IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S246541

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant and Petitioner,

v.

SANFORD J. WISHNEV,
Plaintiff and Respondent.

After Order Certifying Question, United States Court of Appeals for the Ninth Circuit, No.16-16037; On Appeal from U.S. District Court for the Northern District of California, Case No. 3:15-cv-3797-EMC
The Honorable Edward M. Chen

Service on California Attorney General and Contra Costa District Attorney Required by Bus. & Prof. Code § 17209

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF DEFENDANT AND PETITIONER

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Pursuant to Rule of Court 8.520, the American Council of Life Insurers ("ACLI") requests leave to file the attached brief *amicus curiae* in support of Petitioner, The Northwestern Mutual Life Insurance Company ("Northwestern Mutual"). ACLI participated as *amicus curiae* before the Ninth Circuit in the *Wishnev* case and related matters that led to the order certifying questions to this Court. ACLI is familiar with the issues and believes that the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLI is the largest life insurance trade association in the United States, representing the interests of approximately 290 member companies operating in the United States and abroad. ACLI member companies are among the leading providers of life insurance products. In the United States, these companies represent more than 90 percent of industry assets. In California alone, ACLI member companies provide 90% of total life insurance coverage.[1]

ACLI regularly advocates the interests of life insurers and their millions of policyholders and beneficiaries before federal and state legislators, state insurance commissioners, federal regulators, administration officials, and the courts. ACLI regularly files *amicus* briefs

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[1] Pursuant to California Rule of Court 8.520(f)(4), ACLI confirms that no party's counsel authored this brief in whole or in part, and that no party, no party's counsel, and no other person contributed money intended to fund the brief's preparation or submission other than ACLI on behalf of its collective membership.

in cases, like this one, that involve issues of great importance to its members.

ACLI's members have a vital interest in ensuring that its member companies may continue to provide policy loans to policyholders under the procedures and terms that have been in place for decades. A decision that invalidates the loan or interest provisions of insurance policies would conflict with years of life insurance regulation and practice. An adverse decision would also interfere with the ability of ACLI's members to offer policy loans, a valuable and widely-used benefit, without disrupting current policyholders' access to benefits and without requiring a costly overhaul of insurers' business processes in the future.

BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF PETITIONER

I. INTRODUCTION AND SUMMARY OF ARGUMENT

ACLI submits this amicus brief in support of petitioner Northwestern Mutual because a decision that subjects life insurance policy loans to the 1918 usury initiative (the "1918 Initiative") will impede the ability of policyholders to access the cash value that they have accumulated in their policies through policy loans. A ruling that life insurance policy loans are subject to the 1918 Initiative, despite the intent underlying the 1934 Amendment to the California Constitution granting exemptions from the 1918 Initiative (the "1934 Amendment") and the legislature's subsequent exemption of insurers from the 1918 Initiative, would conflict with existing regulations and long-standing practices related to life insurance. The 1934 Amendment was intended to restore plenary authority to the legislature to regulate lenders based on the specific needs and characteristics of their businesses. Contrary to Wishnev's arguments for a narrow construction of the 1934 Amendment and subsequent exemptions, grants of legislative

authority are to be construed broadly and in favor of the effectiveness of legislation. When the legislature exempted insurers from usury laws, it plainly intended to exercise its authority to supplant those laws in their entirety, in favor of comprehensive regulation tailored to the unique conditions and interests presented by policy loans. The Court should begin its analysis with the presumption that the legislature's action was valid. Furthermore, a holding that the signed agreement created by incorporation of the application into the policy upon acceptance does not satisfy the 1918 Initiative would ignore insurance practices and principles of contract formation that predate the 1918 Initiative. The Court should therefore answer both of the certified questions in favor of Northwestern Mutual.

II. ARGUMENT

A. A Ruling That Validates The Loan Provisions Of Life Insurance Policies Will Preserve Policyholders' Ability To Access And Use The Cash Value In Their Policies.

