No. 24-

IN THE

Supreme Court of the United States

LAWANDA D. SMALL AND
MICHELLE L. MORIARTY,

Petitioners,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA AND AMERICAN GENERAL LIFE INSURANCE, A TEXAS CORPORATION,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court encouraged federal courts to certify uncertain questions of state law to state high courts. Since then, many lower courts, especially the Ninth Circuit, have summarily refused to certify those questions to state high courts.

That is what happened here. In both *Small v. Allianz Life Insurance Company of North America* and *Moriarty v. American Life Insurance Company*, the Ninth Circuit refused to certify the same controlling state-law issue to the California Supreme Court, thereby sweeping away a number of pending appeals on this issue. In so ruling, the Ninth Circuit gave no weight to the federalism interests the certification doctrine was intended to protect, leaving hundreds of thousands of Californians whose life insurance policies were terminated in violation of California law with no realistic access to justice.

The question presented is whether a federal court must consider federalism interests when asked to certify important and unresolved questions of state law.

PARTIES TO THE PROCEEDING

Petitioner LaWanda was Plaintiff-Appellee in No. 23-55821.

Petitioner Michelle Moriarty was Plaintiff-Appellee in No. 23-3650.

Respondent Allianz Life Insurance Company of North America was Defendant-Appellant in No. 23-55821.

Respondent American General Life Insurance Company was Defendant-Appellant in No. 23-3650.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Small v. Allianz Life Ins. Co. of N. Am., No. CV 20-01944 TJH, U.S. District Court for the Central District of California. Judgment was entered on October 3, 2024.

Small v. Allianz Life Ins. Co. of N. Am., No. 23-55821, U.S. Court of Appeals for the Ninth Circuit. Judgment was entered on December 10, 2024.

Moriarty v. Am. Gen. Life Ins., No. 3:17-cv-1709-JO-WVG, U.S. District Court for the Southern District of California. Judgment was entered on August 14, 2023.

Moriarty v. Am. Gen. Life Ins., No. 23-3650, U.S. Court of Appeals for the Ninth Circuit. Judgment was entered on March 4, 2025.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petitioners LaWanda D. Small and Michelle L. Moriarty respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. Pursuant to this Court's Rule 12.4, Petitioners are filing a "single petition for a writ of certiorari" because the "judgments . . . sought to be reviewed" are from "the same court and involve identical or closely related questions[.]"

OPINIONS BELOW

The Ninth Circuit's decision in *Small* reversing the district court's class certification ruling (Pet.App.1a-36a) is reported at 122 F.4th 1182. The Ninth Circuit's denial of Small's motion to join Moriarty's motion for certification to the California Supreme Court (Pet.App.37a-38a) is unreported. The Ninth Circuit's order denying Small's petition for rehearing (Pet.App.63a-64a) is unreported. The district court's decision certifying this class action (Pet.App.52a-62a) is unreported.

The Ninth Circuit's decision in *Moriarty* reversing the grant of summary judgment on Moriarty's breach of contract claim and denying Moriarty's motion for certification to the California Supreme Court (Pet. App.65a-67a) is unreported. The Ninth Circuit's order denying Moriarty's petition for rehearing (Pet.App.82a-83a) is unreported. The district court's order granting Moriarty's renewed motion for summary judgment and granting American General Life Insurance's motion to certify order for interlocutory appeal (Pet.App.68a-81a) is unreported.

JURISDICTION

The Ninth Circuit entered judgment in *Small* on December 10, 2024. The court denied Small's petition for rehearing en banc on February 19, 2025. Pet.App.63a-64a. This Court extended Small's time to file a petition for certiorari to June 19, 2025. This Court has jurisdiction over *Small* under 28 U.S.C. § 1254(1).

The Ninth Circuit entered judgment in *Moriarty* on March 4, 2025. The court denied Moriarty's petition for rehearing en banc on May 2, 2025. Pet.App.82a-83a. This Court has jurisdiction over *Moriarty* under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

These cases concern California Insurance Code sections 10113.71 and 10113.72 ("the Statutes"). Pet. App.84a-86a. Based on the California Legislature's belief that lapses of life insurance can have disastrous consequences for consumers, the Statutes require life-insurance companies to give policy owners several "critical safeguards to avoid defaulting." *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24, 35 (Cal. 2021) ("*McHugh II*"). The Statutes' full text is set forth in the Appendix to this Petition (Pet.App.84a-86a), but we briefly summarize them below for the Court's convenience.

