Case No. S246541

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant-Petitioner,

v.

SANFORD J. WISHNEV,
Plaintiff-Respondent.

After Order Certifying Question, U.S. Court of Appeals, Ninth Circuit, No. 16-16037; On Appeal from U.S. District Court, Northern District of California, Hon. Edward M. Chen, No. 3:15-cv-03797-EMC

Service on California Attorney General and Contra Costa County District Attorney Required by Business & Professions Code § 17209

PETITIONER'S REPLY BRIEF

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I.

INTRODUCTION

Plaintiff-Respondent Sanford J. Wishnev ("Wishnev") argues that Defendant-Petitioner The Northwestern Mutual Life Insurance Company's ("Northwestern Mutual") charging of compound interest on his life insurance policy loans violates a phrase of a century-old usury initiative providing that "interest shall not be compounded . . . unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith." (Civ. Code, § 1916-2 (hereafter, "the compound interest restriction of section 2 of the 1918 usury initiative").) As set forth in Northwestern Mutual's Opening Brief, that argument lacks merit under well-established California precedent, for two main reasons.

First, insurance policy loans are not subject to the compound interest restriction of section 2 of the 1918 usury initiative, because the restriction was superseded as to exempt lenders by the 1934 amendment to Section 1 of Article XV of the California Constitution, which vests in the Legislature the exclusive authority to set maximum rates and "in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation" that exempt lenders may collect from borrowers, and supersedes all conflicting provisions of law. (Cal. Const., art. XV, § 1(1)–(2).) Section 1 of Article XV was further amended in 1979 to give the Legislature the power to expand the class of exempt lenders by statute, and, in 1981, the Legislature established admitted insurers such as Northwestern Mutual as exempt lenders. (See Ins. Code, § 1100.1 ["This section creates and authorizes incorporated admitted insurers as an exempt class of persons pursuant to Section 1 of Article XV of the Constitution."].) This Court has repeatedly held that the exemption created by the 1934 amendment

superseded the usury law—which includes the 1918 usury initiative—as to exempt lenders.

Second, there has been no violation of the compound interest restriction of section 2 of the 1918 usury initiative in any event, because Wishnev signed an agreement that interest on policy loans would be compounded—his life insurance contract, which under well-settled California law consists of both the signed application and the insurance policy to which it is attached. (See Ins. Code, § 10113.) Indeed, signing the application is the manner by which Wishnev agreed to *all* provisions of the life insurance contract. And Wishnev, like other policy owners, had the signed agreement with the compound interest disclosure in his possession prior to the taking of any policy loans.

Either of the foregoing points is fatal to Wishnev's claim. And nothing in his Answer Brief ("AB") alters the analysis or the conclusion. Indeed, Wishnev makes several dispositive admissions, and at the same time mischaracterizes or outright ignores swaths of applicable law, including the following:

- Wishnev continues to ignore California precedent holding that the exemption created by the 1934 amendment superseded the usury law in its entirety as to exempt lenders. (See *Penziner v. W. Am. Finance Co.* (1937) 10 Cal.2d 160, 177; *Wolf v. Pacific Southwest Discount Corp.* (1937) 10 Cal.2d 183, 184; *Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 579, 582; *Heald v. Friis-Hansen* (1959) 52 Cal.2d 834, 838; *West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 614–15.)

- Wishnev admits that this Court held in *Heald* that compound interest constitutes interest or "other compensation" charged by a lender in connection with a loan under the 1934 amendment, yet appears to argue that compound interest could be considered "other compensation" for purposes of some provisions of the 1934 amendment but not others. In making that unsupportable argument, Wishnev not only ignores common sense, but also other precedent of this Court (such as *In re Fuller* (1940) 15

Cal.2d 425) defining precisely what is *not* "other compensation"—i.e., compensation paid to third persons, and expense items paid by lenders.

- Wishnev admits that if compound interest *is* "other compensation" charged by a lender, then the Legislature has the sole authority to "in any manner fix, regulate or limit" it "in whatever way is deemed appropriate." (AB at 28.) That admission is fatal to Wishnev's argument because the Legislature's exclusive authority to regulate compound interest charged by exempt lenders necessarily conflicts with continued application of the compound interest restriction of section 2 *as to those same lenders*. For example, the constitutional authority granted to the Legislature clearly includes the authority to absolutely prohibit the charging of compound interest by exempt lenders, or to require periodic disclosures unsigned by the borrower (instead of a signed agreement). Yet it is irrefutable that either of these legislative actions is utterly inconsistent with the one-size fits all compound interest restriction of section 2 of the 1918 usury initiative.

- Wishnev ignores the fact that the comprehensive regulatory scheme for life insurance policy loans enacted in 1982 (see Ins. Code, § 1230 et seq.) goes well beyond regulating only "interest rate caps" and specifically regulates disclosures and other policy loan requirements, which, according to Wishnev's theory, are beyond the Legislature's constitutional authority. Further, he fails to distinguish this Court's precedent holding that subsequent regulatory promulgations are relevant in determining the scope of the regulatory power conferred and the interpretation of the authorizing provision. (See, e.g., *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.)

- Finally, Wishnev admits that an insurance policy and attached application together constitute the signed "agreement" between the insurer and the policyholder, but argues—contrary to the plain language of section 2—that section 2 requires something beyond a signed "agreement," such as a signed "document" or "writing," or otherwise requires a two-step, "disclosure and consent" procedure that is nowhere to be found in section 2. In doing so, he overlooks the obvious point that even his invented requirements are satisfied here. For example, a signed

"agreement" would of course constitute a signed "document" or "writing" in any court of law.

Given Wishnev's concessions, this Court should answer "no" to the first Certified Question and "yes" to the second (should this Court reach it), consistent with the decisions of all other federal district courts to address these same issues. (See *Washburn v. Prudential Insurance Company of America* (N.D.Cal. 2015) 158 F.Supp.3d 888, 896; *Martin v. Metropolitan Life Insurance Company* (N.D.Cal. 2016) 179 F.Supp.3d 948, 956; *Lujan v. New York Life Insurance Company* (N.D.Cal., Aug. 9, 2016, No. 4:16-cv-00913-JSW) 2016 WL 4483870, at *6.) Tellingly, Wishnev does not even cite, much less discuss, any of these decisions.

However, if this Court answers both questions in favor of Wishnev, then this Court's decision should apply prospectively only. Wishnev's only arguments to the contrary (AB at 62–68) are fundamentally misplaced and should be rejected. A decision in Wishnev's favor would upend both a long-accepted and relied upon industry-wide practice regarding disclosure of compound interest terms on life insurance policy loans, as well as over 80 years of settled law governing how life insurance contracts are formed in California. In any event, because well-established California precedent dooms Wishnev's arguments, this Court should have no need to reach the issue of retroactivity.

