at 629 [further detailing how the proposed changes to the Insurance Code were meant to protect "people who had faithfully paid their life insurance policies for years," but who "accidentally let their policy lapse (in some cases, because they were being hospitalized when the bill came; in others, as a result of a mail mix-up or forgetfulness, etc.)"]; *id.* at 630 [also explaining how the additional protections are needed to assist existing "policyholders" from inadvertently losing existing life insurance coverage]; *id.* at 633-635 [same, noting no opposition to that legislation].) Even the insurance industry, represented through the Association of California Life and Health Insurance Companies ("ACLHIC"), ultimately withdrew any opposition to AB 1747, agreeing that it shared the legislative goal of helping "policyholders keep their valuable life insurance coverage in place." (1 AA 637.)

Thus, to the extent that legislation was undoubtedly intended to protect "policyholders" (*i.e.,* those who already purchased policies) who "had faithfully paid their life insurance policies for years," and to prevent them from inadvertently losing "existing life insurance

coverage," it was the Legislature's clear intent that sections 10113.71 and 10113.72 would be applicable to existing in force policies at the time that legislation was enacted. No language in the legislative history suggests otherwise, nor has Protective Life been able to identify a contrary purpose of AB 1747.

Instead, Protective Life advances a straw argument which stems from its unsupported logical leap that if those statutes applied to existing "policyholders" and their in force policies, they would necessarily be "retroactive" in nature. From there, Protective Life dismisses any legislative history demonstrating a contrary purpose of those statutes as being too vague to support retroactive application. In other words, Protective Life starts with the *conclusion* that sections 10113.71 and 10113.72 are necessarily retroactive where they apply to existing in force policies, ignoring compelling legislative history to the contrary. It then backfills that conclusion by asserting that the Legislature never intended retroactive application because it would have been required to use specific language to demonstrate that retroactive intent. In doing so, Protective Life intentionally conflates the central inquiry of what the Legislature intended by its passage of

AB 1747 with the separate question of whether it intended that remedial legislation to also apply "retroactively."

As Petitioners explain further below, Protective Life's baseline definition of "retroactivity" is self-serving and ultimately incorrect. But the harm the Legislature intended to address through its enactment of sections 10113.71 and 10113.72 – to protect "policyholders" from losing years of premium payments and valuable insurance coverage through inadvertence – cannot be seriously disputed. Nor can Protective Life attempt to distinguish the intent of the authors of AB 1747 from the Legislature's intent where it cannot point to any contrary intent expressed in the relevant legislative history. Indeed, if the author's expressed intent (which, again, was ultimately unopposed by the insurance industry or the DOI) varied from the intent of the enacting Legislature writ large, this Court should expect to see that discrepancy expressed somewhere in the relevant legislative history as AB 1747 passed through both the Assembly and the Senate. It does not exist here.

2. The Legislature Has Plenary Power to Regulate in Force Insurance Contracts in California.

As this Court emphasized over 30 years ago, insurance "is a highly regulated industry, and one in which further regulation can reasonably be anticipated." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830.) This Court in *Calfarm* further reasoned, "[i]t is no longer open to question that the business of insurance is affected with a public interest . . . . neither the company nor a policyholder has the inviolate rights that characterize private contracts." (*Ibid.* [citations omitted]; see also Ins. Code § 41 ["All insurance in this State is governed by the provisions of this code"].) Instead, "[t]he contract of the policyholder is subject to the reasonable exercise of the state's police power." (*Calfarm, supra,* 48 Cal.3d at 830; Cf. *Energy Reserves Group v. Kansas Power & Light* (1983) 459 U.S. 400, 416 [reasoning that because the natural gas industry was "heavily regulated," that industry should reasonably expect that its contracts were subject to alteration by subsequent state regulation].)

Yet despite that continuing plenary power the Legislature reserves for regulating insurance contracts in California, Protective Life insists that this Court's prior decision in *Interinsurance Exchange of*

Auto Club v. Ohio Cas. Ins. (1962) 58 Cal.2d 142 (decided over 25 years *before* this Court decided *Calfarm*) stands for the immutable proposition that the Legislature has no such power. It does so pointing to language in the *Interinsurance Exchange* opinion which states that "insurance policies are governed by the statutory and decisional law in force at the time the policy is issued." (*Interinsurance Exchange, supra,* 58 Cal.2d at 148.) That is an accurate statement, *as far as it goes*. But what that statement does not mean is that the Legislature is powerless to enact subsequent regulation meant to address how all in force policies are administrated, even after they are issued. Indeed, the *Interinsurance Exchange* opinion acknowledges as much, indicating that the Legislature could have passed a subsequent regulation removing the requirement that each policy contain the mandated permissive user coverage in question. (*Id*. at 149 ["It is no doubt true, as Ohio contends, that in 1957 the Legislature could, constitutionally, have removed from all policies in force at the effective date of the statute this mandatory coverage"].)

Thus, the polemic Protective Life attempts to create between the *Interinsurance Exchange* opinion and the retained power of the Legislature to enact subsequent regulations which impact "all policies in force," simply does not exist. The fact that the *Interinsurance Exchange* court recognized that power extends to "all policies in force at the effective date of the statute" only reinforces that point. (*Ibid.*) Consequently, while it is true that insurance policies in California are generally governed by the law in place when they are issued, it is also true that they are subject to subsequent regulation – through the exercise of the state's police power – enacted while those policies remain "in force." (*Calfarm, supra,* 48 Cal.3d at 830; see also see also *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 [confirming that the state's regulation of insurance is squarely within its police power].) Protective Life's misplaced reliance on *Interinsurance Exchange* does not limit that power.

