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Case No. S246541

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant and Petitioner,

vs.

SANFORD J. WISHNEV
Plaintiff and Respondent

After Order Certifying Question to the California Supreme Court by the U.S. Court of Appeals, Ninth Circuit, Case No. 16-16037, on Appeal from the U.S. District Court, Northern District of California, Hon. Edward M. Chen, Judge Presiding, Case No. 3:15-cv-03797-EMC

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

RESPONSE TO BRIEFS OF INSURANCE INDUSTRY *AMICI*

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Briefs *amicus curiae* in support of Northwestern Mutual Life Insurance Company ("NWM") have been submitted by three insurance-related entities: (1) the American Council of Life Insurers ("ACLI"); (2) the Association of California Life and Health Insurance Companies ("ACLHIC"); and (3) the Metropolitan Life Insurance Company ("MetLife"). The first two entities are insurance trade associations, of which NWM is a member. The third, MetLife, is the defendant in a similar action to this one, pending before the Federal Courts. Not surprisingly, each of the entities would prefer that this Court rule that the compound interest disclosure and consent requirement of the 1918 Initiative does not apply to life insurance loans and that NWM's procedures were sufficient to comply with that requirement if it applies.

Plaintiff/Respondent Wishnev submits this response.

RESPONSE TO ACLI BRIEF

I. ACLI MISAPPREHENDS THIS COURT'S ROLE IN CONSTRUING LEGISLATIVE ENACTMENTS AND MISSTATES THE IMPACTS OF A RULING IMPLEMENTING THE INITIATIVE'S PROTECTIONS

A. ACLI's Appeal To The Court To Abandon Its Proper Role Must Be Rejected

ACLI extolls the virtues of insurance loans and urges the Court to rule in NWM's favor in order to maximize the availability of such loans at minimum cost. (ACLI Br. at 7, 8-10.) But the Court's role is to interpret and enforce legislative provisions (whether enacted by the People or the Legislature), not to evaluate the wisdom of those provisions. Arguments that a different balancing than that set out in the Initiative might better serve insureds or insurers are properly put to the People or the Legislature, not to this Court.

In *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1983) 33 Cal.3d 816 ("*McConnell II*"), this Court explained the purpose and design of the disclosure/consent provision of the Initiative:

> Section 2 is designed to protect borrowers, prevent the unjust enrichment of lenders, and deter lenders from violating its terms. It achieves the first of these goals by providing that a lender who intends to charge compound interest must express that intention in clear terms and, in order to assure that the language employed by the lender meets this requirement and that the borrower agrees to

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> pay compound interest, it prescribes that the provision for compounding must be in writing and signed by the borrower. The second and third goals of the section are evident from the provision therein that an agreement which does not comply with its requirements shall be "null and void" with regard to the promise to pay interest.

Id. at 822. ACLI has nothing to say about these goals.

Instead, ACLI argues that the Initiative's requirement should be held inapplicable to insurance loans because compliance would purportedly lead to adverse consequences, i.e. less readily available insurance loans and higher costs in the form of compliance by insurers. (ACLI Br. at 8-10.) But even if ACLI's factual assertions were accurate, it is not this Court's role to judge the wisdom of the Initiative's balance between protection for borrowers and deterrence to lenders, on the one hand, and the benefits of more readily available insurance loans, on the other.

> The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function.

Superior Court v. Cty. of Mendocino (1996) 13 Cal.4th 45, 53. *See also, Los Angeles Cty. Metro. Transportation Auth. v. Alameda Produce Mkt., LLC* (2011) 52 Cal.4th 1100, 1113-1114; *Sunset Sky Ranch Pilots Assn. v. Cty. of Sacramento* (2009) 47 Cal.4th 902, 909 ("This court does not sit in judgment of the Legislature's wisdom in balancing such competing public policies.").

In enacting the disclosure/consent provision of the Initiative, the People determined that assuring protection for borrowers justified a requirement of a signed written disclosure before compounding interest on any loan. The People also specified the remedies for failure to do so. ACLI argues that an actually-signed written disclosure is not really necessary here and that NWM's procedure (obtaining a signature and *then* disclosing the intention to compound) ought to be a good enough. It also argues that the remedies specified in the Initiative ought not to be implemented because they are severe. But ACLI's arguments are properly put to the People or to the Legislature, not to a court.

B. ACLI's Assertions That Enforcement of the Initiative Will Lead to Lapsed Policies and That Compliance Costs Will Be Significant Are Unpersuasive

ACLI notes that some insurance loans are issued automatically, if the insured has requested the feature to be available, when the insured has not otherwise paid the amount of a premium due on the policy. ACLI suggests that application of the disclosure/consent requirement could preclude such loans due to a delay needed to obtain the insured's signature consenting to compounding. But this contention ignores the multitude of ways in which any insurer can easily comply fully with the Initiative's requirement far in advance of any actual loan issuance.