II.

ARGUMENT

A. Exempt Classes of Persons Pursuant to Section 1 of Article XV of the California Constitution Are Exempt from the Compound Interest Restriction of Section 2 of the 1918 Usury Initiative.

Wishnev's primary argument is that exempt lenders are exempt from every provision in the usury law *except* the one phrase he relies on in this

lawsuit—the compound interest restriction of section 2 of the 1918 usury initiative. (AB at 18–54.) His argument has no merit.

1. The Exemption Created by the 1934 Amendment Applies to All Restrictions in the Usury Law.

First, Wishnev does not (and cannot) refute that this Court has consistently held, in a long line of cases, that exempt lenders are exempt from *all restrictions* in the usury law.[1]

As set forth in Northwestern Mutual's Opening Brief, this Court has repeatedly recognized that the exemption created by the 1934 amendment superseded the usury law insofar as it applied to exempt lenders. (See, e.g., *Penziner, supra*, 10 Cal.2d at p. 177 ["Of course, the placing in the hands of the legislature the control of the charges to be made by the exempted groups is inconsistent with the usury law over which the legislature has no power."]; *Wolf, supra*, 10 Cal.2d at p. 184 [the 1934 amendment "designated certain organizations and individuals which are exempt from the general provisions of the usury law"]; *Carter, supra*, 33 Cal.2d at p. 582 ["the objective of the [1934] amendment was to abolish the inflexible, inadequate and unworkable provisions of the usury law and to reestablish in the Legislature the power to enact laws affecting the business of lending money in this state. . . . [T]he purpose of the [1934 amendment was] to free the Legislature from the restraints imposed by inflexible usury provisions so that interest and charges more appropriate to business conditions peculiar to each of the exempted classes could be established. Those who voted for the 1934 amendment had reason to expect that the exempt classes would not remain unregulated indefinitely. But until the Legislature exercises the power granted to it by the amendment to regulate the business

[1] As noted, Wishnev has abandoned his untenable contention from his federal court briefing that section 2 of the usury law is somehow not part of the usury law.

of lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to no restriction on interest rates or charges."]; *Heald, supra*, 52 Cal.2d at p. 838 ["The *Penziner* decision is in accord with cases holding that [the 1934 amendment], by exempting from its restrictions certain enumerated classes of persons . . . operates to exempt those classes from the restrictions in the Usury Law"]; *West Pico, supra*, 2 Cal.3d at pp. 614–15 ["It has been for some time the settled law of this state . . . that [the 1934 amendment] by exempting from its restrictions certain enumerated classes of persons . . . 'operates to exempt those classes from the restrictions in the Usury Law.' . . . Any other result would frustrate the constitutional amendment which was designed to place in the hands of the Legislature the control of the charges to be made by the exempted groups." (citation omitted)].)[2]

Wishnev fails to reconcile his position with this consistent train of authority. Rather, he argues that these cases did not directly involve the compound interest restriction of section 2 of the 1918 usury initiative. But Northwestern Mutual has cited these cases for the broader dispositive proposition that exempt lenders are exempt from the entirety of the usury law. Wishnev has no answer to that.

As expected, Wishnev again attempts—and fails—to find support in *Penziner*. The defendant there asserted that the 1918 usury initiative had been repealed by the 1934 amendment—but, critically, the defendant was

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[2] (See also *Creative Ventures, LLC v. Jim Ward & Assoc.* (2011) 195 Cal.App.4th 1430, 1441–42 [a loan is "exempt from the usury law" if made by an exempt lender, using the term "usury law" to collectively refer to the 1918 usury initiative and the 1934 and 1979 constitutional amendments]; *In re Lara* (9th Cir. 1984) 731 F.2d 1455, 1458 fn. 2 ["[The 1979 constitutional amendment] also amended Article XV to permit the legislature to exempt other classes of lenders from the usury prohibitions. Pursuant to this authority, the legislature has created exemptions for corporate insurance companies, *see* Cal. Ins. Code § 1100.1 . . . ."].)

not an exempt lender. This Court held that, ***as to nonexempt lenders such as the defendant***, the 1934 amendment modified, but did not repeal in toto, the 1918 usury initiative. (10 Cal.2d at pp. 178.) The *Penziner* court specifically and repeatedly drew a crucial distinction between exempt lenders (such as Northwestern Mutual) and nonexempt lenders (such as the *Penziner* defendant). Indeed, *Penziner*—like all subsequent decisions of this Court—unequivocally recognized that the 1918 usury initiative conflicts with the 1934 amendment's grant of complete authority to the Legislature over exempt classes, stating that: "***Of course, the placing in the hands of the legislature the control of the charges to be made by the exempted groups is inconsistent with the [1918 usury initiative] over which the legislature has no power.***" (*Penziner, supra*, 10 Cal.2d at p. 177 (emphasis added).)[3] Thus, the presumption against repeals by implication discussed in *Penziner* (AB at 18–19) has no application here. (See *Penziner, supra*, 10 Cal.2d at p. 178 ["From what has been said, it follows that in our opinion, at least **as to the nonexempt classes of lenders** (of which group defendant is a member) the usury law was not repealed by the adoption of the constitutional provision . . . ." (emphasis added)].)[4]

Wishnev also relies on dicta in *Penziner* that the 1934 amendment "place[s] in the hands of the Legislature the power to control certain of the

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[3] (See also, e.g., *Martin, supra*, 179 F.Supp.3d at p. 953 ["*Penziner* also recognized 'the placing in the hands of the Legislature the control of the charges to be made by the exempted groups is inconsistent with the [1918 initiative],' thereby suggesting exempt lenders had been freed in greater measure from the obligations articulated in the initiative."].)