3. The Remedial Measures Taken by the Legislature – Focusing Primarily on Notice Requirements Before Terminations of Policies Could Lawfully Occur – Were Measured and Appropriate.

The Legislature's enactment of sections 10113.71 and 10113.72 represents a reasonable exercise of the state's police power, intended to rectify a harm of great public significance. Specifically, by seeking to protect seniors and disabled policyholders from forfeiting years of paid premiums through inadvertence or mistake, the Legislature was affecting important public policy objectives: the continuity of life insurance coverage for existing policyholders and the protection against inadvertent forfeitures. (Cal. Const., art. XI, § 7 [establishing that the state's police power extends to enacting and enforcing laws to protect public health, safety, and welfare]; *Wooster v. Department of Fish & Game* (2012) 211 Cal.App.4th 1020, 1027 [confirming the well-established maxim that "the law abhors forfeitures"].) The Legislature undoubtedly retained the power to do so. (See *California FAIR Plan Association v. Garnes* (2017) 11 Cal.App.5th 1276, 1305 [discussing the "intersection of insurance policies and the Insurance Code," and explaining that "because the business of insurance is a matter of the public interest, and insurance contracts are subject to the reasonable

exercise of the state's police power . . . [a]ny provision in an insurance policy that fails to conform to law or violates public policy is unenforceable"].)

That exercise of the state's police power was a measured and appropriate means for securing the public policy objectives at issue in this case. To be sure, through its enactment of sections 10113.71 and 10113.72, the Legislature did not fundamentally change the nature and scope of life insurance coverage, nor did it require that additional coverages or liabilities be assumed by insurers. Instead, those statutes focused only on the manner in which in force policies are *administered*, including what notices must be given (and to whom) before an insurer can lawfully terminate a policy for nonpayment.

Separate from the *de minimis* nature of those changes (discussed more fully, below), it is important for the Court to remember that insurers in California were already obligated to provide notice to their insureds before a policy can be terminated for nonpayment. (See, *e.g.*, 10 Cal.Code.Regs § 2534.3, subd. (c)(2) [applying to variable life coverages and mandating at least a 31-day grace period in all policies].) Because the amount of notice required, the manner in which that notice

was provided, and to whom that notice was given, lacked uniformity and often varied from policy to policy and from insurer to insurer, the risk of inadvertent lapses was heightened. (See 1 AA 645 [where the Legislature sought to address that uncertainty through passage of AB 1747, which "codifies life insurance grace periods and extends them to 60 days"].) Thus, by AB 1747's addition of sections 10113.71 and 10113.72 to the Insurance Code, the Legislature appropriately sought to bring uniformity to those notice requirements, striking a reasonable balance between an insured's right to adequate notice before policy termination, and an insurer's right to terminate a policy for nonpayment if that notice has been accomplished.

Public policy favors protecting policyholders from inadvertently losing valuable policy benefits if that result can be accomplished without doing violence to the terms of the parties' contract. Requiring strict compliance with notice and cancellation provisions before a termination can be effective is also an appropriate means for achieving those public policy goals. (See, *e.g., Lee v. Industrial Indemn. Co., Inc.* (1986) 177 Cal.App.3d 921, 924.) The compulsory nature of section 11013.71's provisions, mandating that terminations "shall not be

effective" unless an insurer precisely complies with its notice and termination requirements, embodies that principle and further advances those goals. (Ins. Code § 11013.71, subd. (b).) Requiring strict adherence to termination restrictions also promotes certainty in the insuring arrangement, and properly places the burden on insurers who administer those policies, and who typically stand to benefit from claimed terminations of coverage. That burden of strict compliance on insurers also recognizes that policyholders will often be deceased when disputes about the payment of life insurance benefits subsequently arise, leaving them unable to testify or to counter arguments by insurers concerning the notice they received before any forfeiture for nonpayment purportedly occurred. In short, Protective Life can neither dispute that the Legislature retained the police power to regulate the manner in which all in force policies were administered, nor can it reasonable contend that the notice and termination provisions contained in sections 10113.71 and 10113.72 are an unreasonable exercise of that power.

4. The Plain Language of Sections 10113.71 and 10113.72 Evinces an Intent to Apply to All In Force Policies.

As Petitioners previously detailed in their Opening Brief, the plain language of sections 10113.71 and 10113.72 further support their application to existing in force policies at the time those statutes were enacted. For example, the operative language of section 10113.71 concerning the application of its 60-day grace period plainly mandates that *"[e]ach* life insurance policy issued or delivered in this state *shall* contain a provision for a grace period of not less than 60 days from the premium due date." (Ins. Code § 10113.71, subd. (a) [emph. added].) In that relevant context, "each" means *every policy*, "issued or delivered" (past tense) encompasses *policies already issued or delivered,* and "shall" speaks of mandatory requirements. The Legislature's use of the past tense "issued and delivered" is no mistake, but is a strong indication of actions already completed; in this case, policies already issued or delivered to existing policyholders. (*Dr. Leevil, LLC v. Westlake Health Care Center* (2018) 6 Cal.5th 474, 479.)