First, the Statutes require insurers to give policy owners a 60-day "grace period" in which to pay past-due premium before cancelling a policy for unpaid premium. *See* Cal. Ins. Code § 10113.71(a).

Second, the Statutes require insurers to give policy owners two pretermination notices during the 60-day grace period: (1) a notice of unpaid premium within 30 days after the premium was due and unpaid, *id.* § 10113.71(b)(3), and (2) a notice of impending termination at least 30 days before the policy is terminated. *Id.* §§ 10113.71(b)(1), 10113.72(c).

Third, the Statutes require insurers to give policy owners the opportunity to designate one or more other persons to receive duplicate copies of the foregoing notices. *See id.* § 10113.72(a); *see also id.* §§ 10113.71(b)(1), 10113.72(c). Insurers must provide policy owners with a form to designate a third party to receive those notices, and must remind policy owners annually of their right to designate a third party to receive notices. *Id.* § 10113.72(a).

Finally, the Statutes prevent an insurer from terminating a policy for unpaid premiums without giving policy owners the foregoing notices to the policy owner and any third-party designees. *Id.* § 10113.72, subd. (c) (mandating that no policy "shall lapse or be terminated" for an unpaid premium "unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a).")

INTRODUCTION

Between them, Allianz Life Insurance Company of North America ("Allianz") and American General Life Insurance Company ("American General") (collectively, "Respondents") violated the Statutes by terminating thousands of life insurance policies without giving policy

owners an opportunity to designate other persons to receive notices of unpaid premiums and impending termination.

Petitioners LaWanda D. Small and Michelle L. Moriarty are two such persons. Both paid life insurance premiums on their husbands' policies for years without ever missing a payment. Both missed a single payment due to circumstances beyond their control. And in both cases, their insurer terminated their policies without giving them an opportunity to designate another person to receive notices of unpaid premiums and impending termination, leaving them with no insurance when their husbands died.

Small and Moriarty filed actions against Allianz and American General, respectively, each arguing that their insurer's undisputed violation of the Statutes prevented their policies from lapsing before their husbands died, and therefore entitled them to death benefits due under the policies. In both cases, the district courts agreed with Petitioners on that central point, rejecting the insurers' arguments that, to obtain the benefits of coverage, a plaintiff must make an individualized showing that the insurers' statutory violations caused them harm.

But in *Small*, after the district court certified a class under Fed. R. Civ. P. 23(b)(2) and (b)(3), the Ninth Circuit granted Allianz's Rule 23(f) petition. The panel acknowledged that this was an unsettled and controlling issue of California state law as to which both federal and state courts disagree. But rather than certifying that question to the California Supreme Court, as Small had urged, the panel ventured a guess that the

California Supreme Court would require an individualized showing of causation to reinstate a policy terminated in violation of the Statutes. Pet.App.5a; Pet.App.37a-38a. Based on that guess, the Ninth Circuit decided that the "causation question" defeats class certification because it involves too many individualized questions of fact. In doing so, the Ninth Circuit swept away several pending appeals involving the same state-law question, including Moriarty's case against American General.[1]

Then, in *Moriarty*—which was before the Ninth Circuit on interlocutory appeal from the district court's grant of summary judgment for Moriarty—the panel held that, "[i]n the absence of controlling California Supreme Court authority or other intervening authority, this court is bound by *Small*[,]" and summarily denied Moriarty's motion to certify the controlling question to the California Supreme Court. Pet.App.67a.

These decisions cannot be reconciled with *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), where this Court encouraged federal appellate courts to certify uncertain questions of state law to state high courts. Certification, the Court advised, "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 391. Despite this instruction, the *Small* panel gave *no*

1. Based on *Small*, the Ninth Circuit also ruled for the insurers in *Poe v. Northwestern Mutual Life Ins. Co.*, No. 23-3124 & 23-3243 (9th Cir. March 4, 2025) and *Siino v. Foresters Life Ins. & Annuity Co.*, 133 F.4th 936 (9th Cir. 2025). The court has yet to decide *Farley v. Lincoln Benefit Life Co.* (No. 23-16224) and *Lee v. Great American Life Ins. Co.* (No. 24-6617), but unless this Court grants review here, they will undoubtedly meet the same fate, because they both hinge on the same controlling question of state law decided in *Small*.

consideration to the principles of cooperative federalism enunciated in *Lehman*, thereby depriving the California Supreme Court of the opportunity to rule on an important and unsettled question of state law. The *Moriarty* panel then felt constrained to follow *Small*.