ACLI's members issue several forms of permanent life insurance that permit policyholders to accumulate cash value over time. The cash values on some policies accrue at a fixed interest rate; variable insurance policies permit insureds to allocate account values among a menu of underlying options, including mutual funds. A policy with cash value provides multiple benefits to policyholders, including tax-favored treatment of certain events. For example, increases in cash value that result from interest crediting of investment performance generally remain tax-deferred until the policyholder withdraws that value. *See I.R.S. v. CM Holdings, Inc.*, 301 F.3d 96, 99 (3d Cir. 2002).

Policy loans provide a means for policyholders to utilize the cash value with more flexibility than taking withdrawals (which may trigger a

taxable event, among other consequences). Loan proceeds are not taxable, even if the amount borrowed exceeds the premiums paid, so long as the policy does not lapse and is not surrendered. *See Minnis v. Commissioner*, 71 T.C. 1049, 1053 (1979). Policy loans also provide a more flexible source of liquidity than other types of credit. Because the loan is effectively secured by the cash value that accumulates over time in the insurance policy, policyholders may take loans without the need for underwriting or credit checks. Kenneth Black, Jr. & Harold D. Skipper, Jr., *Life and Health Insurance* 237 (13th Ed. 2000). Policyholders may also vary their repayment schedules to suit their needs and ability to repay. *Id.* There is no set schedule for repayment of principal. 8-88 Jeffrey E. Thomas, *New Appleman on Insurance* § 88.04[4] (Law Library Ed. LexisNexis). Policyholders may elect to repay principal at any time, as a lump sum, through installment payments, or, in the event the policyholder dies before the loan is repaid, through a deduction from the death benefit. Black & Skipper at 237. A policyholder may elect to pay interest annually. If the policyholder does not make annual interest payments, many contracts provide that the interest will be compounded, either by adding the unpaid amount to the existing indebtedness or by taking out a new loan in the amount of the unpaid interest. Policyholders may therefore use policy loans to pay for unexpected expenses, large purchases, capital for a new business, or as a tool in retirement planning, in which the insured may use a combination of policy withdrawals and loans as a tax-advantaged source of cash for retirement.

Policy loans also protect against a loss of life insurance coverage due to nonpayment of premium, whether through inadvertence or inability to pay. The legislature has enacted statutory protections against the lapse of life insurance coverage, in recognition of the substantial consequences a lapse may have to a policyholder. *See* Ins. Code §§10113.71-72 (requiring

insurers to notify third-party designee of impending lapse before termination of policy). A lapsed policyholder must reapply and be subjected to additional examination and underwriting to establish their eligibility for insurance. *See* Comm. Rep. for 2011 Cal. Assemb. Bill No. 1747, 2011-2012 Reg. Sess. (June 11, 2012)(legislative analysis of Bill No. 1747, which was codified at Ins. Code. §§10113.71-72). They may have to pay higher premiums as a result of age or change to their risk classification, or they may find themselves uninsurable due to declining health. *Id.* An unintended or unexpected lapse may therefore have drastic results on the financial interests of policyholders and their beneficiaries. *Id.* To avoid these consequences, the proceeds of policy loans can be applied to pay outstanding premium obligations, thereby sustaining coverage where a policy would otherwise lapse. Policy loans provide policyholders additional flexibility as to the payment of premiums, as they can fall back on the cash value of the policy to reduce or delay future premium payments. Policy loans may also sustain a policy against inadvertent or unintentional lapses, without additional action by the policyholder. Many products provide an automatic premium loan feature, which will automatically loan premium payments to the insured using the cash value as collateral in order to sustain the policy, in the event no payment is received.

The volume of policy loans against life insurance policies issued nationwide and in California demonstrates their popularity, their value to policyholders, and the potential impact of any decision that will restrict the availability or value of policy loans. Data from the National Association of Insurance Commissioners show that at the end of 2017, outstanding loans to policyholders against their life insurance policies amounted to $136.5 billion. ACLI estimates that there are approximately $16.7 billion in loans to policyholders on life insurance policies issued in California.