While Protective Life has argued that "issued or delivered" language is prospective only, it offers no plausible rationale for how that construction would advance the legislative goal of protecting existing

policyholders from losing years of prior premium payments due to inadvertent lapses. Protective Life further ignores the Legislature's clearly established custom that if it intends a new statute to apply only at some definitive point or date, it explicitly says so. (See, *e.g.,* Ins. Code § 396, subd. (g) ["This section applies to policies that are issued and take effect or that are renewed on or after January 1, 2016"]; Ins. Code § 10113.5 ["This section shall not apply to individual life insurance policies delivered or issued on or before December 31, 1973"]; Ins. Code § 10128.4 ["this article shall apply to all policies issued, delivered, amended, or renewed in this state after January 1, 1977"]; Ins. Code § 10117.5 ["no disability insurer contract that covers hospital, medical, or surgical benefits that is issued, amended, renewed, or delivered on and after January 1, 2002, shall contain a provision . . ."]; Ins. Code § 10121 ["every self-insured employee welfare benefit plan issued or amended on or after July 1, 1972, which provides benefits to the employee's dependents, shall contain a provision granting immediate accident and sickness coverage . . ."].) The absence of any specific date tied to that "issued or delivered" language found in section 10113.71, subd. (a) can only logically mean that the Legislature intended it to more broadly

apply to all policies already in force on January 1, 2013 and all policies to be issued or delivered in the future. Had the Legislature intended to carve out all policies in force when it enacted sections 10113.71 and 10113.72, it would have said so. It would have further taken specific and concrete steps to include language in those statutes that would have limited their application only to newly issued policies. But it never did so. Consequently, Protective Life is incorrect to suggest that this Court – like the Court of Appeal – should now simply insert that limiting language into those statutes which the Legislature clearly knew how to use, but did not do so in this particular instance precisely because it wanted to ensure the broadest application possible to its statutory mandate.[2]

[2] While the Court of Appeal pointed to Insurance Code section 10235.95 to suggest the language used in that statute ("policies in force, regardless of their dates of issuance") could have been used here, that conclusion is erroneous in light of the operation of companion section 10235, which made that additional language necessary in that precise context. The fact that Protective Life does not attempt to defend or adopt the Court of Appeal's improper reading of section 10235.95 speaks volumes to its appreciation that the norm with new mandates contained in the Insurance Code is to apply them to all policies in force on the date of a statute's enactment, *absent limiting language indicating otherwise*.

Of course, Protective Life's arguments are further exposed by the fact that section 10113.71, subd. (b)(1) nowhere mentions a requirement of "issued or delivered" in the context of further requiring that a notice of pending lapse and termination of a life insurance policy "shall not be effective" unless 30-days prior notice is provided. (Ins. Code § 10113.71, subd. (b)(1).) Similarly, the language of section 10113.72 plainly dictates at subd. (b) that insurers "shall" notify policyholders of the right to designate, and at subd. (c) that no policy "shall" lapse or be lapsed without 30-days prior written notice. (Ins. Code § 10113.72, subds. (b) & (c).) The Legislature's mandates contained in those separate subsections – without any textual reference to those policies being "issued or delivered" – only further demonstrates that they are *independent obligations* which bind insurers irrespective of when their policies were originally issued or delivered. In short, the statute's various subsections are intended to impose independent obligations on insurers, and are deliberately couched in those terms to effectuate that result as broadly as possible.

Yet in a further attempt to escape the plain meaning of those statutes and the numerous and independent obligations they impose on

insurers, Protective Life focuses myopically on "applicant" language found only in subd. (a) of section 10113.72. To that end, Protective Life ignores all other provisions of section 10113.71 and 10113.72 which do not contain that "applicant" language and instead speak consistently of obligations flowing to the "policy owner." (See Ins. Code § 10113.71, subds. (b)(1) & (b)(3) [using the term "policy owner"]; § 10113.72, subds. (b) & (c) [same].) But even indulging Protective Life's argument regarding the significance of the term "applicant," it clearly oversteps when it insists that word necessarily means that all of the independent obligations found elsewhere in sections 10113.71 and 10113.72 were intended by the Legislature only to apply to new policies issued after January 1, 2013.

Instead, a more logical analysis of the use of the word "applicant" found in section 10113.72, subd. (a) suggests that it was used by the Legislature to ensure that the designee provisions contained in that subdivision were applied as soon, and as broadly, as possible. To do so, that subdivision requires insurers to advise new policy owners of their right to designate at the time of their original policy application so that designee information can be made part of any policy from the outset.

That requirement then complements the companion obligations found in subd. (b) to inform policy owners that they can change that designee information on an annual basis. But none of those provisions negate the broader mandate in subd. (c), which makes clear that termination of a policy is not permissible without proper notice being provided to the policy owner *and* his or her designee. (Ins. Code § 10113.72, subds. (c).) Thus, the combination of those subdivisions contained in section 10113.72 reveal a legislative intent to include as much notice as reasonably necessary to assist policy owners to take full advantage of that designee protection and thereby to avoid inadvertent lapses. Indeed, the Legislature could have required a notice of a right to designate only after the issuance of the policy, but doing so would neither be as efficient nor would it accomplish the overarching goal of protecting the loss of insurance before that designation could be made. Consequently, including that protection for "applicants" from the outset was the most effective way to ensure that it would inure to the benefit of both new policyholders from the outset of their coverage, as well as

those with existing policies whose continuing coverage that designee requirement was also meant to protect.[3]