[4] (See also, e.g., *Lujan, supra*, 2016 WL 4483870, at *5 ["Plaintiffs rely heavily on the language of the California Supreme Court in *Penziner* to argue that the compound interest provision of the Initiative appl[ies] to lenders exempt from Article XV. However, in *Penziner*, the Court did not seek to extend its findings to exempt classes of lenders and explicitly qualified its holding to 'non-exempt classes of lenders.'" (citing *Penziner, supra*, 10 Cal.2d at pp. 173, 178)].)

charges of certain designated classes of lenders" and "place[s] in the legislature a certain degree of control over the fixing of charges made by the exempted groups." (AB at 40–41.) But those statements do not aid Wishnev because, as explained below, it is indisputable that compound interest is among those charges that the Legislature has the power to control, and the degree of control placed in the Legislature includes the power to "in any manner . . . regulate" compound interest, which conflicts with the continued application of the compound interest regulation embodied in section 2. For this reason (among others), application of the presumption against repeals by implication would not avail Wishnev in any event.[5]

Finally, Wishnev attempts to counter Northwestern Mutual's point that *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1983) 33 Cal.3d 816, 821 ("*McConnell II*") and its predecessor decision *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1978) 21 Cal.3d 365, 370 ("*McConnell I*") refute his theory that section 2 applies to constitutionally exempt lenders. As Northwestern Mutual has explained, in both of these cases, the class of plaintiffs (margin account customers) included only those who maintained margin accounts prior to the date the defendant broker firm obtained constitutionally exempt status. In response, Wishnev states that the plaintiff class in *McConnell I* alleged two claims, one of

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[5] (See, e.g., *Martin, supra*, 179 F.Supp.3d at p. 955 ["The presumption against repeals by implication poses no barrier to this interpretation [that the exemption created by the 1934 amendment superseded the compound interest restriction of section 2 of the 1918 usury initiative] . . . . The presumption against repeal simply does not operate in this instance because the two provisions 'cannot have concurrent operation.'" (citing *Penziner, supra*, 10 Cal.2d at p. 176)]; *Lujan, supra*, 2016 WL 4483870, at *5 ["However, for reasons stated below, the regulation of compound interest is incorporated in the provisions of Article XV and the Initiative's compound interest provision conflicts with and is superseded by Article XV."].)

which was that the defendant charged interest in excess of the maximum rate. (AB at 47 fn. 16.) That fact is of no moment, however, because, as *McConnell II* makes clear, all claims *except* the alleged violation of the compound interest restriction of section 2 were dismissed. (33 Cal.3d at p. 818 fn. 2.)

2. The Compound Interest Restriction of Section 2 of the 1918 Usury Initiative Is in Conflict with the Legislature's Power to "In Any Manner . . . Regulate" Compound Interest Charged by Exempt Lenders.

In addition, there is clearly a patent conflict between (i) Article XV's grant to the Legislature of the power to "in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation" that exempt lenders may charge in connection with a loan, and (ii) the 1918 usury initiative's continued regulation of the charging of compound interest. For this reason alone, the compound interest restriction of section 2 of the 1918 usury initiative is necessarily superseded by virtue of the 1934 amendment, which states that Article XV's provisions "shall supersede all provisions of this constitution and laws enacted thereunder in conflict therewith."

To argue otherwise, Wishnev must contend that compound interest is somehow not part of the interest, charges or "other compensation" charged by a lender in connection with a loan. If compound interest ***is*** part of the interest, charges, or other compensation charged by a lender—and it is, as discussed below—then pursuant to Article XV the Legislature has the exclusive power to "in any manner fix, regulate or limit" it. The Legislature's authority over interest or other compensation necessarily conflicts with the application of the compound interest restriction of section 2 as to exempt lenders, and is therefore superseded by operation of the fourth paragraph of the 1934 amendment.

a. Under Well-Established Precedent and as a Matter of Common Sense, Compound Interest Constitutes Interest, Charges or Other Compensation Charged by a Lender.

Significantly, Wishnev concedes that this Court held in *Heald* that compound interest is compensation charged by a lender in connection with a loan. (AB at 49.)[6] Further, Wishnev does not (and cannot) dispute that this Court in *Lewis v. Pac. States Sav. & Loan Co.* (1934) 1 Cal.2d 691 similarly explained that compound interest is indeed taken into consideration when testing a transaction for usury. (1 Cal.2d at pp. 695–96.) Indeed, though Wishnev fails to acknowledge it, this Court has always considered compound interest in testing a transaction for usury, whether in, for example, the *Lewis* court interpreting section 2 of the 1918 usury initiative ("No person . . . shall directly or indirectly take or receive in money, goods or things in action, or in any manner whatsoever, any greater sum or any greater value" for a loan than at the rate of 12%) or the *Heald* court interpreting paragraph 2 of the 1934 amendment ("No person . . . shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan . . . .").

And, tellingly, Wishnev fails to address this Court's controlling precedent (discussed at page 29 of Northwestern Mutual's Opening Brief) specifically identifying the types of things that are ***not*** interest or "other compensation" paid to lenders in connection with loans—i.e., compensation paid to third persons, and expense items paid by lenders. (*In re Fuller, supra*, 15 Cal.2d at p. 434 ["the word 'interest', while broad enough to cover 'bonus', 'commission', or any other form of

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[6] Nevertheless, Wishnev apparently cannot help but counterfactually suggest in passing that the "in any manner" language relates only to "fees," and not charges or "other compensation." (AB at 49.)

'compensation' paid to the lender for the use of money, does not include brokerage or other compensation paid to a third person, or expense items such as appraisals, recording fees, insurance, or similar charges"]; see also *Cambridge Dev. Co. v. U.S. Financial* (1970) 11 Cal.App.3d 1025, 1028 ["The word 'interest' as used in the usury law includes any bonus, commission, or any other form of compensation paid to the lender for the use of the money borrowed, but it does not include expense items for investigating, appraising, inspecting and otherwise servicing the loan." (emphasis omitted) (citing *In re Fuller, supra*, 15 Cal.2d at p. 434)].) Of course, these limited categories of disbursement are not compound interest paid to a lender.

Further, Wishnev has no response from a common sense perspective as to why or how compound interest should not be considered "compensation" paid to a lender in connection with a loan, or could somehow be considered outside the ambit of the usury law.

In light of Wishnev's concessions, and his inability to address either this Court's relevant precedents or the dictates of common sense, one would expect that he would simply concede the obvious point that compound interest is part of the interest and overall "compensation" charged by a lender in connection with a loan under the 1934 amendment. Instead, Wishnev appears to argue that while compound interest is included within the "fees, bonuses, commissions, discounts or other compensation" charged by a lender for purposes of the second paragraph of the 1934 amendment and the "none of the above restrictions" language of the exemption paragraph, it is ***not*** included within that exact same language for purposes of the "in any manner fix, regulate or limit" language of the same exemption paragraph. Needless to say, there is no basis for such an absurd, inherently conflicting construction, and Wishnev does not even attempt to proffer one. The sole rationale for such a construction can only be

Wishnev's recognition that, if compound interest is compensation charged by a lender in connection with a loan, then the Legislature has the exclusive authority to in any manner fix, regulate or limit it as to exempt lenders, and that is utterly inconsistent with application to exempt lenders of the one-size-fits-all compound interest regulation of section 2.