A decision that retroactively disallows compound interest would also adversely impact the value of other benefits available to policyholders. Policy loans provide a valuable benefit to policyholders who borrow from their policies, but the interest payable on those loans supports the cash value guarantees in the life insurance contracts of all policyholders. Interest also increases the amounts available for benefits beyond those guaranteed by the policy, such as higher dividends and credits to account values. The actuarial pricing process relies on assumptions regarding expected cash flows, both into and out of the insurance company, to determine what benefits are sustainable. *See* Black & Skipper at 41-46. An unanticipated decrease in an incoming cash flow, such as a reduction in interest paid, will impact both insurers and policyholders. The drastic and unexpected reduction in loan interest that could result from an adverse ruling here would leave fewer assets than expected to support insurance benefits and guarantees, which would in turn result in reductions in available benefits to policyholders. The legislature recognized the connection between interest on policy loans and benefits to other policyholders when it enacted comprehensive statutes regulating policy loans. *See* Ins. Code § 1230 ("It is the intent of the Legislature that the life insurance industry make available to the people of the State of California who purchase new life insurance policies after the effective date of this act the benefits of higher dividends or lower premiums, or both, resulting from the increased earnings through the use of higher policy loan interest rates.") The adverse impact of a ruling that disallows or impedes the collection of compound interest would therefore disadvantage all policyholders, including those who have not taken policy loans or who have paid interest before it is added to principal. Any reduction resulting from the elimination of compound interest, on the other hand, would only benefit policy owners with outstanding loans and accrued interest.

B. Limiting The Legislature's Authority To Regulate Compound Interest Charged By Exempt Insurers Conflicts With the Expressed Intent of the 1934 Amendment.

Wishnev's reading of Article XV of the State Constitution (which contains an amended and expanded version of the 1934 Amendment) ignores the underlying intent of the 1934 Amendment – to restore the legislature's plenary authority to regulate exempted lenders – in favor of an inapplicable presumption against implied repeal. As evidenced by the ballot argument and text of the amendment, the 1934 Amendment was intended to grant the legislature the necessary power to regulate certain lenders and to prevent the use of "fees" or other disguised interest charges to circumvent limitations on interest. The ballot argument in favor of the 1934 Amendment discusses the inadequacy of the 1918 Initiative, where "Interest disguised as 'charges' is currently exacted at rates that range as high as *eighteen hundred per cent* per annum." (Supp. E.R. 12) Consistent with the intent to prevent the use of labels to circumvent the usury laws, paragraph 2 of the 1934 Amendment prohibits lenders from receiving "any fee, bonus, commission, discount or other compensation" of more than ten percent per annum (the maximum permitted interest rate under the 1934 Amendment). Cal. Const., art. XX, 22 (1934). The description of "compensation" is not intended as a limitation or an identification of a category of charges separate from interest, but as an expression of intent that any "compensation" received for a loan, regardless of how labeled, should be treated as a form of interest. The same broad language is used to describe the legislature's authority to regulate exempt lenders.[2]

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[2] The original parallel construction of the prohibition against excessive interest and the legislature's authority over exempt lenders has been altered

Wishnev's argument turns on a distinction between "interest" and "other compensation" that is not supported by the original text of the 1934 Amendment. Wishnev splits the 1934 Amendment's grant of authority into two parts: the authority to specify maximum rates of interest and the authority to regulate "fees, bonuses, commissions, discounts or other compensation." The actual language of the Amendment does not draw that distinction, however:

> The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

Cal. Const., art. XX, 22 (1934). The 1934 Amendment's grant of power to the legislature to regulate compensation received by exempt lenders does not expressly mention "interest" at all. Consistent with the intent to extend the reach of the legislature's power to interest in any form, the initiative uses the same broad list, "fees, bonuses, commissions, discounts or other compensation," when granting the legislature the authority to set and regulate interest as it does when prohibiting any form of compensation above the ten per cent maximum rate. The words "fees, bonuses,

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through subsequent amendments. None of those amendments suggests an intent to restrict the authority granted under the 1934 Amendment, however.

commissions, discounts or other compensation" are not describing something other than interest. They are used to describe the broad range of compensation that should be treated as interest. Under Wishnev's false dichotomy between "interest" and "other compensation," the exempted lenders under the 1934 Amendment would have been free to charge any rate of interest, since the Legislature's power only would only extend to "loan charges." (Respondent's Answer Brief at 33) This absurd result illustrates why Wishnev's interpretation should be rejected. *See Bonnell v. Med. Bd. Of Cal.*, 31 Cal. 4th 1255, 1260-61 (2003) (construction that produces absurd consequences should be rejected).