Most obviously, a disclosure could be added as part of the application process itself, for which a signature is already obtained from the prospective insured. It would be simple to include a short, clear disclosure about compound interest within the application or in an accompanying short document dedicated to the purpose. NWM's application form, for example, is three pages in length. (ER 156-158.) Adding a paragraph or two would be simple and easy.[1]

Alternatively, insurers can easily send a second document along with the policy itself, clearly disclosing the intention to compound and instructing that the insured must sign and return that document if he or she wishes to access the loan feature.[2] Indeed, such a document could be sent at *any* time of the insurer's choosing. Interference with "automatic" premium loans would only exist if the insurer chooses *not* to make the required disclosure and obtain consent in a timely manner.

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[1] Though still at the application stage, when no insurance contract has yet been formed, the intention to charge compound interest on any loan thereafter issued under a resulting policy can be stated conditionally, i.e. "If we issue you an insurance policy that permits you to borrow against the cash value of that policy, interest unpaid on a loan anniversary will be added to and will become part of the loan principal and bear interest on the same terms." (*Compare* ER 150 [Sect. 6.4].)

[2] There could never be any concern that such a procedure would delay loan availability since insurance loans do not become available until years later, when sufficient cash value has accrued on a policy to support such a loan. *See* MetLife Brief at 15.

These same points demonstrate the absurdity of the suggestion that the Initiative's disclosure/consent requirement would impose any appreciable compliance costs on insurers. Obtaining the signature of an insured on a clear disclosure about compounding would be simple and easy; it could be accomplished in a variety of ways. As this Court noted 40 years ago: "Compliance with these clear requisites does not impose an onerous burden." *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1978) 21 Cal.3d 365, 381 ("*McConnell I*").

C. In Urging the Court Not To Rule That NWM Is Subject To the Remedies Specified in the Initiative, ACLI Essentially Argues That Insurers Should Be Immune From Monetary Awards

ACLI asserts that application of the Initiative's remedies would reduce the amount of assets available to offer benefits to policyholders and could result in a shifting of costs and benefits among policyholders. ACLI urges that the Court rule in NWM's favor to avoid such results. (*Id.* at 11.) Again, though, this argument is properly presented to a legislative body, not a court. The People determined the appropriate available remedies where compound interest is charged without meeting the Initiative's requirements, specifying remedies to achieve both compensation and deterrence.

McConnell II, 33 Cal.3d at 822. If ACLI believes that those remedies are not warranted, its proper course is to return to the People for modification.

Moreover, if ACLI's arguments were correct, insurers would be immune from *any* monetary awards. Any time an insurer must pay an award of damages or restitution, it leaves (in ACLI's words) "fewer assets than expected to support insurance benefits and guarantees, which would in turn result in reductions in available benefits to policyholders." (*Id.* at 11.)[3] Yet not only are insurance companies frequently the subject of monetary judicial awards, *punitive* damage awards against such companies, as well as attorneys' fees awards, have been approved without any suggestion that the potential for decreased "benefits" to other policyholders precluded that result.[4] Moreover, to the extent that the Initiative includes potential remedies intended to deter, that purpose would be lost were insurance companies able to avoid them by threatening to pass the costs on to policyholders.

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[3] ACLI assumes that added costs or revenue reductions would be passed on to policyholders in the form of reduced insurance benefits. Obviously, though, there are other possibilities, including reduced executive compensation, reduced shareholder dividends or reduced marketing or other expense outlays. *Cf. Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 341 (noting "frequently extreme complexity of economic incidence analysis"). ACLI's assumption is particularly questionable in this case, since it is far from clear that the Department of Insurance would permit NWM (or any other insurer) to impose upon policyholders the burden of an award flowing from its unlawful interest charges.

[4] *See e.g., Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780; *Pulte Home Corp. v. Am. Safety Indem. Co.* (2017) 14 Cal.App.5th 1086.

The possibility (unsupported in this record, it should be noted) that benefits and burdens of an award might ultimately impact different categories of policyholders differently does not support any other result, for all the reasons stated above. Indeed, it would be unsurprising if a successful challenge to the lawfulness of certain interest assessments resulted in an award favoring those who were actually charged that interest over those policyholders who were not so charged. The fact that an insurer may have used some of the additional revenues obtained from unlawful charges to increase insurance benefit levels is no justification for the unlawful charges themselves.