Ultimately, the Legislature's use of the word "applicant" in section 10113.72, subd. (a) must be read in harmony with section 10113.71 subds. (a) & (b)(1), both of which explicitly provide that those statutes are meant to apply to "each policy" and require the policy owner and their designee (whenever named) receive adequate notice before termination. (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1230 [confirming the well-established maxim that statutes are not to be read in isolation, but must be interpreted in a manner that brings harmony to the entire statutory scheme].) The fact that the Legislature saw fit to give individuals applying for their insurance their first (but not last) notice of a right to designate does not indicate in any fashion that it did not intend existing policyholders to have a right of a 60-day grace period, 30-days' notice before termination, or a continuing right to designate found elsewhere in that same statutory scheme. To

[3] Protective Life's "applicant" argument also ignores that applications for continual insurance coverage often occur after a policy's original issuance. For example, reinstatement of a policy is usually subject to an application process, as are conversions of policies (*i.e.,* from term to whole life).

the contrary, the intentionally broad definition of applicable policies indicates an intent to make those statutes as inclusive as possible, including in force policies already in existence, to provide the same protections for both existing and new policyholders. Protective Life's arguments to the contrary read the word "applicant" out of that important statutory context while also ignoring the legislative goal of providing as much protection as possible to all policyholders.

5. Applying Sections 10113.71 and 10113.72 Only to New Policyholders Would Lead to Absurd Results Contrary to the Legislature's Intent.

In construing the statutory language in question, this Court should not miss the forest for the trees, which is precisely what Protective Life urges it to do. To be sure, even if the Court concludes that some portion of the language contained in sections 10113.71 and 10113.72, when viewed in isolation, is subject to differing interpretations, it must avoid a construction of those statutes as a whole which runs contrary to their integrated purpose and which would lead to absurd results. (*Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 551 [explaining that where the language of a statute is reasonably susceptible of two constructions, one which, in application, will render it

reasonable, fair and harmonious with its manifest purpose, and another which will be productive of absurd consequences, the former construction will be adopted]; see also *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394 ["[W]e avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend"] [internal quotes omitted].)

Under the construction of sections 10113.71 and 10113.72 advanced by Protective Life, any policy issued before January 1, 2013 (even on December 31, 2012) would be deemed unworthy of the consumer protections measures those statutes were meant to provide, irrespective of whether those policies remained "in force" at the time those statutes took effect, or remained in effect for decades thereafter. Such an interpretation would lead to absurd results, contrary to both the public policy ills those statutes were meant to address and to the legislative remedies they were designed to enshrine. (*Allstate, supra,* 9 Cal.App.3d at 902 [when changes to the Insurance Code are remedial in nature, they should be liberally construed to most broadly carry out the Legislature's remedial goals].)

Indeed, to indulge Protective Life's interpretation, this Court would have to conclude that after repeatedly lauding the goal of providing additional protection to all "policyholders" (especially the elderly and disabled) from inadvertent lapses, the Legislature instead intended to allow insurers to continue lapsing large swaths of annually renewing policies simply because they were issued before sections 10113.71 and 10113.72 were enacted. Such a misplaced application of sections 10113.71 and 10113.72 would only further enable inadvertent forfeitures by the very class of persons those statutes were meant to protect the most, even as those policies continued in force for many years in the future. In other words, senior and disabled policyholders who need the protections of those statutes the most (after paying years of premiums) would not receive their protection at all.[4]

Again, this Court should *not* presume that the Legislature viewed itself as powerless to standardize grace periods and cancellation notices

[4] On that very issue, Judge Gee in *Bentley v. United of Omaha Life Ins. Co.* (C.D. Cal. 2019) 371 F.Supp.3d 723, 733 aptly observed that the construction proffered by the insurer in that case (like Protective Life in this case) – that sections 10113.71 and 10113.72 would never apply to an existing policy issued before their effective date no matter how far into the future that policy is extended – "leads to an absurd result, which the Legislature could not have intended."

applicable to all in force policies. To be sure, under Protective Life's proffered construction of those statutes, new policyholders, who have paid the least amount of premiums over the short life of their policies, would receive the most protection from inadvertent lapses while older policyholders, who have invested many more years of premium payments, would receive no additional protection from those same inadvertent lapses. Protective Life offers no explanation as to how that result would be consistent with the overarching goals embodied in sections 10113.71 and 10113.72.

Finally, this Court should not presume that the Legislature intended to create *two different and conflicting regimes* for policy grace periods, notices of termination, and designee schemes, with policies issued before January 1, 2013 controlled by one set of rules, while all policies issued thereafter controlled by a different set of rules. This is especially so where those statutes evince an attempt to standardize what is otherwise a confusing and often inconsistent patchwork of contract requirements and regulations for providing those notices prior to termination. But this is precisely what Protective Life espouses: two sets of standards which most policyholders will not even know exist, let

alone know how to navigate. Protective Life may have a vested interest in continuing that confusion, but the Legislature was not without the power and authority to address and eliminate it. Instead, given the broad and obvious remedial purpose of those statutes, and the general plenary authority the Legislature retains to regulate insurance practices in this state, this Court should conclude that the Legislature intended sections 10113.71 and 10113.72 to be applied to all policies in force in 2013, when those statutes became effective.

B. Application of Sections 10113.71 and 10113.72 to Existing In Force Policies Does Not Implicate Principles of Retroactivity.

As previewed above, although Protective Life starts with the self-serving conclusion that sections 10113.71 and 10113.72 are necessarily "retroactive" where they apply to existing in force policies, the law actually presumes that the Legislature did *not* intend those statutes were to be retroactive unless it clearly indicated as much. (See, *e.g., Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648; see also *Rogers v. Edmonds* (1988) 200 Cal.App.3d 1237, 1241 [confirming that absent some clear expression by the Legislature that its enactments are intended to have retroactive effect, courts should not

assume retroactivity].) Here, there is no evidence, let alone a "clear expression" of retroactive application by the Legislature, and Protective Life has pointed to none. Instead, it relies solely on a circular presumption leading to a self-fulfilling conclusion: sections 10113.71 and 10113.72, if applied to existing in force policies, are retroactive. This Court should reject that approach, as it conflicts with established criteria for determining whether legislation is retroactive or prospective only.

