LICAC
LIFE INSURANCE CONSUMER ADVOCACY CENTER

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Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Susan Pitt v. Metropolitan Tower Life Insurance Co.*, Case No. S289376; letter seeking resolution of certified question

Dear Chief Justice Guerrero and Associate Justices:

The Life Insurance Consumer Advocacy Center ("LICAC") is a California-based non-profit social welfare organization that advocates for the protection of California consumers of life insurance and annuity policies. LICAC previously submitted an amicus letter asking this Court to accept the question certified by the Ninth Circuit. We write again to request that the Court retain jurisdiction over this matter, address the certified question, and exercise its discretion to resolve an issue of continuing public interest that is likely to recur.

By order dated April 18, 2025, this Court agreed to decide whether California Insurance Code sections 10113.71 and 10113.72 (the "Statutes") apply to life insurance policies that are originally issued out of state but later are renewed in California. On July 11, 2025 – after Petitioner filed her opening brief – the parties submitted a Joint Notice of Settlement, stating that they had reached a settlement and subsequently would be filing a request for dismissal.

We urge the Court not to dismiss this matter. Notwithstanding the parties' settlement, the Court retains the authority to determine the proper application of the Statutes. "If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot." *Baluyut v. Superior Ct.* (1996), 12 Cal. 4th 826, 829 n.4.

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(citations and interior quotation marks omitted); *Liberty Mutual Ins. Co. v. Fales* (1973) 8 Cal. 3d 712, 715-716 ("*Liberty Mutual*").

A. This case presents a question of continuing public interest.

The Statutes set forth grace period and notice requirements intended to "shield consumers from losing life insurance coverage because of a missed premium payment." *McHugh v. Protective Life Ins. Co.* (2021) 12 Cal. 5th 213, 220. In drafting the Statutes, the California Legislature was aware that "longtime policy owners may miss a payment 'because they were being hospitalized when the bill came, … as a result of a mail mix-up or forgetfulness,'" and "enacted the … [Statutes] to protect existing policy owners from losing the important life insurance coverage they had spent years paying for." *Id*. at 240-241 (quoting legislative history, emphasis omitted).

The Ninth Circuit asked this Court to decide the following question: "Do [the Statutes] apply to annually renewing life insurance policies originally issued in another state, but subsequently renewed and administered in California?" 2/20/25 Order Certifying Question to the Supreme Court of California at p. 1 ("Certification Order"). The Ninth Circuit considered the question important enough to certify, and this Court considered it important enough to accept the Ninth Circuit's request for a decision.

It is also question of continuing public interest. As this Court explained in *McHugh*, the Statutes "require insurers to provide policy owners with limited but critical safeguards to avoid defaulting ... [and] affect contractual relationships in a field pervasively affected with a public interest." *Id*. at 231 (citations and interior quotation marks omitted).

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Moreover, the rights of hundreds of thousands of policyholders turn on the extent to which the Statutes apply to out-of-state policies renewed in California.[1] Since the Statutes took effect in 2013, about 5 million people – on average, nearly 500,000 per year – have moved to California.[2] Approximately 38% of these new California residents would have moved into this state owning life insurance policies purchased elsewhere.[3] Thus, close to 200,000 policyholders move to California each year with policies originally issued in other states.

B. This case presents a question that is likely to recur.

Absent action by this Court, questions regarding the scope of the Statutes likely will continue to arise. The parties' settlement thus presents a situation similar to

[1] LICAC's March 12, 2025 letter to this Court explained why the Court should rule that the Statutes apply to all life insurance policies renewed in California without regard to whether they were originally issued in another state and provided statistical analysis of the number of policyholders whose rights would be protected by such a ruling. For the convenience of the Court, we also include that statistical analysis here.

[2] According to U.S. Census data, the numbers of new residents moving to California each year were as follows: 2023 – 422,075 people; 2022 – 475,803 people; 2021 – 433,402 people; 2020 – no data available; 2019 – 480,204 people; 2018 – 501,023 people; 2017 – 523,131 people; 2016 – 514,758 people; 2015 – 514,477 people; 2014 – 513,968 people; and 2013 – 485,477 people. U.S. Census Bureau, "State-to-State Migration Flows," tables for 2013-2023, https://www.census.gov/data/tables/time-series/demo/geographic-mobility/state-to-state-migration.html.

[3] Based on recent industry statistics from the Life Insurance Marketing and Research Association ("LIMRA"), 38% of U.S. consumers own individual life insurance. Stephen Wood et. al., LIMRA, 2022 Insurance Barometer Technical Supplement, Table 1, Page 4.