II. ACLI'S STATUTORY INTERPRETATION ARGUMENTS ARE UNPERSUASIVE

ACLI asserts that the wording of the 1934 Constitutional Amendment, together with the ballot materials leading to it, show a clear intent to replace the Initiative's disclosure/consent requirement as to "exempt" lenders with plenary Legislative control. (ACLI Br. at 12.) In so arguing, ACLI simply ignores most of the points presented in Wishnev's Answering Brief to the contrary. ACLI fails to address the policy favoring broad application of remedial provisions (Answering Br. at 19-20); it fails to address the judicial policy requiring an attempt to harmonize Constitutional language with prior

enactments if possible (*id.* at 18-19)[5]; it fails to address the point that the Constitutional phrasing could have – but does not – expressly provide that "exempt" entities will no longer be subject to the portions of the Initiative which were left unchanged by the Amendment (*id.* at 24 and n. 6); and it fails to address the case law cited by Wishnev holding that "undebatable evidence" in ballot materials is required before finding that a prior enactment has been superseded by a later enactment which does not expressly so state that intention (*id.* at 38-39). Most significantly, ACLI does not even acknowledge Wishnev's primary contention that the Initiative's disclosure/consent requirement can be harmonized and enforced as to "exempt" lenders consistently with the Legislature's authority over those lenders regardless whether compound interest is or is not deemed to fall within the expressly identified items subject to such authority. (Answering Br. at 25-29.) Finally, as to the canon of *ejusdem generis* (Answering Br. at 32-33), ACLI simply states tautologically that the result suggested by that canon is contrary to Legislative intent and therefore should be disregarded. It offers no explanation for why the Amendment specifically lists particular items if the term "other compensation" was intended to sweep in all such items anyway. (ACLI Br. at 14.)

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[5] ACLI does assert that the presumption against finding implied repeals is "inapplicable" (ACLI Br. at 12) but offers no reasoning to support that assertion.

Instead of grappling with these points, ACLI attributes to Wishnev a contention which he has not made – i.e. a "false dichotomy between 'interest' and 'other compensation,'" which ACLI contends leads to the absurd conclusion that exempt lenders "would have been free to charge any rate of interest, since the Legislature's power only would only [sic] extend to 'loan charges.'" (ACLI Br. at 13-14.) Wishnev is unclear on the logic of ACLI's argument; the Amendment's language expressly provides that the Legislature shall have the power to "prescribe the maximum rate per annum," which Wishnev himself has emphasized and has certainly never questioned. (Answering Br. at 30.)

If ACLI means to say that application of the Initiative's disclosure/consent requirement to exempt lenders leads to the conclusion that the Legislature is helpless to limit or regulate such lenders' compound interest charges, ACLI makes the same logical error as does NWM. Compliance with the Initiative is a necessary threshold to charging compound interest, but it is not a positive authorization to do so. (Answering Br. at 25-29.) Absent federal preemption, the Legislature possesses general authority to over loans (whether "exempt" loans or non-exempt loans; whether the lender is an insurance company or otherwise), including the authority to prohibit or limit compounding of interest. That

authority does not need to be based on Art. XV's language; the Legislature has broad general police power authority over commerce. (Answering Br. at 29, n. 8.) Nothing in Wishnev's position suggests that the Legislature would be left helpless to take whatever regulatory actions deemed appropriate, with the single exception that only the People have the power to vacate the requirement that an intention to charge compounding be disclosed and consented to in writing. As Wishnev notes in his Answering Brief, if his position is accepted "[t]he Legislature retains full authority to prohibit compounding by an exempt lender altogether if it so chooses – compliance with the Initiative gives no immunity to such a Legislative ban." (*Id.* at 26.)

III. NEITHER THE HISTORICAL REGULATION OF LIFE INSURERS NOR THE 1982 PASSAGE OF INSURANCE CODE SECTIONS 1230 *ET SEQ.* SUPPORT A FINDING OF IMPLIED REPEAL OF THE INITIATIVE'S DISCLOSURE/CONSENT PROVISION

ACLI argues that this Court should presume that the proper construction of the 1934 Amendment's language was to relieve exempt lenders from the obligation to comply with the Initiative's disclosure/consent requirement because insurers have historically been heavily regulated. (ACLI Br. at 15.) This argument lacks merit for numerous reasons. First, the 1934 Amendment must be construed similarly as to *all* exempt industries. The regulated status of any particular subsequently-designated

industry is of little help in construing the meaning of that Amendment's language. Second, the above point is particularly cogent where, as here, the industry in question was not only not designated as exempt under the 1934 Amendment itself, but remained undesignated for another half a century until 1981.[6] Third, it cannot be disputed that insurance loans were subject to both the Constitution's interest rate caps and the Initiative's compound interest disclosure requirement until 1981. Therefore, if anything, history undermines the argument ACLI makes – insurance loans in California were unquestionably subject to the disclosure/consent requirement of the Initiative for 63 years from 1918 to 1981. Thus, there is nothing incompatible in traditional regulation of insurance and application of the Initiative's disclosure/consent requirement.