1. No New Set of Rules Has Been Imposed Which Changes the Legal Consequences for Past Conduct.

"A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.) "The test of retroactivity is whether [a statute] operates retroactively to materially alter the legal significance of a prior event . . . . The problem is to discern the materiality of events with respect to the policy advanced by the presumption of prospectivity. The source of the presumption is the 'general consensus that notice or warning of the rule should be given in advance of the actions whose effects are to be judged.'

[Citation.] Application . . . is retroactive only when it gives a different and potentially unfair legal effect to actions taken in reliance on the preenactment law." (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 609.)

By applying sections 10113.71 and 10113.72 to all policies in force on January 1, 2013, no conduct by Protective Life or any other insurer is implicated. Protective Life was free to lapse policies on shortened notice and grace periods prior to that date. It is only Protective Life's conduct *after* the passage of those statutes – of which they had ample notice – that is implicated by their application. Doing so is entirely *prospective*, as mandating additional notices and a longer grace period for lapses after the effective date of those statutes does nothing to impact or change the legal consequences of conduct before that time. Instead, as Petitioners previously explained, those statutes established primarily *procedural changes* – new grace periods and related notice requirements which were not before codified but were embodied in regulation only – which apply only to the *future* administration and attempted termination of policies by Protective Life. As this Court previously clarified, a statute "is not made retroactive merely because it

draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) For that reason, "it is a misnomer to designate [such statutes] as having retrospective effect." (*Ibid.*)

Protective Life has no inviolate right to administer in force policies in a specific way, or to terminate them only as it sees fit. As the Legislature noted in adopting sections 10113.71 and 10113.72, those elements of policy administration and termination are already subject to some measure of regulation. (See 1 AA 615 [Senate Insurance Committee Hearing on AB 1747, noting how the "30 day grace period is set in regulation, but not in statute," and citing to 10 Cal.Code.Regs § 2534.3, which controls variable life policies].) If, in providing notices of termination in the past, Protective Life complied with those regulations and relevant policy provisions, it has nothing to fear by the subsequent enactment of sections 10113.71 and 10113.72; those statutes will do nothing to attach new or different legal consequences to those past acts. Instead, the focus of those statutes is on how insurers like Protective Life will be permitted to administer and terminate policies *after* their

passage. Protective Life (and the rest of the insurance industry) has ample notice of those changes and new standards, and can chose to comply with them moving forward or not. But it will only be those post-enactment actions taken by Protective Life which will be judged under sections 10113.71 and 10113.72, as is the situation in this case.

Protective Life's reliance on *Ball v. Cal. State Auto. Assn. Inter-Ins. Bureau* (1962) 201 Cal.App.2d 85 does not compel a different conclusion. There, the First District concluded that a statute's mandate – that all automobile liability policies must include uninsured motorist coverage – did not impose liability on the insurer for a previously issued policy which did not include that coverage. While Protective Life places considerable heft on the application of that decision to the facts of this case, there are several obvious distinctions which should be made at the outset. First, the statute in question in *Ball* added an entirely new line of coverage to automobile liability policies. As such, retroactive imposition of that additional coverage into existing policies would fundamentally change the bargain insurers previously made when they entered into those antecedent policies. In contrast, in this case, sections 10113.71 and 10113.72 do not alter or impose any new coverages.

Instead, they merely change forfeiture provisions. There are significant differences between the substantive effect of mandating an additional line of coverage to existing policies, and mandating new notice and termination procedures for existing coverages. Protective Life's reliance on *Ball* simply ignores those differences.

Second, the *Ball* court's reasoning was focused almost entirely on whether there was a "conflict" between the provisions of that new statute and the language of the existing policy. If that conflict existed, a specific provision in the policy would address and resolve it. (*Ball, supra,* 201 Cal.App.2d at 88-89.) No such "conflict" is at-issue here, and no specific provision in the McHugh policy is implicated to address and resolve that conflict, even if it existed. Thus, the *Ball* decision must be understood within the limited factual context it was decided and the tautological nature of the "conflict" issue framed by the First District resulting from those particular facts. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [reinforcing that a decision is necessarily limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it, or referenced in its holding or reasoning].)

Third, there was no analysis in *Ball* of the purpose of the statute in question, and no evidence developed of legislative intent. As discussed above, ample evidence exists in this case concerning the Legislature's intent in enacting sections 10113.71 and 10113.72: to ensure that policyholders in California (including seniors and disabled policyholders who had invested years of premiums) did not forfeit that coverage due to inadvertence. Contrast that with the situation encountered in *Ball*, where no evidence was presented or developed to establish that the Legislature intended the additionally mandated uninsured coverage should be included or implied into in force policies in place at the time of that statute's enactment.