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that which the Court confronted in *Liberty Mutual*. There the Court considered whether Insurance Code §11580.2(g)'s statute of limitations for subrogation actions against uninsured motorists afforded "the insurer advantages over the uninsured motorist which its own insured did not enjoy, i.e., the power, by delayed filing, to preclude the uninsured motorist from seeking affirmative relief for personal injuries by cross-claim." *Liberty Mutual*, 8 Cal. 3d at 717.

Before reaching questions regarding the interpretation of §11580.2, and resolving those questions against the insurer, the Court had been "met at the threshold with a problem of mootness." *Id*. at 715. After the uninsured motorist, Fales, "submitted his opening brief to the Court of Appeal, Liberty filed in the trial court a document declaring that the judgment rendered against Fales had been satisfied. Thereafter, Liberty moved to dismiss [the] appeal as moot, and the Court of Appeal granted the motion." *Id*.

This Court, however, refused to dismiss the case – finding that it involved a "matter of continuing public interest and the issue is likely to recur." *Id.* 715-716. It explained, "appellate review has been and may continue to be thwarted by the filing of a notice of satisfaction of judgment by the insurer (as occurred here) or the acquiescence by the insurer in dismissal of the action … when the validity of section 11580.2, subdivision (g), is raised." *Id*. at 716.

Likewise, it will be impossible to obtain definitive answers regarding the application of the Statutes – which can only be provided by this Court – if insurance companies can buy their way out of appellate review by settling with any plaintiff whose case is accepted for review by this Court. This problem is significantly enhanced by two factors.

First, appellate litigation concerning the applicability of the Statutes to policies originally issued outside of California is centered in the federal courts. The Ninth Circuit noted that "neither the Supreme Court of California nor the California

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Courts of Appeal" have addressed this issue. Certification Order at p.7. In contrast, district courts within the Ninth Circuit have repeatedly confronted this question and the Ninth Circuit itself, in two unpublished decisions, has concluded that the Statutes "only apply to policies issued or delivered in California." *Id*. at pp. 9-10 (citations and interior quotation marks omitted).

Thus, only if the federal courts ask it to do so will this Court have another chance to explain how the Statutes apply to policies renewed in California but originally issued elsewhere. With limited opportunities for this Court to interpret the Statutes, it will be easy for insurance companies to settle with any hypothetical future plaintiff whose case gets to this Court.

Second, while the law limits the ability of a defendant in a class action to avoid review by "picking off" the named plaintiff (*see, e.g*., *Timlick v. Nat'l Enter. Sys., Inc.* (2019), 35 Cal. App. 5th 674, 689-690), the Ninth Circuit has construed the Statutes in a way that effectively ensures there will not be any class actions concerning their interpretation or enforcement.

In *McHugh*, this Court held that "insurers cannot terminate policies for a premium lapse until they give at least 30-day mailed notice to the policy owners and to any additional designated individuals." *McHugh*, 12 Cal. 5th at 246. But the Ninth Circuit has refused to accept the logical consequence of *McHugh*: "an Insurer's failure to comply with these statutory requirements means that the policy cannot lapse" and for such a policy, which remains in force, the insurer breaches its "contractual obligations by failing to pay benefits to the Beneficiary under the policies after the Insured's death." *Small v. Allianz Life Ins. Co. of N. Am*. (9th Cir. 2024) 122 F.4th 1182, 1195 (citation, brackets, and interior quotation marks omitted).

Small held – wrongly in our view, though that is an issue for another day – that to establish an insurer's liability for not providing lapse notices in accordance with

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the Statutes, "Plaintiffs must not only establish a violation but that the violation caused them harm." *Id*. at 1199. Following from this premise, it concluded that "common questions do not predominate" in a putative class action challenging an insurer's failure to comply with the Statutes "because causation cannot be determined on a class-wide basis." *Id*.

So long as *Small* remains the law in the Ninth Circuit, there will be no class actions predicated on violations of the Statutes; any litigation concerning the application of the Statutes to policies renewed, but not issued, in California will have to be prosecuted by individual plaintiffs; and insurers will retain the ability to avoid review simply by settling with any individual whose case is presented for review.

To ensure that review by this Court is not thwarted, and considering the public interests implicated by the question certified by the Ninth Circuit, this Court should retain jurisdiction and resolve that question. If, in light of the parties' settlement, the Court needs to appoint someone to serve as the Petitioner or to argue the Petitioner's side of the case, LICAC would be willing to serve in that role.

Respectfully,

Brian P. Brosnahan

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Respectfully,

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