ACLI also asserts, without explication, that Insurance Code §§1230-1239 constitute "comprehensive statutes regarding life insurance policy loans." It argues from that premise that the Court should defer to an imagined understanding by the Legislature that insurance loans are not

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[6] To make ACLI's argument logically sound, one would have to accept the following reasoning: (1) When passing the 1934 Amendment, the voters recognized that – sometimes in the future, perhaps 50 years later – the insurance industry might be added to the list of exempt industries covered by the Amendment; (2) In anticipating that possibility, the voters recognized that the insurance industry is heavily regulated; and (3) Therefore, due to that possibility, in approving the wording of the 1934 Amendment, the voters intended that exempt entities be immunized from any statutes of general application, including the non-repealed portions of the Initiative.

subject to the Initiative, emphasizing that legislative power is generally to be broadly construed. (ACLI Br. at 16.) Wishnev fully responded to a similar argument in his Answering Brief and will not repeat it here. (Answering Br. at 50-54.) Two additional observations merit mention, however.

First, while Wishnev does not dispute that legislative power is to be construed broadly with unconstitutionality not lightly found, the same point exists as to enactments by the People through initiative. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934, 935; *Indep. Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1032. It is ACLI (like NWM) that is arguing for a finding of unconstitutionality (via implied repeal) of a validly enacted provision, not Wishnev.

Second, it is noteworthy that neither the Attorney General (on behalf of the Legislature) nor the Insurance Commissioner (on behalf of the Department of Insurance) apparently see any risk to Legislative or regulatory authority over insurers raised by the argument that the Initiative applies to insurance loans, as neither has sought leave to participate as *amici* here. The Court should be skeptical of assertions by regulated entities that an outcome they dislike would put at risk a regulatory scheme when the regulators themselves have not expressed that view.

IV. COMPLIANCE WITH THE INITIATIVE'S DISCLOSURE/CONSENT REQUIREMENT IS DIFFERENT THAN THE QUESTION OF CONTRACT FORMATION

ACLI describes the historical and current case and statutory law providing that insurance contract obligations are set forth in both the policy and any attached application. (ACLI Br. at 17-20.) ACLI proposes a reason why the law in this area has developed in that way, i.e. that the insurer cannot practically set out all contract terms at the time of application because underwriting to determine the extent of risk has not yet occurred. (*Id.* at 17.) As a result of these developments, ACLI emphasizes that an insured becomes contractually bound to all terms stated in either the application or the policy.

Assuming all of that to be accurate, however, ACLI offers no reasoned argument that complying with the rules of insurance contracting suffices to comply with the Initiative, an independent provision with its own requirements. The Initiative requires that the intent to assess compound interest be disclosed in writing and signed by the borrower. NWM contends that a signature on the application -- essentially a blank piece of paper, insofar as compound interest is concerned -- suffices so long as the requisite disclosure is subsequently made in the policy; obviously, Wishnev disagrees. But that dispute cannot be resolved through reference to ordinary rules of

insurance contracting, particularly since the Initiative itself provides that "[a]ny agreement or contract of any nature in conflict with the provisions of this section shall be null and void...." (Initiative, §2.)

For example, suppose hypothetically, that a statute of general application provides that interest may not be compounded on any loan unless the intention to do so is disclosed in at least 16 font size. An insurer who disclosed the intent but not in a sufficient font size could not avoid that requirement merely by noting that insurance obligations become contractually binding upon acceptance of the policy. One does not follow from the other; the statute has its own requirement (large font size) that is not rendered irrelevant even if ordinary rules of insurance contracting would otherwise make the obligation enforceable.

ACLI also repeats its contentions that all proposed insurance terms cannot practically be disclosed at the time of application and that requiring a "second" disclosure would increase costs and delay loan availability. (ACLI Br. at 20.) These misplaced contentions have been addressed in Section I-B above.

V. IN ARGUING AGAINST RETROSPECTIVE APPLICATION, ACLI IGNORES THE APPLICABLE PRECEDENTS AND INSTEAD ARGUES THAT THE POLICIES UNDERLYING THE INITIATIVE SHOULD BE DISREGARDED

Ignoring the pertinent case law governing the question whether a "rare" exception should be made to the general rule of retrospective application of judicial rulings (*see* Answering Brief at 62-65), ACLI urges the Court to ignore the People's decision as to appropriate remedies for a violation of the Initiative's provisions and instead declare that past violations by insurers will be overlooked. (ACLI Br. at 20-22.) ACLI offers three reasons for this novel request. All three are lacking in merit.

First, ACLI repeats its assertion that the Initiative's remedy of disallowed interest would cause insurers to reduce other insurance benefits offered to policyholders and argues that the remedy should not be enforced for that reason. (*Id.* at 20-21.) This contention has been addressed above in Section I-C. In short, insurers are not immune from monetary awards.

Second, ACLI asserts that insurers (presumably, including NWM), in failing to meet the Initiative's requirements, have reasonably relied on long-standing case law and statutory provisions providing that applications are incorporated into the final insurance contract upon issuance of the policy. (ACLI Br. at 21.) There are two fatal defects in this argument.