Wishnev's discussion of *ejusdem generis* relies on the same flawed construction of "interest" and "other compensation" in the 1934 Amendment as different categories, as opposed to descriptions of the same concept. This canon therefore should have no bearing on the Court's interpretation. In any event, the paramount objective of statutory construction "is to ascertain and effectuate the underlying legislative intent." *Moore v. Cal. State Bd. of Accountancy*, 2 Cal. 4th 999, 1012 (1992). This fundamental rule "overrides the *ejusdem generis* doctrine, just as it would any maxim of jurisprudence, if application of the doctrine or maxim would frustrated the intent underlying the statute." *Id.*; *see also People v. Kelly*, 154 Cal. App. 4th 961, 967 (2007) ("When we must resort to rule of statutory construction such as *ejusdem generis* to clarify ambiguous language, we do so to effectuate the legislature's intent, not to defeat it."). Wishnev therefore cannot rely on *ejusdem generis* or any other canon of construction to forge a gap in legislative power that conflicts with the 1934 Amendment's underlying intent to vest the legislature with plenary authority to regulate exempt lenders.

C. The Legislature's History Of Regulating Insurance Supports The Power To Regulate All Aspects Of Policy Loans.

A ruling that limits the legislature's power to regulate compound interest is inconsistent with the intent of the 1934 Amendment and the history of comprehensive regulation of insurance by the states. Because of its importance to consumers and its unique features, life insurance has traditionally been subject to comprehensive regulation through provisions specific to insurance, as opposed to more general commercial statutes. The federal McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) was passed to "to insure that the states would continue to enjoy broad authority in regulating the dealings between insurers and their policyholders. *Am. Int'l Group, Inc. v. Superior Court*, 234 Cal. App. 3d 749, 757 (1991)(citing *Cochran v. Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979)). Pursuant to that mandate, the California legislature has "enacted comprehensive legislation expressly designed to regulate the business of insurance." *Id.* at 764. This level of regulation is common to most states, which elect to treat the business of insurance as a separately regulated industry. Insurance is not ordinarily regulated by general commercial statutes, but by pervasive regulation of all aspects of the business of insurance, including such diverse matters as the contents of life insurance policies, the reserves insurers must maintain, how insurers may advertise their products, and how they invest their assets. *See, e.g.* Cal. Ins. Code § 923.5 (reserves); Cal. Ins. Code §§ 1170-1182 (investments); 10 Cal. Admin. Code §§ 2201- 2218.10 (requiring submission of all policy forms); 10 Cal. Admin. Code §§ 2547-2547.11 (life insurance advertisements). The extent of the state's interest and involvement in regulating insurance is also reflected in the special guarantees and remedies the state provides to policyholders in the event an insurer becomes insolvent. *See* Ins. Code §§1067-1067.19 (California Life and Health Insurance Guarantee Association Act).