Finally, it should be noted that despite the vaunted status Protective Life attributes to the *Ball* decision, a diligent search has revealed that in the 58 years since *Ball* was decided, it has only been cited in *two* other cases, one of which was the Court of Appeal's *McHugh* decision under review here. In the other decision, *Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 46-48, the issue was whether automobile liability insurance written to cover an automobile licensed in England was issued or delivered in California such that it was required to

include uninsured motorist coverage. In making that determination, the *Ahern* court simply adopted *Ball's* "issued and delivered" conclusion without further analysis. To the extent this Court has subsequently found in *Calfarm, supra,* 48 Cal.3d at 830, that the state's police power extends to regulating existing insurance contracts in California, *Ball's* application should be limited or appropriately distinguished. It certainly should not be viewed as an authoritative impediment to the Legislature's proper exercise of its police power to enact remedial measures meant to standardize forfeiture provisions for all in force insurance policies in California, as embodied in sections 10113.71 and 10113.72.

2. If There Is Any Retroactive Effect to the Statutes, It Is Minimal and Will Not Substantially Impair Any Vested Contractual Rights, Especially Where Insurers Are Already Required to Provide Proper Notice to Policyholders Before Terminations Can Lawfully Occur.

While Protective Life consistently asserts that application of sections 10113.71 and 10113.72 to existing in force policies would necessarily be "retroactive," it never demonstrates how even if it were correct, that application would be constitutionally impermissible.

Indeed, even if this Court were to assume *arguendo* that there was some retroactive effect to sections 10113.71 and 10113.72, Protective Life has made no showing that such an effect substantially impairs its contractual rights. Yet it well-settled that legislative impairment of contract rights is forbidden only if the impairment is "substantial" (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244) *and* lacks a legitimate and significant public purpose (*Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 321-322). Neither is true here.

It bears repeating that at no point in the proceedings below did Protective Life demonstrate anything resembling "substantial impairment" of any vested contractual rights. *Indeed, no such evidence was proffered by Protective Life at trial, and none otherwise exists in the record.* If Protective Life would have believed that application of sections 10113.71 and 10113.72 substantially impaired a vested contractual right, it would be reasonable to expect that it would have introduced either lay or expert testimony on that subject in the trial court. It did neither. As such, Protective Life's arguments about the purportedly retroactive impact of sections 10113.71 and 10113.72 are

toothless and ultimately academic, and therefore should not influence this Court's interpretation of those statutes.

As explained previously, in *Calfarm, supra*, 48 Cal.3d 805, this Court upheld a provision of Proposition 103, regulating insurers, which restricted insurers' right to cancel or non-renew a policy. The Court held that any impairment imposed by Proposition 103 was not substantial: the regulation was "moderate and restrained," allowing insurers to continue to refuse to renew for nonpayment, misrepresentation, or a substantial increase in the hazard; it guaranteed insurers fair and reasonable rates; and it affected a "highly regulated industry, and one in which further regulation can reasonably be anticipated." (*Calfarm, supra,* 48 Cal.3d at 830.)

Similarly, the application of sections 10113.71 and 10113.72 to existing in force policies would not substantially impair any vested contract rights. (*Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120 [where this Court further confirmed how the contract clause and the principle of continuing governmental power "are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not

prevent laws which restrict a party to the gains reasonably to be expected from the contract"].) Creating and sending form notices populated with policy owner and designee information is a *de minimis* obligation which, at most, could only have a marginal impact on preexisting contracts, especially where Protective Life and other insurers routinely send renewal and premium payment notices anyway. To the contrary, Protective Life's proffered application of sections 10113.71 and 10113.72, requiring insurers to discern and follow *two different regimes for notice and grace periods* depending on whether policies were issued before January 1, 2013, would be far more burdensome on insurers than the minimal and universal approach the Legislature clearly intended by its enactment of those statutes. In short, the uniform requirements for sending those notices embodied in sections 10113.71 and 10113.72 cannot constitute "substantial impairment" of any right Protective Life previously enjoyed under McHugh's policy. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1268-1272 [finding that the revival of barred insurance claims for the benefit of policyholders who suffered losses from the Northridge earthquake did not substantially impair a contract

right, especially where the insurance industry is so "heavily regulated and one in which further regulation can reasonably be anticipated"].)

Moreover, despite Protective Life's hue and cry about retroactivity, nothing in sections 10113.71 and 10113.72 stops Protective Life or any other insurer from lawfully exiting any insurance contract if a policyowner fails to honor his or her payment obligations. It only needs to provide a reasonable grace period and sufficient notice, *de minimis* requirements which pale in comparison to the inadvertent and substantial financial losses those remedial statutes were meant to prevent. (*20th Century Ins., supra,* 90 Cal.App.4th at 1270-1271 [reasoning that a "significant and legitimate public purpose" such as "the remedying of a broad and general social or economic problem" easily overcomes any minimal adjustment of contractual rights arising out of the Legislature's statutory enactment of reasonable conditions for the protection of the public from sharp insurance practices].) Protecting vulnerable policyholders (especially seniors) from losing long-established life insurance coverage due to accidentally missed premium payments is a legitimate public policy objective. Because those statutes accomplish those objectives in a manner that imposes little to no

additional burden on insurers like Protective Life, they are constitutional regardless of even hypothetical (and at most *minimal*) resulting contractual impairment. (*20th Century Ins. Co., supra,* 90 Cal.App.4th at 1268-1272.)

C. Protective Life's Continuing Reliance on Unofficial Communications from Department of Insurance Employees Is Misplaced, As They Do Not Represent Authorized Positions of That Agency As Defined by Statute and This Court's Own Precedent.

Protective Life spends only a handful of pages at the end of its Answering Brief attempting to prop-up the Court of Appeal's Opinion, which improperly relied upon DOI "agency expertise" to interpret sections 10113.71 and 10113.72 contrary to both their plain language and purpose. Yet it floods this Court with companion requests for judicial notice of materials, most of which were never before the trial court and therefore never contained in the Court of Appeal record.