(a) In the absence of judicial decisions clearly *holding* that the Initiative's disclosure/consent requirement was met by the signature first, disclosure later approach used by NWM, this argument provides no basis for denying retrospective application here. *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 318 (2001). NWM may have assumed or believed that the application's incorporation into the insurance contract sufficed to meet the Initiative's terms (though no such facts are in the record), but that assumption or belief, if inaccurate, is irrelevant in the absence of clear case law so holding. *People v. Guerra* (1984) 37 Cal.3d 385, 399-400.

A decision for Wishnev here will explain what the law has always been, not make new law. *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36. Even assuming *arguendo* that NWM had a "reasonable belief" that it was not subject to the Initiative's disclosure/consent requirement or that its procedures met that requirement if applicable, such a belief is not a basis for avoiding application of remedies mandated by statute. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573 ("if we were to restrict our holding to prospective application, we would, in effect, negate the civil penalties, if any, that the Legislature has determined to be appropriate in this context").[7]

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[7] *Cf. Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798 ("[T]he intent sufficient to support the judgment [of usury] does not require a conscious attempt,

(b) In any event, ACLI is wrong in suggesting that a finding that the disclosure/consent requirement has not been met here would require the overturning of "principles of contract formation that have guided insurers' practices for over a century." (ACLI Br. at 21.) As explained in Section IV above, the question whether the Initiative has been complied with is a question quite distinct from the question whether a valid insurance contract has been formed and under what terms. The "principles of contract formation" noted by ACLI are not at issue here. (*See also,* Response to MetLife, *infra*, Section X-A.)

Finally, ACLI makes an open appeal to the Court to adopt a balancing of policy interests of its own choosing in lieu of the Initiative's own balance, by making its decision prospective only. (ACLI Br. at 21-22.) This is neither an appropriate standard for determining whether an exception should be made to retrospective application (Answering Br. at 62-68) nor an appropriate role for the judiciary in any event (Section I-A *supra*).

RESPONSE TO ACLHIC BRIEF

The arguments contained in the *amicus* brief submitted by ACLHIC parallel in large part the arguments presented by ACLI. Rather than

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with knowledge of the law, to evade it. The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives; if that amount is more than the law allows, the offense is complete. (Citation omitted)").

repeating his responsive arguments in full, Wishnev respectfully refers the Court to his response to ACLI above. Supplemental arguments focused on ACLHIC's submission are presented here.

VI. THIS COURT SHOULD NOT "IGNORE" THE DISTRICT COURT'S DECISION LEADING TO THIS APPEAL

ACLHIC urges the Court to "ignore" the District Court's interpretation of the pertinent law, in order to "to ensure policy loan benefits remain readily accessible and available to policyholders in the future." (ACLHIC Br. at 9.) As with ACLI, this is a blatant appeal to the Court to exceed the limited role the judiciary plays in our system of governance.

To the extent that ACLHIC is suggesting that a limit on the interest insurers can charge their borrowers (i.e. requiring written disclosure and consent before compounding interest) will *itself* reduce the availability of insurance loans, its argument is equally unavailing. Presumably, the prospect of collecting greater amounts of interest payments induces any lender to more readily offer loans, regardless of category of loan, though at greater cost to the borrowers in question. It can be argued that this would be a positive social good – or it can be argued that it would be a negative. This Court need not wade into that morass because California voters have already made that determination when it comes to compounding of interest: Whatever benefits flow from the availability of compound interest in the

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form of easier credit, it is outweighed by the negatives unless fully disclosed and consented to in writing.

VII. THE 1982 ENACTMENT OF INSURANCE CODE SECTIONS 1230 - 1239.5 DOES NOT SHED ANY LIGHT ON THE VOTERS' INTENTIONS IN ENACTING THE 1934 CONSTITUTIONAL AMENDMENT

ACLHIC reiterates arguments also presented by NWM and ACLI that the Court should not find that the Initiative's disclosure/consent requirement applies to "exempt" lenders because insurance is, in general, heavily regulated and the Legislature in 1982 enacted legislation directed specifically at insurance loans. (ACLHIC Br. at 10-12.) Wishnev has fully responded to these argument elsewhere and will not repeat them here. (*See* Answering Br. at 45-46, 50-54; Response to ACLI, *supra,* Section III.)

However, Wishnev must point out that ACLHIC has cited as supportive authority a non-citable case. (Rule of Court 8.1115(a).) At page 12 of its brief, ACLHIC cites to *Thomason v. Bateman Eichler, Hill Richards, Inc.* (1988) 245 Cal.Rptr. 319 – a case which was affirmatively ordered to be depublished by this Court and hence "must not be cited" as precedent. Rule of Court 8.1115(a).[8]

[8] Upon receiving ACLHIC's brief, counsel for Wishnev contacted ACLHIC's counsel informally, stating that Wishnev would not oppose the submission of a corrected version omitted that citation. No response was received and no corrected version has been submitted to Wishnev's knowledge.