Wishnev makes two other meritless arguments that compound interest is somehow not compensation paid to a lender. (AB at 24, 29–34.) ***First***, he states that the exemption under the 1934 amendment "focused only on interest rate caps," and "expressly alters the treatment of certain lenders insofar as interest rate caps." (AB at 24.) In fact, however, the first paragraph of the 1934 amendment reduced the maximum permissible interest rate from 12 percent to 10 percent (Cal. Const., art. XV, § 1(1)), while the second paragraph of the 1934 amendment provided that no person could charge any other "fee, bonus, commission, discount or other compensation" that resulted in the borrower paying more than the maximum 10 percent interest rate. (*Id.* § 1(2).) That includes compound interest, pursuant to *Heald.*

Second, Wishnev relies on a selected rule of statutory construction, the doctrine of *ejusdem generis*, but it does not support his theory. Preliminarily, canons of construction "are merely aids to ascertaining probable legislative intent," *Stone v. Superior Court* (1982) 31 Cal.3d 503, 521 fn. 10; they "are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391.) Rather, the "fundamental task" for the court is to "select the construction that comports most closely with the apparent intent of the Legislature . . . ." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 (citations omitted) (internal quotation marks omitted).) Thus, canons have no role to play where, as here, the Legislature's intent and purpose is known or obvious.

This Court has repeatedly determined that the purpose behind the 1934 amendment was to remove, and re-vest in the Legislature, the control over all loan "charges to be made by the exempted groups" (*Penziner, supra*, 10 Cal.2d at p. 177) and "to abolish the inflexible, inadequate and unworkable provisions of the usury law and to reestablish in the Legislature the power to enact laws affecting the business of lending money in this state" "so that interest and charges more appropriate to business conditions peculiar to each of the exempted classes could be established" (*Carter, supra*, 33 Cal.2d at pp. 579, 582). Thus, Wishnev's attempt to invoke a canon of construction to defeat or compromise the Legislative intent and purpose, and limit the broad power of the Legislature over exempted classes, is inherently misguided.

In any event, Wishnev's application of his cherry-picked canon is entirely unavailing. He asserts that construing "other compensation" to include compound interest violates the doctrine of *ejusdem generis* because the remainder of the list in the exemption paragraph of the 1934 amendment ("fees, bonuses, commissions, [and] discounts") is comprised of charges, while compound interest is merely a "method of calculation." (AB at 32–34.) This assertion is wrong on at least three levels. ***First***, compound interest is not merely a method of calculation; it is additional interest charged to the borrower and actual compensation paid to a lender to compensate for the lost use of funds and risk of non-repayment, just like the other listed charges. ***Second***, even if compound interest were merely a method of calculation, Wishnev fails to acknowledge that the *Lewis* court, in explaining that compound interest is indeed taken into consideration when testing a transaction for usury, specifically likened compound interest to a "method of calculation." (*Lewis, supra*, 1 Cal.2d at pp. 695–96.) Thus, even Wishnev's preferred characterization of compound interest does nothing to support his argument, pursuant to this Court's precedent. ***Third***,

in addition to constituting part of the interest and overall compensation paid to a lender in connection with a loan, compound interest is also a "charge,"[7] just like the other listed items in the exemption paragraph of the 1934 amendment.

b. The Legislature's Power to "In Any Manner . . . Regulate" Compound Interest Charged by Exempt Lenders Conflicts with and Therefore Supersedes The Compound Interest Restriction of Section 2.

Given that compound interest is in fact "compensation" paid to a lender (a point Wishnev should have straightforwardly conceded), the Legislature has the sole authority to "in any manner fix, regulate or limit" it. And such authority necessarily conflicts with and therefore supersedes continued regulation under the compound interest restriction of section 2 of the 1918 usury initiative.

Wishnev effectively concedes this point. Indeed, he admits that the Legislature has the power to in any manner fix, regulate or limit compound interest charged by exempt lenders "in whatever way is deemed appropriate." (AB at 28.) That admission is perhaps in recognition that the alternative—that the Legislature can set maximum rates but cannot control charges that may be used by lenders to circumvent the maximum rates—would frustrate the clear purpose of the 1934 amendment, as this Court has held,[8] and as the other district courts to consider claims identical to

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[7] (See *Carter, supra*, 33 Cal.2d at p. 583 ["The regulation of the business of [exempt entities], including their interest *and charges*, is entirely within the control of the legislature." (emphasis added)]; *Lujan, supra*, 2016 WL 4483870, at *5–6 ["Additionally, compound interest also falls under the purview of Article XV as it is a 'charge' upon a loan . . . . Because compound interest is a 'charge' upon a loan and also 'compensation' received from a lender," article XV applies to the regulation of compound interest."]; *Martin, supra*, 179 F.Supp.3d at p. 956 ["The legislative history of the constitutional amendment also bolsters the conclusion the legislature's authority to regulate charges exempt classes impose supersedes the compound interest consent requirement."].)

[8] As this Court held in *Carter*, "[t]he unmistakable purpose of the

Wishnev's have concluded. (See Northwestern Mutual's Opening Brief at 33–34.) Most importantly, that admission is fatal to Wishnev's claim. If the Legislature has the power to in any manner fix, regulate or limit compound interest charged by exempt lenders, that power conflicts with the application of the compound interest restriction of section 2 to exempt lenders.

At least two examples demonstrate this point. If the Legislature has the authority to in any manner fix, regulate or limit compound interest charged by exempt lenders, then the Legislature has the authority (i) to absolutely prohibit the charging of compound interest by exempt lenders, or (ii) to require periodic unsigned compound interest disclosures to the borrower instead of a signed agreement by the borrower. But either of these actions by the Legislature is utterly inconsistent with continued application of the compound interest restriction of section 2.

Wishnev nevertheless attempts to argue that the Legislature could absolutely prohibit the charging of compound interest by exempt lenders *even if* section 2 were deemed to apply to exempt lenders. (AB at 26, 28, 29 fn. 8.) To be clear, that is false. Under Wishnev's theory, the Legislature would lack the power to absolutely prohibit the charging of compound interest by exempt lenders because section 2 allows a lender to charge compound interest if a written agreement is signed by the borrower.