But putting aside for the moment whether those materials are even properly the subject of judicial notice, Protective Life provides a wholly inadequate legal basis for their use as interpretative tools for construing sections 10113.71 and 10113.72. In fact, all of the relevant legal statutory authority and decisional law dictate that those materials

are *not* properly considered to interpret those statutes, as they are not imbued with any "agency expertise" worthy of this Court's reliance.

1. Insurance Code Section 12921.9, Government Code Section 11340.5, and This Court's Precedent in *Heckart* All Make Clear the Only Acceptable Actions the DOI Can Take As an Official Position on the Application of the Statutes.

As Petitioners previously detailed in their Opening Brief, Insurance Code section 12921.9 makes clear that any letter or legal opinion issued by even high ranking DOI officials (*e.g.,* the DOI Commissioner or DOI Chief Counsel) "shall not be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or regulation." (See Ins. Code § 12921.9.) Instead, if the DOI wishes to establish such guidelines, instructions, or standards, it must do so either as part of a adopted regulation filed with the Secretary of State, or as part of an agency guideline or standard: (1) sent to the Secretary of State; (2) made known to the agency, the Governor, and the Legislature; (3) published in the California Regulatory Notice Register within 15 days of the date of issuance; and (4) made available to the public and the courts. (Govt. Code § 11340.5, subds. (b) & (c).) Any agency

interpretation is subject to those requirements unless it is "essentially rote, ministerial, or . . . repetitive of . . . the [law's] plain language." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336-337.)

Again, the purpose of those intentionally rigorous requirements is to prevent "underground regulations," rules which only the government knows about. (*Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217.) Such "underground regulations," given their lack of both substantive and procedural review and development, do not represent the official position of any agency (including the DOI), but instead represent the non-binding opinions of agency staff. Recognizing that important distinction, this Court recently instructed in *Heckart v. A-J Self Storage, Inc.* (2018) 4 Cal.5th 749, 769 fn. 9, that "instructions" issued by DOI staff only do not reflect "'careful consideration by senior agency officials but rather reflect an interpretation prepared 'in an advice letter by a single staff member . . . .'" (*Id.,* citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 [similarly confirming that an interpretation of a statute contained in a regulation adopted after

public notice and comment is more deserving of deference than one contained in an advice letter prepared only by staff members].)

As explained in the records filed in support of Petitioners' original Petition for Review (which this Court has already judicially noticed), the DOI has taken the very clear position that the testimony of certain DOI regarding the construction and application of sections 10113.71 and 10113.72 is legally irrelevant under section 12921.9 and this Court's *Heckart* opinion. Those judicially noticed materials also included a sworn declaration by Michael J. Levy, Deputy General Counsel for the DOI, confirming that any testimony by DOI staff members on that subject would only elicit their personal opinions and would not otherwise represent any official position taken by the DOI on the application of sections 10113.71 and 10113.72. (See Exh. A to the Request for Judicial Notice previously filed in support of Petitioners' Petition for Review, and granted by Order of this Court dated 01/29/20.)

Protective Life never deals with *that* official position the DOI has quite clearly staked out in other legal proceedings. Instead, it totally ignores Mr. Levy's uncontradicted testimony by insinuating that in the absence of an official position, the musings of DOI staff are still

somehow worthy of this Court's consideration. But under section 12921.9 and *Heckart*, the opposite is actually true. At bottom, the only official position the DOI has taken on the interpretation and application of sections 10113.71 and 10113.72 is "no position at all." Protective Life cannot now attempt to fill that vacuum with the unofficial and non-binding communications and opinions of DOI staff. It was similarly improper for the Court of Appeal to do so and to elevate those unofficial communications and opinions as the DOI's "administrative construction" of those statutes. (*McHugh*, *supra,* 40 Cal.App.5th at 1177.)

Of course, doing so would also further contradict the position the DOI took when sections 10113.71 and 10113.72 were being debated in the Legislature. On that very issue, the legislative history of those statutes plainly demonstrates that the DOI was one of their many proponents, never voicing any concerns regarding their intended application to existing policyholders. (See 1 AA 653-655 [where the DOI wrote two letters voicing its "strong support" for AB 1747 because it "would provide important consumer protection for those who have purchased life insurance coverage, especially for seniors," and would

allow for policyholders to name designees consistent with the DOI's established regulatory preference].) If the DOI was concerned that the Legislature's anticipated application of those statutes to existing policyholders was somehow improper or contrary to its historical interpretation of the Insurance Code, it had every opportunity and motive to voice that concern *before* those statutes were passed into law. But instead it wrote the AB 1747 authors in both the Assembly and Senate, pledging the DOI's "strong support" for that remedial legislation as a mechanism to enact badly needed "safeguards" against inadvertent lapses not previously enshrined in the Insurance Code. (1 AA 653-655.)

Similarly, if the DOI was concerned that those statutes – after they were enacted – would be applied in a manner contrary to its agency expertise, it would have been further motivated to enact a new regulation, rule, or directive to that effect. But tellingly, it did not do so either. Instead, the DOI has not promulgated any such regulation or rule regarding the interpretation or application of those statutes, has refused to permit its staff counsel to testify on the subject under oath on that subject, and has even gone so far as to assert privileges that would

prevent any analysis of the DOI's position (either way) on the application of those statutes. Simply put, the DOI has never taken the position on the application of sections 10113.71 and 10113.72 that either Protective Life or the Court of Appeal has ascribed to it, but instead showed itself to be an emphatic supporter of their addition to the Insurance Code. Accordingly, this Court should conclude that through the DOI's official backing of sections 10113.71 and 10113.72 in the Legislature to "provide important consumer protections for those who have purchased life insurance coverage, especially for seniors," as well as its subsequent refusal to adopt or ratify the unofficial communications and opinions of its staff on how those statutes should be applied, the DOI has actually demonstrated its support for those statutes being applied to existing in force policies.