The 1934 Amendment's restoration of power to the legislature over exempt lenders, along with the 1979 Amendment's grant of the power to exempt additional classes of lenders, should be construed broadly in favor of the ability to regulate effectively and consistently with the legislature's historical role in regulating the life insurance industry. Any analysis of the legislature's authority begins with the grant of plenary power under the state Constitution: "We do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited." *Cal. Redev. Assn. v. Matosantos*, 53 Cal. 4th 231, 254 (2011) (*quoting Methodist Hosp. of Sacramento v. Saylor*, 5 Cal. 3d 685, 691 (1971)). Any limitations in the state Constitution are therefore construed narrowly: "[A]ll intendments favor the exercise of the Legislature's plenary authority: 'if there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.'" *Methodist Hosp. of Sacramento*, 5 Cal. 3d at 691 (citations omitted). Where the legislature has effectively adopted a construction of the Constitution by statute, that construction "is well nigh, if not completely, controlling." *Id.* Here, the legislature has exercised its power to enact comprehensive statutes regarding life insurance policy loans, consistent with its historically comprehensive regulation of other aspects of life insurance. The legislature's construction of its power to regulate life insurance loans is consistent with the intent of the 1934 Amendment and its historical regulation of insurance. The Court should therefore affirm that construction.

D. A Complete Life Insurance Contract, Consisting Of The Signed Application And Insurance Policy, Satisfies The Requirement Of A Signed Agreement For Purposes of the 1918 Initiative.

Even if the Court were to find that the 1918 Initiative's requirement of a signed agreement applied to insurers, that requirement is satisfied by the insurance contract, which incorporates the insurance policy and the signed application into the final agreement. This result is favored by California law and over a century of practice in the insurance industry, in which the insurance contract incorporates and includes the signed insurance application, as opposed to providing the entire document for signature at the time of the application. This practice, which reflects the realities of underwriting and forming insurance contracts, provides flexibility to both the insurer and insured in negotiating and selecting coverage.

It is impracticable to present the full contract at the time of application because the insured's eligibility or choice of product may not have been determined yet. An application for insurance is treated as a proposal by the applicant for insurance, which also provides the information necessary for the insurer to conduct the underwriting process. *See Vyn v. Northwest Cas. Co.*, 47 Cal. 2d 89, 94 (1956); *Rios v. Scottsdale Ins. Co.*, 119 Cal. App. 4th 1020, 1029 (2004). Underwriting entails the insurer's evaluation of the proposed insured's qualifications to determine whether the applicant qualifies for insurance, and if so, at what rate and in what amount. 8-83 *New Appleman on Insurance* § 83.02. Determining the risk classification of the insured may require a physical examination or review of medical and financial information. 1-3 Bertram Harnett & Irving I. Lesnick, *The Law of Life and Health Insurance* § 3.01 (2015). The insurer reviews the application, assesses the risk presented by the applicant, and offers one or more policies based on that assessment. *Id.* The insurer may respond to the application with a counteroffer, requesting that the applicant amend his or her application to request different coverage or provide additional

information. When the final policy is issued, the application and any amendments are attached to the policy and incorporated into the final contract. California statutes specifically endorse this process by providing that the contract may incorporate the application by attaching it to the insurance policy. *See* Cal. Ins. Code § 10113.

While Section 10113 of the Insurance Code sets out the procedure for treating the insurance policy and signed application as the agreement between the insurer and insured, it codifies a practice that preexisted the 1918 Initiative. *See Cayford v. Metropolitan Life Ins. Co.*, 5 Cal. App. 715, 717 (1907) (Life insurance policy provided "The contract between the parties hereto is completely set forth in this policy and the application therefor taken together"); *see also Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 412 – 13 (1896) (enforcing provision in fire insurance policy that application "was made a part of the policy."). A review of U.S. Supreme Court decisions also show that courts have long accepted and enforced clauses which, similar to the terms of Wishnev's policies, incorporated the signed application into the final insurance contract. *See Iowa Life Ins. Co. v. Lewis*, 187 U.S. 335, 344, 23 S.Ct. 126, 47 L.Ed. 204 (1902) (application for insurance made "part of contract"); *McMaster v. N.Y. Life. Ins. Co.*, 183 U.S. 25, 35, 22 S.Ct. 10, 46 L.Ed. 64 (1901) ("The applications were in terms parts of the policies..."); *Ritter v. Mut. Life Ins. Co. of N.Y.*, 169 U.S. 139, 18 S.Ct. 300, 42 L.Ed. 693 (1898) (citing Pennsylvania statute requiring that application be attached to policy in order to be received into evidence as part of the policy.) *Moulor v. Am. Life Ins. Co.*, 111 U.S. 335, 342, 4 S.Ct. 466, 28 L. Ed. 447 (1884) (reviewing application together with policy as part of contract).