ACLHIC's citation of *Thomason* as authority is particularly inappropriate since, in 1988, when the case was ordered to be depublished, such orders indicated the Court's disagreement and disapproval with the appellate opinion:

> [A]s then-Justice Joseph R. Grodin wrote in 1984 (confirming earlier explanations by the late Chief Justice Donald R. Wright and then-Chief Justice Rose Elizabeth Bird), the court, in the "vast majority" of cases, orders depublication "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent."
>
> *********
>
> Prior to adoption of Rule 979, then, an observer could write that "everyone is aware" that a depublication order means "a rejection by the supreme court of some significant aspect" of a court of appeal opinion.

Stephen R. Barnett, "Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court," 26 Loy. L.A. L. Rev. 1033, 1035, 1036 (1993) (footnotes omitted).

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VIII. REQUIRING AN *ACTUALLY* SIGNED DISCLOSURE OF INTENT TO COMPOUND WILL NOT "UPEND" INSURANCE CONTRACT LAW NOR "IMPAIR" INSURED'S ACCESS TO INSURANCE LOANS

As do NWM and ACLI, ACLHIC argues that the Initiative's requirement of signed consent should be deemed met (despite the undisputed lack of a disclosure that was actually signed) because applications attached to subsequently-issued policies are incorporated by referenced therein as a matter of insurance contract law. (ACLHIC Br. at 13.) This argument is unpersuasive. (Answering Br. at 54-62; Response to ACLI, *supra*, Section IV.)

Echoing ACLI, ACLHIC asserts that a literal application of the Initiative's requirement would have "far reaching implications" because all terms of a prospective insurance policy cannot be presented at the time of application. (ACLHIC Br. at 13.) But the only "term" which the Initiative requires to be disclosed and consented to in writing is the intent to charge compound interest on any loan. That requirement can be easily met at the time of application, at the time of policy issuance (through a second signature) or at any later time of an insurer's choosing (also, through a second signature).

Also echoing ACLI, ACLHIC asserts that a requirement that it obtain an actual signed consent before charging compound interest would impose

significant costs on insurers and would impair insured's ready access to loans. (ACLHIC Br. at 13-14.) As noted previously, these arguments are both factually unsupported and inaccurate, and – in any event – are properly directed to a legislative body not a court. (Response to ACLI, *supra*, Section I-B.)

RESPONSE TO METLIFE BRIEF

The *amicus* brief submitted by MetLife contains two sections. First, MetLife summarizes the District Court opinion in the parallel case in which it is a defendant, *Martin v. Metro. Life Ins. Co.* (N.D. Cal. 2016) 179 F. Supp. 3d 948, and urges this Court to find that opinion persuasive. (MetLife Br. at 9-12.) Second, MetLife argues that a contrary decision by this Court should be limited to prospective application only. (*Id.* at 13-16.)

IX. THE *MARTIN* OPINION IS NOT PERSUASIVE

MetLife argues that the Court should follow the reasoning set forth in *Martin*. The Court should not do so.

A. *Martin* Erred In Finding An Irreconcilable Conflict Between the Initiative and the Constitutional Amendment

For all the reasons stated in Wishnev's Answering Brief, this Court should answer the first certified question "yes", holding that the Initiative's disclosure/consent requirement retains vitality as to lenders exempt from

Art. XV's interest rate limits. Wishnev will not repeat all of those arguments here.

In concluding that the Initiative's disclosure/consent requirement was impliedly repealed as to exempt lenders, the *Martin* decision rested on a fundamentally inaccurate premise. The *Martin* court explained its understanding of the issue presented to it as follows:

> [¶] Compound interest is a tool lenders may employ to circumvent the interest rate cap. Thus, the legislature's authority to regulate such charges places compound interest within the legislature's ambit.
>
> Plaintiffs' contrary position -- that the legislature can set rates and control charges other than compound interest -- isolates that tool for special treatment without justification, and accordingly is unpersuasive. **To plaintiff, the legislature can set a maximum rate of interest for an exempt industry, but is required to watch lenders exceed it with impunity by charging compound interest to those who have agreed.**

179 F.Supp.3d at 954-955 (emphasis added). Having understood the contention in that manner, the court concluded to the contrary.

Whatever the contention of the plaintiffs in *Martin*, the contention described by the court in that case is certainly not the position of Wishnev here.[9] As Wishnev explained in the Answering Brief:

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9 Since counsel for Wishnev was also counsel for the plaintiffs in the *Martin* case, we know in fact that the *Martin* District Court did not accurately portray the argument that the plaintiffs intended to present. But the pertinent point is that the court there perceived the position to be as described in the opinion – and it was *that* position which the court rejected.