2. The SERFF Notices Were Only Meant to Guide Acceptable Insurance Policy Forms for New Policies Moving Forward, and Never Took a Position on the Application of Sections 10113.71 and 10113.72 to Existing In Force Policies.

Protective Life continues to overstate its case with respect to the relevance and application of policy form "SERFF Notices." While it is true that the DOI created those SERFF to assist the insurance industry

in drafting new policy forms after the passage of sections 10113.71 and 10113.72, it is demonstrably untrue that those policy form notices in any way represent a determination by the DOI concerning whether those statutes applied to *existing in force policies*. That the DOI would suggest in those instructions that new policies issued by the industry after January 1, 2013 should contain the notice and termination provisions included in sections 10113.71 and 10113.72 is hardly remarkable. That is their function: to bring new policy forms in alignment with current law. But what those SERFF instructions never did – and never were intended to do – is to determine whether specific provisions of current law apply to existing in force policies, which may or may not use different policy forms. Indeed, Protective Life has presented no case where SERFF instructions have been used to construe the applicability of specific provisions of the Insurance Code to existing in force policies. Nor has Protective Life pointed to evidence in the record in these proceedings demonstrating that Protective Life relied upon those SERFF notices in deciding not to apply the notice provisions contained in section 10113.71 and 10113.72 to the McHugh policy, as no such evidence exists. Instead, Protective Life seeks judicial

notice of those materials, even though they were never made part of the lower courts' record, to stake out a position regarding their significance that no court has previously supported.

Instead, the only court that has considered the relevance of those SERFF notices has rejected Protective Life's position. Specifically, as Petitioners previously detailed, Judge Gee in the *Bentley* case correctly concluded that those SERFF notices issued by the DOI do not determine the applicability of sections 10113.71 and 10113.72 to existing policies, are not intended to represent an official position or interpretation of those statutes by the DOI, and are meant instead only to provide sample policy forms for the industry's adaptation for new policies. (*Bentley, supra,* 371 F.Supp.3d at 727-728.) Protective Life has presented no decisional law or competing authority which contradicts or otherwise undermines that conclusion.

In summary, by providing instructions to the insurance industry concerning acceptable policy forms for new policies, the DOI took no position with respect to the applicability of sections 10113.71 and 10113.72 to existing in force policies. Protective Life cannot demonstrate otherwise, and as such, it was error for the Court of

Appeal to have equated those SERFF notices with an official position taken by the DOI on the application of those statutes to McHugh's policy. This is especially so where the Court of Appeal simultaneously acknowledged that its reliance on those SERFF notices led it to construe sections 10113.71 and 10113.72 in a manner that was clearly "at odds" with their authors' intent. (*McHugh*, *supra,* 40 Cal.App.5th at 1177.) Indeed, the Court of Appeal candidly conceded that the relevant legislative history of those statutes confirmed that those authors intended the statutes to apply to all in force life insurance policies, whenever issued. (*Ibid.* [quoting that history which made clear that "[a]ccording to the author, the bill provides consumer safeguards from which people who have purchased life insurance coverage, especially seniors, would benefit"].) Relying on those SERFF notices, as well as other unofficial communications by DOI staff, to reach a contrary conclusion was clear error invited by Protective Life. This Court should decline that same invitation now and conclude that the DOI has not taken an official position on the application of sections 10113.71 and 10113.72 to existing in force policies. That determination is ultimately one this Court alone

should now make. (*Yamaha*, *supra*, 19 Cal.4th at 7 [where this Court previously confirmed that "[t]he ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body"].)

III.

CONCLUSION

Sections 10113.71 and 10113.72 were added to the Insurance Code to prevent senior and disabled policyholders from inadvertently losing important life insurance coverage after years of investment in premium payments. Yet the position Protective Life maintains before this Court, which it also pressed the Court of Appeal to adopt, would disregard those safeguards and leave existing policyholders vulnerable to the inadvertent lapse and termination of important insurance coverage.

To validate the Legislature's power to enact remedial measures to address important public policy issues, this Court should clarify the application of sections 10113.71 and 10113.72 to existing in force policies, including McHugh's Protective Life insurance policy in question.

Respectfully submitted,

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DATED: Oct. 30, 2020

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Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2015), contains 10,163 words, excluding its caption and tables.

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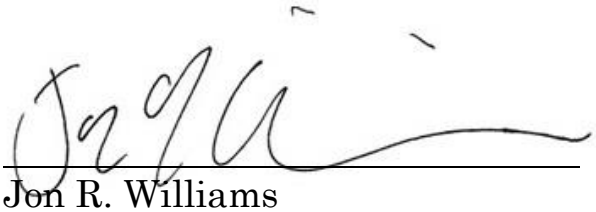

Jon R. Williams

McHUGH, et al. v. PROTECTIVE LIFE INSURANCE
Supreme Court of the State of California
CA Supreme Court Case No.: S259215
Court of Appeal Case No.: D072863
San Diego County Superior Court Case No.: 37-2014-00019212-CU-IC-CTL

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