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second paragraph [of the 1934 amendment] was to prevent lenders from circumventing the limits on interest established in the preceding paragraph by forbidding any charges whereby the borrower is required to pay more than the ten percent." (33 Cal.2d at p. 579.) Similarly, as this Court explained in *West Pico*, "It has been for some time the settled law of this state . . . that [the 1934 amendment] by exempting from its restrictions certain enumerated classes of persons . . . 'operates to exempt those classes from the restrictions in the Usury Law.' . . . **Any other result would frustrate the constitutional amendment which was designed to place in the hands of the Legislature the control of the charges to be made by the exempted groups.**" (2 Cal.3d at pp. 614–15 (emphasis added) (citing *Penziner, supra*, 10 Cal.2d at p. 177).)

Wishnev attempts to dispute this fact by characterizing the compound interest restriction of section 2 as "prohibit[ing] a lender from charging compound interest" unless the lender secures such an agreement (AB at 28), but that is simply double talk. Regardless of the words chosen to characterize the compound interest restriction of section 2, the consequence of its application to loans made by exempt lenders is exactly the same: the Legislature would lack the power to absolutely prohibit the charging of compound interest by exempt lenders. Similarly, Wishnev posits that the Legislature is "free to require any *additional* disclosures (signed or unsigned) as it sees fit" (emphasis added), but that misses the point entirely. If the Legislature has the power to "in any manner . . . regulate" compound interest charged by exempt lenders, that power, including the power to require "disclosures," is inconsistent with continued application to exempt lenders of the one-size-fits-all compound interest regulation embodied in section 2 (what Wishnev calls a "disclosure" requirement).

Wishnev's remaining contentions are likewise easily refuted. While he no longer argues (as he did in his Ninth Circuit and trial court briefing) that section 2 is a mere "procedural" disclosure requirement (now saying it "is of little importance" whether it is considered substantive or procedural, AB at 26 fn. 7), he still suggests in passing that the Legislature has only the "authority to substantively regulate exempt entities' loans." (AB at 23.) That, too, is false, as the 1934 amendment provides that the Legislature has the authority to "in any manner" regulate compound interest, not to only "substantively" regulate it. And Wishnev's suggestion is unavailing in any event because the compound interest restriction of section 2 is indeed a substantive prohibition. The California courts refer to section 2 as being, in its entirety, a "usury prohibition." (See, e.g., *Bisno v. Kahn* (2014) 225

Cal.App.4th 1087, 1099.)[9] Having said that, Northwestern Mutual agrees that it should not matter whether section 2 is considered substantive or procedural, because the 1934 amendment gives the Legislature the authority to "in any manner" regulate compound interest, and a disclosure requirement is a quintessential manner of regulation. Thus, even assuming arguendo that the compound interest restriction is a mere "procedural" requirement, it *still* would conflict with—and therefore would be superseded by—the Legislature's power under Article XV to "in any manner . . . regulate" compound interest.

Wishnev further argues that Northwestern Mutual is attempting to use the "in any manner fix, regulate or limit" sentence of the exemption paragraph of the 1934 amendment to "subsume" the "none of the above restrictions" sentence of the exemption paragraph. (AB at 43–44.) The reality is that Wishnev cannot reconcile the "in any manner" language with his interpretation of the 1934 amendment. By contrast, Northwestern Mutual's reading of the exemption provisions of the 1934 amendment is the only plausible one that gives meaning to *both* key provisions: (1) pursuant to the "none of the above restrictions" sentence, all of the constitutional restrictions on interest and other forms of compensation that lenders may charge borrowers in connection with loans do not apply to exempt lenders; and (2) pursuant to the "in any manner . . . regulate" provision, the Legislature was granted the power to develop industry-specific rules that would prescribe the maximum interest rate and "in any manner" "regulate" the other compensation that exempt lenders may charge borrowers in connection with loans.

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[9] Wishnev's suggestion to the contrary notwithstanding (AB at 26 fn. 7), the fact that section 2 is a substantive prohibition does not alter the fact that the remedial changes required of life insurers in the event that Wishnev prevails would be procedural in nature. (See Northwestern Mutual's Opening Brief at 48.)

Finally, Wishnev fails to even acknowledge that in all three of the nearly identical putative class actions filed by his counsel, the district courts correctly applied controlling precedents and ruled that admitted insurers are indeed exempt from the compound interest restriction of section 2 of the 1918 usury initiative. (See *Washburn, supra*, 158 F.Supp.3d at p. 896; *Martin, supra*, 179 F.Supp.3d at p. 956; *Lujan, supra*, 2016 WL 4483870, at *6.)

c. The Ballot Materials for the 1934 Amendment Further Support Northwestern Mutual's Position.

Wishnev argues that the ballot materials for the 1934 amendment do not specifically mention the compounding of interest. That argument is a red herring.

Preliminarily, as noted in Northwestern Mutual's Opening Brief, the absence of any uncertainty as to the legislative purpose and intent behind the 1934 amendment makes review of the ballot materials unnecessary. However, the materials only reinforce the point that the amendment broadly "[p]ermits [the] Legislature to regulate said exempted classes, prescribe their maximum interest rate per annum and regulate their charges on loans." (*Carter, supra*, 33 Cal.2d at p. 581 [discussing the ballot materials].) Against this backdrop, the ballot materials do not contain any sort of affirmative statement that the broad grant of power to the Legislature by way of the 1934 amendment would leave a single phrase in section 2—the compound interest restriction—in effect for exempt lenders. One would expect that the authors of the ballot materials would have stated their intention to carve out the compound interest restriction phrase of section 2 from the effect of the 1934 amendment—*if* that was the intention.

In response to this, Wishnev summarily argues that "[s]ilence in ballot materials suggests that pre-existing law remains unchanged . . . ." (AB at 36.) But none of Wishnev's cited cases actually stands for this

proposition. Moreover, here the voters granted to the Legislature the broad authority "to regulate said exempted classes . . . and regulate their charges on loans." (*Carter, supra*, 33 Cal.2d at p. 581.) The "silence" in the ballot materials does not mean that "pre-existing law remain[ed] unchanged" (AB at 36), because the voters in fact changed it through a broad amendment that granted the Legislature the authority to regulate exempt lenders and their loan charges, and nothing in the ballot materials suggests that the voters intended to exclude compound interest from the charges that the Legislature had the power to regulate as to exempt lenders.

Wishnev's interpretative arguments rest on the demonstrated false premises that compound interest does not constitute interest, charges or other compensation, and that disclosure requirements do not qualify as "regulation" "in any manner." As explained above and in Northwestern Mutual's Opening Brief, those premises are simply untenable—and, in fact, Wishnev now concedes that disclosure requirements do qualify as "regulation" "in any manner." (AB at 28.) This is why all three of the other district courts that have considered whether admitted insurers are exempt from the compound interest restriction of section 2 have concluded that the ballot materials support exemption (see Northwestern Mutual's Opening Brief at 37)—a fact which Wishnev fails to even acknowledge.

d. Wishnev Fails to Acknowledge the Significance of Relevant Insurance Code Sections.