> [A]pplying the Initiative's requirement to loans by exempt entities still leaves the Legislature with the unfettered authority to substantively regulate those loans: The Legislature retains full authority to prohibit compounding by an exempt lender altogether if it so chooses -- compliance with the Initiative gives no immunity to such a Legislative ban. Similarly, the Legislature can limit the frequency of compounding by such a lender, or allow compounding but reduce the interest rate cap if the lender does so, or require additional disclosures or consent mechanisms before compounding.

Answering Br. at 26.

The *Martin* court thought it was faced with a stark dichotomy: Either the Legislature has no authority to regulate or limit compound interest at all as to exempt lenders or the Initiative's disclosure/consent requirement cannot be applicable to such lenders. This was a false choice. As explained in the Answering Brief, the Initiative's requirement can be harmonized with the Legislature's more general authority over exempt lenders.

B. *Martin* Offers No New Insight Into the Second Certified Question

The *Martin* court decided that the question of the insurer's compliance with the Initiative's disclosure/consent requirement was controlled by the status of insurance contract law, i.e. that Insurance Code §10113 allowed incorporation of an application (if attached) into the contractual obligations of the insurance policy. *Martin* concluded that the insureds there effectively

gave written consent to being charged compound interest despite the fact that the written "consent" preceded any disclosure about such charges. 179 F.Supp.3d at 957.[10] For the reasons explained in the Answering Brief, this line of reasoning is unpersuasive and should be rejected. (Answering Br. at 54-62.)

Martin also mistakenly believed that MetLife's arguments were bolstered by a kind of "substantial compliance" line of reasoning, i.e. because the insureds were in possession of the written disclosure (contained in the policy) before they received any loans, that was good enough regardless of the lack of a signature on that disclosure. 179 F.Supp.3d at 957. This Court rightfully rejected similar arguments in *McConnell II*, noting the "unequivocal requirement of section 2 that the borrower must agree in writing to pay compound interest." 33 Cal.3d at 823. (Answering Brief at 60-61.)

X. METLIFE OFFERS NO PERSUASIVE REASON FOR DEPARTING FROM THE GENERAL RULE OF RETROACTIVE EFFECT OF JUDICIAL DECISIONS

MetLife argues that a ruling in Wishnev's favor should be prospective only, a result which – though MetLife does not acknowledge it – would

[10] The court declined to consider the contrary reasoning of this Court in *McConnell II* because it felt that the facts at issue in that decision rendered it distinguishable. *Id.* In Wishnev's view, this was in error. (Answering Br. at 58-61 and n. 22.)

constitute a "rare' exception to the general rule of retroactive effect of judicial decisions. *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978.

MetLife offers three reasons in support: First, MetLife says that insurers have relied on the case law holding that insurance contracts are comprised of both the policy and any incorporated application and argues that a ruling that the Initiative requirement is not met by NWM's 'sign first, disclose later' approach would require overturning those cases. (MetLife Br. at 13-15.) Second, MetLife argues that the policy reasons for the Initiative's requirement of a signature on a disclosure (as opposed to just a disclosure) are not very compelling and therefore do not need to be enforced retroactively. (*Id.* at 15.) Third, MetLife argues that enforcement of the remedies specified in the Initiative could be very expensive to it and other insurers, expense which MetLife characterizes without explication as "undue hardship". (*Id.* at 15-16.) None of these reasons suffice for finding prospective-only application, under this Court's jurisprudence. Indeed, the first argument is factually and legally inaccurate and the latter two arguments ask the Court to substitute its own view of public policy for that set forth by the People in the Initiative.

A. A Ruling That the Initiative's Disclosure/Consent Requirement Applies to Loans by Exempt Lenders Would Not Overturn or Even Modify Existing Law Regarding Formation of Insurance Contracts

MetLife emphasizes long-standing law holding that an insurance contract, once formed, is comprised of both the policy and any attached application. (MetLife Br. at 13-14.) MetLife then asserts that a rejection of its contention that the disclosure/consent requirement was met by the circumstances of this case would require the Court to overturn that law. Not so.

Insurance contracts – like all contracts – are enforceable only to the extent that they comport with all applicable limitations set forth in statutory or other law. *Boyer v. U.S. Fid. & Guar. Co.* (1929) 206 Cal. 273, 276 (insurance contracts "must not be against public policy or in contravention of specific provisions of law."). The Initiative represents just such a "specific provision[] of law" (*id.*): it is an independent requirement that lenders may charge compound interest only if a sufficient written disclosure is made and written consent thereto obtained. That legal requirement precludes the charging of compound interest (absent compliance), *even if* a validly-formed contract provides for such compounding. Indeed, the Initiative itself states as much. Initiative, Sect. 2 ("…[a]ny agreement or

contract of any nature in conflict with the provisions of this section shall be null and void...").