By incorporating the application into the complete contract, Wishnev's signature was effectively affixed to the life insurance policies once he accepted them. This process provides the flexibility necessary to conduct underwriting and explore alternatives after an application is submitted, while still providing policyholders of the right to review and consent to all terms of the policy. At common law, the insured's application was treated as an offer; the policy issued by the insurer was treated as a counteroffer. *See, e.g., Cobin v. Midland Mut. Life Ins. Co.*, 260 F.2d 92, 94 (9th Cir. 1958) (no contract formed where applicant returned offered insurance policy without paying premium); *Yore v. Bankers' & Merchants' Mut. Life Assn. of the U.S.*, 88 Cal. 609, 612 (1891) ("A policy which in its terms is different from the application is not a completed contract, and until accepted by the insured is no more than a proposal to contract, upon the terms stated in it.") An applicant who was dissatisfied with the proposed policy could therefore reject the counteroffer and return the policy. *Cobin*, 260 F.2d at 94. Alternatively, the policyholder could accept the policy and its terms by retaining it. *Yore*, 88 Cal. at 615. Policyholders have a duty to read their policies upon receipt, and may be charged with notice of the clear terms of the contract, including the incorporation of the application into the agreement and the provisions regarding policy loans. *See Telford v. N.Y. Life Ins. Co.*, 9 Cal. 2d 103, 107 (1937); *Hadland v. NN Investors Life Ins. Co.*, 24 Cal.App.4th 1578. 1586 (1994); *Aetna Cas. & Surety Co. v. Richmond*, 76 Cal. App.3d 645, 652 (1977). This process of offer and acceptance has since been codified in the California Insurance Code, by which all policyholders receive a "free look" period of at least ten days to review the policy after delivery and decide to return it if they are dissatisfied with any of its terms. Cal. Ins. Code § 10127.9. In addition, the contents of the policy are the product of extensive regulation of insurance policies, which mandates certain protections be present in all policies, while prohibiting

other conditions. *See, e.g.* Cal. Ins. Code § 10113.5 (requiring incontestability clause in all life policies); §§ 10159.1-10167.5 (requiring nonforfeiture provisions). This regulatory overlay ensures that whether the insured elects to read the policy or not, the terms are consistent with the State's view of the terms necessary to protect the insured's interest.

If the Court were to hold that the legislature's exemption of insurers from the 1918 Initiative did not extend to compound interest, or that the integrated insurance contract does not satisfy the 1918 Initiative in any event, that ruling would inflict costs on insurers and impair policyholders' ability to access their life insurance policies and to protect their life insurance policies against forfeiture. Policy loans offer flexibility and convenience; requiring insurers to revise their forms to require policyholders to sign and return a second compound interest disclosure (even where that disclosure already appears in the policy previously delivered to the owner) will add additional steps to the loan process and slow down the processing of loans. Requiring an additional countersigned document would also interfere with the availability of loans intended to protect policyholders from the consequences of a lapse in coverage. Automatic premium loans, for example, are intended to protect insureds from lapse due to inaction. A ruling that would require policyholders to take action by submitting another countersigned document would effectively undermine that protection.

E. In The Event The Court Rules In Wishnev's Favor, That Ruling Should Be Applied Prospectively To Minimize The Disruption Of Contracts And Loans Taken In Reliance On Over A Century Of Established Practices.

A ruling that existing life insurance policy loans violate the 1918 Initiative, if applied retrospectively, would impact insurers and policyholders

who have negotiated contracts in reliance on existing law and practice. In addition to harming insurers by undoing agreements to repay interest on policy loans, a retroactive ruling would also impact the majority of policyholders who have not taken loans on their policies. As recognized by the legislature, the interest paid on policy loans funds other guaranteed benefits to policyholders. Cal. Ins. Code § 1230. In addition to supporting guarantees, the cash flows attributable to interest may permit insurers to extend benefits beyond guarantees, such as higher dividends or other credits to account values. The abrupt removal of the inflow from interest payments will impact the insurers' ability to fund other contract benefits and invalidate the assumptions used to price the products when they were designed. Any ruling in Wishnev's favor should therefore be applied prospectively, in order to preserve existing benefits while insurers rework contracting procedures that were based on over a century of industry practice.