Preliminarily, Northwestern Mutual's point in citing to Insurance Code section 1230 et seq. is *not*, as Wishnev argues, to demonstrate that application of the compound interest restriction of section 2 "would create a direct conflict with the code sections." (AB at 50–51.) Rather, the direct conflict at issue is between application of the compound interest restriction of section 2 to exempt lenders, and the 1934 amendment's granting to the Legislature the sole authority to regulate in any manner the charging of

compound interest by exempt lenders. Here, Wishnev sets up a straw man argument.

The actual point in citing to Insurance Code section 1230 et seq. was to refute Wishnev's argument that exempt lenders are exempt only from the usury law's "maximum interest rate provisions," but are ***not*** exempt from the compound interest restriction of section 2. That argument is untenable for the numerous reasons stated above, but the passage of Insurance Code section 1230 et seq.— a comprehensive regulatory scheme expressly governing "Life Insurance Policy Loans"—provides another compelling reason. The Legislature enacted this regulatory scheme directly in the wake of the 1981 insurer exemption (Ins. Code, § 1100.1), which was itself passed in the immediate wake of the 1979 constitutional amendment permitting the Legislature to add exempt classes of lenders. The 1982 regulatory scheme for life insurance policy loans expressly established requirements not only for maximum interest rates, but also for, inter alia: pricing and dividend policies, and disclosures relating thereto; disclosures regarding the frequency of rate determinations; notice requirements for other charges; and the amount of policy loan and cash surrender values.[10] The Legislature's broad regulation of policy loans and interest charges by admitted insurers in direct response to the 1979 amendment and 1981 statutory exemption demonstrates that the Legislature understood it had the regulatory power to do far more than merely set maximum interest rates. If Wishnev's theory were correct, then the Legislature exceeded its

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[10] (See, e.g., Ins. Code, § 1232(a) [maximum interest rates applicable to policy loans]; §§ 1232(c), 1237 [written pricing and dividend policies, and disclosures relating thereto]; § 1233 [written disclosures to policyholders regarding the frequency of rate determinations for variable interest rates]; § 1235 [notice requirements for initial rate charged as well as any increases]; § 1236 [fixing the loan value as the cash surrender value of the policy].)

constitutional authority by enacting the detailed disclosure and other requirements set forth in Insurance Code section 1230 et seq. However, courts must presume that the Legislature exercised its authority in a constitutional manner. (*Dyna-Med, supra*, 43 Cal.3d at p. 1387.)

In its Opening Brief, Northwestern Mutual cited the principle that the contemporaneous view of the Legislature's own regulatory authority and the scope of the authorizing provision is entitled to considerable weight, quoting *Pacific Legal Foundation, supra*, 29 Cal.3d at p. 180 ["when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. . . . [A] focused legislative judgment on the question enjoys significant weight and deference by the courts." (citations omitted)]; *cf. Dyna-Med, supra,* 43 Cal.3d at pp. 1388–89. Again, Wishnev sets up a straw man argument that Northwestern Mutual "suggest[s] that this Court should infer a legislative understanding that the Initiative's provision does not apply to insurers and then defer to that supposed legislative understanding." (AB at 53 fn. 19.) To the contrary, Northwestern Mutual is not suggesting that this Court infer anything about the Legislature's understanding other than what is included in the very provisions of Section 1230 et seq.—i.e., a broader regulation of policy loan and interest charges beyond "maximum interest rates." Further, Wishnev asserts that there is "no evidence whatsoever" that the Legislature acted "with the relevant constitutional prescriptions in mind." (AB at 53.) To the contrary, the Legislature could *only* have acted with the relevant constitutional prescriptions in mind when enacting Insurance Code section 1230 et seq. in 1982, as the Legislature had no power to act at all absent the previous year's statutory exemption, which expressly provides that "[t]his section creates and authorizes incorporated admitted insurers as an exempt

class of persons pursuant to Section 1 of Article XV of the Constitution." (Ins. Code, § 1100.1.)[11]

B. The Signed Life Insurance Agreement, Comprised of the Application and Policy and Delivered to the Borrower Prior to the Taking of Any Policy Loans, Meets the Requirements of Section 2 of the 1918 Usury Initiative.

The foregoing confirms that Northwestern Mutual is exempt from the compound interest restriction of section 2 of the 1918 usury initiative. But even if Northwestern Mutual were not, Wishnev's life insurance agreement complied with section 2.

Wishnev concedes that his insurance agreement is comprised of both the policy and the application (AB at 55), that he signed the insurance agreement by signing the application, and that the insurance agreement provided for the compounding of interest. Accordingly, Wishnev's insurance agreement complied with section 2 of the 1918 usury initiative, which requires only that "in the computation of interest upon any . . . instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an *agreement* to that effect is clearly expressed in writing and signed by the party to be charged therewith." (Civ. Code, § 1916-2 (emphasis added).)

Wishnev relies again on *McConnell II*, but it does nothing to support his argument. The agreement at issue in that case did not provide for the charging of compound interest, and thus the defendant "violated section 2 by failing to clearly express in a writing signed by its customers that compound interest would be charged." (33 Cal.3d at p. 823.) Here, by contrast, Wishnev's agreement provides for the charging of compound

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[11] Initially, Wishnev incorrectly asserts that Insurance Code section 1100.1 is phrased only in terms of the "restrictions upon rates of interest" referenced in the second paragraph of the statute (AB at 51–52), but then immediately acknowledges in a footnote the true scope of section 1100.1. (AB at 52 fn. 18.)

interest; thus, "the provision for compounding [was] in writing and signed by the borrower." (*Id.* at p. 822.)[12]

In his Answer Brief, Wishnev misrepresents the straightforward requirement of section 2—that there be a signed "agreement"—in two respects. ***First***, he argues that, to achieve compliance, there must be a "document" that both discloses an intention to charge compound interest and contains Wishnev's signature, and that there is no such "document" here. (AB at 54–55.) Wishnev is wrong on both counts. Preliminarily, the word "document" appears nowhere in section 2; it uses the word "agreement."[13] Nevertheless, such a requirement would be satisfied here because in common usage and in any court of law, the term "document" encompasses an "agreement" or "contract." (See Black's Law Dict. (10th ed. 2014) [defining "document" as, inter alia, "The deeds, *agreements*, title papers, letters, receipts, and other written instruments used to prove a fact." (emphasis added)].) Thus, Wishnev signed a "document" (i.e., the insurance agreement) that provided for the charging of compound interest.