Importantly, these are not isolated incidents. As counsel for Respondent Allianz explained in a pending petition for *certiorari* in an unrelated case, the lower courts have "developed widely divergent approaches" to certification, with several giving no consideration whatsoever to the principles of cooperative federalism enunciated in *Lehman*. *See Montera v. Premier*, No. 24-999 (filed March 17, 2025), at i.

As a result, Allianz's counsel argued in *Montera*, states are often demoted to "benchwarmer status—relegated to watching from the sidelines as federal courts play the lead role in developing their laws." *Id.* at 2. Allianz's counsel argued that "[f]urther guidance addressing the federalism concerns underlying certification is both warranted and long overdue." *Id.* at 22.[2]

Petitioners could not agree more. Guidance is urgently needed lest the principles of cooperative federalism set forth on *Lehman* continue to go unheeded.

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2. A host of states filed an *amici* brief in *Montera* supporting the Petitioner, urging this Court to "adopt a framework that favors certification whenever it stands a fair prospect of preventing federal interference with state affairs." Brief of Idaho, Ohio, 13 Other States, and the Arizona Legislature as Amici Curiae in Support of Petitioner, Case No. 24-999, at 3.

Guidance is particularly warranted here in light of the Ninth Circuit's uniquely standardless approach to certification. As one commentator has observed, "[m]ore than any other circuit . . . the Ninth Circuit's approach to [certification] has been inconsistent and poorly reasoned." Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 Denv. U. L. Rev. 139, 163 (2009).

That approach is on full display in this case, where the Ninth Circuit declined certification in both *Small* and *Moriarty* even though the question presented has recurred repeatedly among district courts in the Ninth Circuit, with courts reaching different answers, and even though panels in the Ninth Circuit have reached different answers on the unsettled issue of state-law at the heart of this case.

Making matters worse, these cases involve insurance—an area where the states have a uniquely powerful regulatory role. *See Smith v. PacifiCare Behav. Health of California, Inc.*, 113 Cal. Rptr. 2d 140, 152-53 (Cal. App. 2001); *accord Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Yet the panels in *Small* and Moriarty accorded this interest no weight when it declined Petitioners' certification requests. *See* Pet.App.37a-38a (*Small*); Pet. App.67a (*Moriarty*).

These decisions should not be permitted to stand. Just as in *Montera*, the Ninth Circuit's unprincipled approach to certification does violence to the federalism interests at the heart of *Lehman*. The decision in *Small* should be vacated and remanded with instructions to certify the

controlling question of state law to the California Supreme Court so that Court can give California's sovereign interests the respect they deserve. *Moriarty* should be vacated and stayed pending the ultimately outcome in *Small*. The interests of federalism deserve no less.

STATEMENT OF THE CASE

A. Certification arose out of federalism concerns.[3]

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requires federal courts to apply substantive state law in diversity cases. To avoid "the problem of" federal courts opining on "unresolved state law," states began adopting certification procedures circa 1945. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212, 227 n.25 (1960).

Certification ensures that the "judicial policy of a state [is] decided when possible by state, not federal, courts." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.). Certification protects a state against "los[ing] the ability to develop or restate the principles that it believes should govern" and "ensures that the law [federal courts] apply is genuinely state law." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (Easterbrook, J.). Conversely, when a federal court fails to certify a question, it "in effect, prevent[s] state courts from deciding unsettled issues of state law[.]" *McCarty v. Olin Corp.*, 119 F.3d 148, 158 (2d Cir. 1997)

3. This discussion draws on the pending petition for review in *Montera*, No. 24-999, which summarizes the background issues regarding certification. Parts I and II of the Argument also draw on the petition in *Montera*.

(Calabresi, J., dissenting). That violates "fundamental principles of federalism and comity." *Id.*

B. This Court encouraged certification in *Lehman* but did not provide guidance as to when certification is important.

Soon after states began authorizing certification, this Court encouraged federal courts to use the practice. In *Lehman Bros. v. Schein*, the Court reversed a lower court for failing to consider whether a "controlling issue of Florida law should be certified to the Florida Supreme Court." 416 U.S. at 392. The Court favorably discussed certification, noting that "in the long run," it can "save time, energy, and resources and help[] build a cooperative judicial federalism." *Id.* at 391. But because the procedure was so novel, the Court provided little in the way of guidance, noting simply that certification was not "obligatory" and that "[i]ts use in a given case rests in the sound discretion of the federal court." *Id.* at 391.