Prospective application is appropriate here because existing policy loans and contracts were made in reliance on principles of contract formation that have guided insurers' practices for over a century. That reliance was further bolstered by the legislature's action in expressly exempting life insurers from the 1918 Initiative, followed by comprehensive regulation intended to supplant any other interest rate regulations. *See* Ins. Code § 1239 ("No other provision of law shall apply to policy loan interest rates unless made specifically applicable to these rates."). Relying on the practice of incorporating signed applications into the final insurance agreement was reasonable, as that practice, along with case law supporting it, predated the 1918 Amendment by at least several decades.

The purported interest in applying a rule requiring an additional signed disclosure to existing loans and contracts does not outweigh the

substantial reliance interest in enforcing the terms of loans issued under existing practice. Insurance policies and forms are already subject to comprehensive regulation by the state. Existing practice already reflects the state's judgment as to the subject matter, timing and form of disclosures. These disclosures include mandatory policy provisions as well as specific notices to be provided at the time a loan is issued. *See* Cal. Ins. Code §§ 1235 (notices), 1237 (mandatory policy terms). The statutory "free-look" period provides additional protection to consumers against inadvertently agreeing to undisclosed terms. *See* Cal. Ins. Code § 10127.9. Requiring an additional disclosure will not alter the value or desirability of policy loans. This is not a case where a lender seeks to compound interest based on a vague reference to "usual custom," or by some other hidden term. *See McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 21 Cal. 3d 365, 373-374 (1978). The terms of any loans, including the compounding of interest, are provided at the time of contract formation, and any policyholder interested in a loan has a full disclosure of the terms in the contract before he or she takes a loan. An additional signed disclosure at the time of application will not alter this process – policyholders will still look to the contract before they decide to take a loan. Whatever incremental benefit Wishnev may attribute to imposing this change in procedure is far outweighed by the disruption and losses that will be suffered by insurers and policyholders if existing agreements are retroactively invalidated.

III. CONCLUSION

For the above reasons and the reasons stated in the briefs of petitioner The Northwestern Mutual Life Insurance Company, ACLI joins in the petitioner's request that the Court rule that 1) The legislature validly exempted life insurers from all provisions of the 1918 Initiative, including the provisions relating to compound interest, as it intended and 2) that the

insurance contract formed by the insurance policy and signed application satisfies the requirement of a "signed agreement" under the 1918 Initiative.

DATED: August 31, 2018.

ALSTON & BIRD LLP

By /s/ Thomas A. Evans
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CERTIFICATE OF COMPLIANCE

I hereby certify that, in reliance upon the word count feature of the software used to create the document, the foregoing Brief Amicus Curiae contains 5,050 words, including footnotes, and exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated: August 31, 2018

Respectfully submitted,

/s/ Thomas A. Evans
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PROOF OF SERVICE

I, Robert Chang, declare:

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Alston & Bird LLP, 350 Mission Street, San Francisco, California 94105.

On August 31, 2018, I served the document(s) described as **APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF DEFENDANT AND PETITIONER** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed as stated on the Service List.

I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 350 Mission Street, San Francisco, California 94105 with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Alston & Bird LLP, 350 Mission Street, San Francisco, California 9410.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 31, 2018, at San Francisco, California

ROBERT CHANG

SERVICE LIST

Wishnev v. The Northwestern Mutual Life Insurance Company
Supreme Court of the State of California
Case No. S246541

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Supreme Court – via Truefiling

U.S. District Court of the Northern District of California
San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102
Hon. Edward M. Chen (Courtroom 5 – 17th Floor)
District Court – via U.S. Mail

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