Second, Wishnev twists the requirement of an "agreement" into a "disclosure" and a subsequent "consent" requirement, but the words "disclosure" and "consent" nowhere appear in section 2 of the 1918 usury initiative, or in *McConnell II* for that matter. Nor is there any requirement

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[12] Obviously, in common usage and in any court of law, the term "writing" encompasses an "agreement" or "contract." (See Black's Law Dict. (10th ed. 2014) [defining "contract" as "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law" or "[t]he *writing* that sets forth such an agreement" (emphasis added)].)

[13] (See *Lujan, supra*, 2016 WL 4483870, at *7 ["[T]he Initiative does not state, as Plaintiffs contend, that the compound interest language must appear on the 'actual document signed by the borrower.' . . . Rather, the Initiative simply requires an 'agreement' to be signed by the borrower . . . . ***Plaintiffs did sign an agreement when they signed the application*** that comprised the larger agreement for insurance." (emphasis added)].)

in the 1918 usury initiative or related case law that such "disclosure" be made "in advance" of the loan. (AB at 38.) Nevertheless, Wishnev's invented requirements would be satisfied here as well, because the insurance agreement disclosed the charging of compound interest, and Wishnev signed and agreed to it the same way he signed and agreed to *all* of the provisions of the agreement—i.e., by signing the application. Indeed, Wishnev's right to take a policy loan exists only because he previously agreed to the all of the policy's terms and conditions, including the unambiguous disclosure that compound interest would be charged on policy loans. And Wishnev admits that he received the signed insurance agreements disclosing that compound interest would be charged *before* he took out any policy loans. (AB at 12.) This is yet another reason why *McConnell II* could never support Wishnev's position: in addition to the fact that the agreement at issue there did not provide for the charging of compound interest, the unsigned disclosures to which the defendant pointed in *McConnell II* were provided *after* the loans already had been taken out and compound interest had been charged. (33 Cal.3d at pp. 819–20.) In other words, even if one accepts Wishnev's premise that section 2 of the 1918 usury initiative requires disclosure of compound interest in a document signed by the borrower prior to the issuance of a loan, those circumstances exist here. The insurance policy provides disclosure that compound interest will be charged; that disclosure is provided to the policyholder in an integrated agreement he has signed, and which he further demonstrated acceptance of by making premium payments; and that disclosure is provided prior to the decision by the policyholder to exercise his contractual right to take out a policy loan (and indeed, prior to the policy accumulating cash value sufficient to allow for any policy loans). Notably, Wishnev does not (and could not) claim that he lacked actual or

constructive knowledge from reading the policy language that interest would be compounded before he took out any policy loans.

Perhaps these are the reasons that the Legislature has not seen fit, in the 37 years since the enactment of the insurer exemption, to exercise its authority to require any additional compound interest disclosures for life insurance policy loans beyond those contained in the policy forms filed with the Department of Insurance in compliance with the Insurance Code. (See Ins. Code, § 10163.35.) The public policy of requiring advance knowledge of compound interest charges before a loan is taken is fully satisfied by the uniform life insurance practice of delivering the signed application as part of the integrated insurance agreement. Regardless, the fact remains that Wishnev's insurance agreement complied with section 2 of the 1918 usury initiative, as the compound interest disclosure was made in the integrated agreement he signed. That is all the law requires, *even as to non-exempt lenders.*

This issue is clear, which is why except for the District Court's decision in this case, no California state or federal court has ever concluded that an insurer violated the compound interest restriction of section 2. And the two other district courts to consider this issue (*Lujan* and *Martin*) rejected plaintiffs' reliance on *McConnell II* and held that Insurance Code section 10113 as well as case law compelled the conclusion that plaintiffs signed an agreement clearly providing for compounding of interest on policy loans. (See *Martin, supra*, 179 F.Supp.3d at pp. 956–57; *Lujan, supra*, 2016 WL 4483870, at *6–7.)

C. Any Ruling in Wishnev's Favor Should Apply Only Prospectively.

In its Opening Brief, Northwestern Mutual explained why, as a matter of fairness and public policy, a ruling in Wishnev's favor should be prospective only, as such a ruling would alter settled law or "disrupt[] a

practice long accepted and widely relied on." (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 796.) In response, Wishnev fails to address the four factors relevant to this issue of retroactivity (compare Northwestern Mutual's Opening Brief at 46–50) and instead rests entirely on the inaccurate premise that a ruling in his favor would *not* alter settled law. (AB at 64.) Wishnev further contends that even if this Court's decision would disrupt long-accepted business practices, that is not the appropriate inquiry. (AB at 65.) Neither argument withstands scrutiny.

First, an adverse decision would plainly alter settled statutory and case law dating back over 80 years—law that authorizes insurers to form fully-integrated agreements with policyholders, and obtain assent to all terms in the policy, by delivering the policy with the signed application attached. (See Ins. Code, § 10113 (added by Stats. 1935, ch. 245); *Boyer v. U.S. Fid. & Guar. Co.* (1929) 206 Cal. 273, 276–77 ["The policy and the application therefore constitute the contract."]; see also *Burr v. Equitable Life Ins. Co. of Iowa* (9th Cir. 1936) 84 F.2d 781, 782 [recognizing that the application and policy are "a single insurance contract"]; *New England Mut. Life Ins. Co. v. Lauffer* (S.D.Cal. 1963) 215 F.Supp. 91, 97 ["The insurance policies with the applications attached are construed together as they constitute one contract."]; *Meyer v. Johnson* (1935) 7 Cal.App.2d 604, 609 [noting that the life insurance policies at issue stated that both the policy and attached application "constitute the entire contract," and finding it "apparent, therefore, that the whole application was necessary to constitute the contract. [Citations.]"].)[14]

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[14] Wishnev asserts that insurance applications are part of the insurance contract only "to protect the insurer from material misstatements of fact in the application," citing in purported support *Mitchell v. United Nat. Ins. Co.* (2005) 127 Cal.App.4th 457, 469. (AB at 57 fn. 21.) However, *Mitchell* says no such thing.

Wishnev ignores the significance of Insurance Code section 10113 and the foregoing case law (which he fails to address) by focusing instead on the fact that the two Certified Questions have yet to be answered by any court. That is another red herring. A decision in Wishnev's favor would still alter settled law even though the Certified Questions themselves have not previously been addressed. For example, a ruling that Wishnev's life insurance agreements (comprised of the policy and attached signed application) do not comply with section 2 of the 1918 usury initiative would of necessity require a ruling that the policy with the attached application is not a signed "agreement" at all—a decision at odds with the above settled law governing the formation of insurance contracts. It also would of necessity require a ruling that exempt lenders are exempt from every provision in the usury law *except* the compound interest restriction of section 2 of the 1918 usury inititative—a decision at odds with this Court's consistently holding that exempt lenders are exempt from *all* restrictions in the usury law.