If, as Wishnev urges, the Court finds that the Initiative's disclosure/consent requirement applies to loans by exempt lenders, that will not alter by one whit the manner in which insurance contracts are formed or affect the documents that comprise that contract. Instead, the Court will be holding that the independent requirement of the Initiative must be met before charging compound interest *regardless* of the terms of the contract. Put another way, either the Initiative's requirement is met by a signature in blank, followed by an unsigned disclosure under the circumstances here, or it is not. Whichever way the Court rules, it will not be altering insurance contract law, it will be construing the Initiative's requirement.

For this reason, MetLife is incorrect in stating: "An adverse ruling calling into question this contracting process would jeopardize other terms of the insurance contract which similarly require the consent of the policyholder." (MetLife Br. at 14.) A ruling that the Initiative's requirement applies to insurance loans would *not* "call[] into question this contracting process" nor would it jeopardize any other terms of an insurance contract. For almost all (perhaps, all) other terms, consent is a question to be resolved under ordinary contract law principles. But consent to

compounding of interest is different – not because *Wishnev* says it is different but because the *Initiative* says it is different.

Since existing law regarding insurance contracting would not be altered by a ruling here, it is inescapable that the kind of change to settled law required to justify an exception to the rule of retroactivity of judicial decisions will be absent. The Court will be interpreting the meaning of a legislative enactment, addressing a legal question coming before the Court as a matter of first impression.

B. This Court's Role Is Not To Decide Whether the Initiative's Purposes Are Compelling Nor Whether the Specified Remedies Are Appropriate To Deter Violations

This Court has developed a large body of decisional law describing the criteria under which the Court will assess a request for a rare exception to the general rule of retroactivity of judicial decisions. As explained in the Answering Brief (and in Section X-A, *supra*), a decision here will not qualify under that criteria. (Answering Br. at 62-68.)

Ignoring the rules developed by the Court to assess a request for prospective-only application, MetLife argues that the Initiative's requirement of a *signed* disclosure is not very important here (since there was a disclosure in the policy, just not a signed one) and therefore that the Court should prevent the remedies specified in the Initiative from being

applied to past violations. (MetLife Br. at 15.) MetLife also suggests that it and other insurers might struggle to persuade their insureds to sign consents at this late date for older policies and thus might not be successful in avoiding the Initiative's remedies as to those policies. MetLife says that insurers would suffer "undue hardship" if they are exposed to those remedies. (*Id.* at 15-16.)

These arguments are simply inappropriate. The remedies specified in the Initiative are designed to protect borrowers as well as to deter violations by lenders. *McConnell II*, 33 Cal.3d at 822. The People determined that a *signed* disclosure was needed to insure "that the borrower agrees to pay compound interest." *Id.* That judgment is not subject to revisiting by the courts. *Superior Court v. Cty. of Mendocino*, *supra*, 13 Cal.4th at 53.

Similarly, the fact that insurers such as MetLife may have been charging compound interest to large numbers of borrowers for many years without obtaining the requisite signed disclosure is no basis for declaring that the Initiative's remedies do not apply to those past violations. Nothing in this Court's jurisprudence supports MetLife's request. Indeed, the Court has noted that retroactive application of a decision construing a legislative enactment, including enforcement of its remedies, is a necessary component of the proper allocation of authority between the legislative and judicial

branches. *Alvarado v. Dart Container Corp. of California*, *supra*, 4 Cal.5th at 573 (prospective-only application would negate civil penalties specified by the Legislature and "would exceed our appropriate judicial role"); *Woosley v. State of California* (1992) 3 Cal.4th 758, 793-794 ("Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim." [quoting *People v. Garcia* (1984) 36 Cal.3d 539, 549].)

XI. CONCLUSION

For the foregoing reasons, the Court should find:

1. The Initiative's disclosure/consent requirement was not partially repealed by implication and remains applicable to loans extended by entities exempt from the interest rate limits stated in Art. XV of the Constitution;

2. The Initiative's requirement of disclosure in a document signed by the borrower was not met by NWM's later delivery of a never-signed policy; and

3. As with the vast majority of judicial decisions, the Court's ruling on the above two issues apply retrospectively.

Dated: October 29, 2018

Respectfully submitted,

BRAMSON, PLUTZIK, MAHLER &
BIRKHAEUSER, LLP

___/s/ Robert M. Bramson___
Robert M. Bramson

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document contains 6,982 words, excluding the parts of the document that are exempted by Rule 8.204(c)(3).

October 29, 2018.

/s/ Robert Bramson
Robert M. Bramson

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Bramson, Plutzik, Mahler & Birkhaeuser, LLP, 2125 Oak Grove Road, Suite 120, Walnut Creek, California 94598. On October 29, 2018, I served the within documents:

- **RESPONSE TO BRIEFS OF INSURANCE INDUSTRY AMICI**

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Kristine Kahey