Second, it is eminently appropriate to consider whether this Court's ruling would disrupt business practices "long accepted and widely relied on." (*Grobeson, supra*, 190 Cal.App.4th at p. 796.) Wishnev labels this a "new standard of [Northwestern Mutual's] own invention" (AB at 65), but the opposite is true. As Wishnev acknowledges, the *Grobeson* court cited a California decison from 1983, which, in turn, quoted a U.S. Supreme Court decision from 1982. (AB at 66, discussing *People v. Hicks* (1983) 147 Cal.App.3d 424 and *United States v. Johnson* (1982) 457 U.S. 537.) In *Hicks*, the court noted that the question of retroactivity requires "considerations of convenience, of utility and of the deepest sentiments of justice," but noted that "in certain cases the question has been answered consistently and categorically when a new rule is a clear break with the past." (147 Cal.App.3d at p. 427 (citations omitted) (internal quotation

marks omitted).) Such a "clear break" occurs, the court explained, "when [a] decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon." (*Ibid.* (citations omitted) (internal quotation marks omitted).) Similarly, in *Johnson*, the high court observed that such a "clear break" has been recognized "when a decision explicitly overrules a past precedent of this Court . . . or disapproves a practice this Court arguably has sanctioned in prior cases . . . or overturns a longstanding and widespread practice to which this Court has not spoken, *but which a near-unanimous body of lower court authority has expressly approved.*" (457 U.S. at p. 551 (citations omitted) (emphasis added).)

Wishnev seizes on the foregoing italicized language to suggest that no "clear break" would occur here, as he characterizes the appropriate standard as "referring to a situation where widespread and uniform *judicial* rulings existed that apparently settled a legal rule . . . ." (AB at 66.) But this argument is misplaced. It is beyond dispute that the above case law (*Boyer*, *Burr*, *Lauffer*, and *Meyer*) ***is*** unanimous and uniform authority governing the formation of insurance contracts. Thus a conflicting decision from this Court, including one that "carved out" a compound interest term from the "agreement," would constitute the "clear break" referenced in *Hicks* and *Johnson* because it would "overturn a longstanding and widespread practice," or, in other words, "disrupt[] a practice long accepted and widely relied on." (*Johnson, supra*, 457 U.S. at p. 551; *Hicks, supra*, 147 Cal.App.3d at p. 427.) Indeed, for over 80 years, insurers such as Northwestern Mutual have reasonably relied on settled law to form agreements with policyholders, including agreements for the charging of compound interest, through the process of delivering policies with the signed application attached—thus forming an entire, integrated agreement in compliance with Insurance Code section 10113 and related case law. That is the well-established, industry-wide practice by which policyholders

agree to *all* terms in an insurance contract. Further, the policies, which contain the compound interest disclosures for life insurance policy loans, are on forms authorized by the Department of Insurance in compliance with the Insurance Code, as part of an apparently valid comprehensive regulatory scheme. Accordingly, this Court can and should consider the fact that a decision in Wishnev's favor would disrupt established business practices that have been authorized by statute and a unanimous body of case law, and consistently permitted by the governing regulatory body.[15]

Wishnev obfuscates by suggesting that a "practice that is not lawful cannot become so merely from the passage of time or because its practitioners assumed that it was permitted." (AB at 67 fn. 27.) Northwestern Mutual's well-established contract formation practices are entirely lawful, and were pronounced as such as early as the *Boyer* decision in 1929 and the enactment of Insurance Code section 10113 in 1935. Wishnev further attempts to muddy the waters by stating that Northwestern Mutual "did not obtain his signature to the [four] polic[ies]" issued between 1967 and 1976, i.e., before the 1981 insurer exemption. (AB at 67–68.) That is yet another red herring, as Northwestern Mutual has consistently formed life insurance contracts with policyholders in the same manner it formed contracts with Wishnev: through the provision of the policy along with the signed application. Again, that is how policyholders agree to all of the terms in the insurance contract. (*Boyer, supra*, 206 Cal. at pp. 276–77.) Neither Insurance Code section 10113 nor section 2 of the 1918 usury initiative has ever required anything else.

Nor would there be any purpose in any additional signature requirement. The four factors relevant to the issue of retroactivity

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[15] A decision in Wishnev's favor also would be a "clear break" with this Court's consistently holding that exempt lenders are exempt from *all* restrictions in the usury law.

demonstrate that though the change urged by Wishnev would impose substantial procedural burdens, and would disturb the settled rights and obligations governing countless policy loans dating back decades, it would offer no practical enhancement in notice to policyholders. (Northwestern Mutual's Opening Brief at 46–50.) By ignoring the four factors, Wishnev effectively concedes this.

III.

CONCLUSION

For the foregoing reasons and those set forth in Northwestern Mutual's Opening Brief, this Court should answer the Certified Questions in favor of Northwestern Mutual. If it declines to do so, it should provide for any remedies to apply prospectively only.

Dated: August 1, 2018

DRINKER BIDDLE & REATH LLP

By: _____

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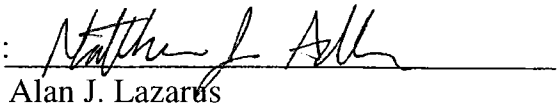
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the text of Petitioner's Reply Brief contains 8,375 words as counted by Microsoft Word.

Dated: August 1, 2018

DRINKER BIDDLE & REATH LLP

By: 

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PROOF OF SERVICE

I, Sylvia Lee, declare that:

I am at least 18 years of age, and not a party to the above-entitled action. My business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105, Telephone: (415) 591-7500. On August 1, 2018, I caused to be served the following document(s):

PETITIONER'S REPLY BRIEF

by enclosing a true copy of (each of) said document(s) in (an) envelope(s), addressed as follows:

☑ **BY MAIL**: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

☐ **BY PERSONAL SERVICE:** I caused such envelopes to be delivered by a messenger service by hand to the address(es) listed below;

☐ **BY E-MAIL:** I caused such documents to be transmitted by e-mail to the following e-mail addresses as set forth below.

☐ **BY OVERNIGHT DELIVERY:** Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by for overnight delivery on this date.

☐ **BY FACSIMILE:** I caused such documents to be transmitted by facsimile transmission to the following facsimile number listed below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 1, 2018 at San Francisco, California.

Sylvia Lee