Since *Lehman*, the Court has "repeatedly commented favorably on the procedure and sometimes instructed lower courts to consider certification on remand." *Lindenberg v. Jackson Life Ins. Co.*, 919 F.3d 992, 997 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc); *see, e.g.*, *McKesson v. Doe*, 592 U.S. 1, 5-6 (2020); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *see also Minn. Voters All. v. Mansky*, 585 U.S. 1, 26-32 (2018) (Sotomayor, J., dissenting).

Despite the foregoing, the Court has not developed the law governing certification.

That lack of guidance is widely acknowledged. *See, e.g.*, Deborah J. Challener, *Distinguishing Certification From Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 866 (2007) ("[The Supreme] Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate."); Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. Wash. L. Rev. 251, 268 (2017) (the Court "has not provided a uniform guidance to lower federal courts in deciding whether to use certification.").

C. These appeals involve the type of unsettled and controlling state-law question that certification was designed to address.

As noted above, the California Legislature has enacted several statutes to give policy owners "critical safeguards to avoid defaulting." *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24, 35 (Cal. 2021) ("*McHugh II*"). First, the Statutes require insurers to give policy owners a 60-day "grace period" to pay past-due premium before cancelling a policy. Cal. Ins. Code § 10113.71(a). Second, they require insurers to notify policy owners of impending termination at least 30 days before the policy lapsed. *Id.* §§ 10113.71(b)(1), 10113.72(c). Third, they require insurers to allow policy owners to designate other people to receive copies of notices. *Id.* §§ 10113.72(a), (c), 10113.71(b)(1). And fourth, they make clear that an insurer's failure to follow these requirements prevents it from terminating a policy for nonpayment of premiums. *See id.* § 10113.72(c)

Despite these protections, between 2013 and 2022, Respondents lapsed thousands of policies in California for unpaid premium without providing the protections required by the Statutes. Two of these policies were held by Petitioners Small and Moriarty.

1. Facts of *Small*.

In 1990, Small's late husband Carl purchased an Allianz policy, naming her as the beneficiary. For 26 years, Small and her husband timely paid premiums on that policy. But in 2016—after Allianz unilaterally took the Smalls off auto-pay—the Smalls missed a payment. And without ever providing the safeguards required by the Statutes, Allianz cancelled the policy for unpaid premium. Pet.App.5a.

Two years later, Small's husband died. Pet.App.5a.

In 2020, Small filed a class action against Allianz, alleging a breach of contract on behalf of herself and the owners and beneficiaries of policies Allianz terminated for unpaid premiums, in violation of the Statutes. Pet.App.6a.

The district court certified two subclasses. First, under Rule 23(b)(2), it certified a subclass of owners of policies with living insureds, for whom a judicial declaration their policies were wrongfully terminated would offer sufficient relief. Pet.App.6a. Second, under Rule 23(b)(3), it certified a subclass of beneficiaries on policies with deceased insureds, for whom death benefits may be due. Pet.App.6a.

The Ninth Circuit granted review under Rule 23(f). Pet.App.8a.

2. Facts of *Moriarty*.

Meanwhile, in September 2012, Moriarty's late husband Heron purchased a $1 million insurance policy from American General, naming Moriarty the sole beneficiary of the policy. Pet.App.69a, 70a.

Between September 2012 and February 2016, Heron timely paid the premiums due under the policy through automatic bank draft connected to his business checking account. Pet.App.69a.

But when American General attempted to draft the monthly payment on March 20, 2016, the payment was declined because the bank account had been closed. Pet. App.69a.

Around April 2016, Heron suddenly and unexpectedly began suffering from mental illness and was admitted to a psychiatric facility. In May 2016, he committed suicide. Pet.App.70a.

Moriarty, as the beneficiary of her husband's life insurance policy, tried to collect her benefits, but American General refused to pay, maintaining that the policy "lapsed on March, 20 2016, and had no value on the date of death." Pet.App.70a.

In 2017, Moriarty sued American General for declaratory relief, breach of contract, bad faith, and violations of California's Unfair Competition Law. After several years of litigation, the district court granted Moriarty's renewed motion for summary judgment, finding that American General failed to comply with the

notice requirements of the Statutes before terminating Moriarty's policy. Pet.App.68a-81a. The court found that, under the Statutes' plain text, the policy did not lapse. Pet.App.78a.

The district court granted American General's motion to certify for interlocutory appeal its order granting Moriarty's summary judgment motion. Pet.App.66a.

3. The Appeal in *Small*.

As noted, the Ninth Circuit granted Allianz's Rule 23(f) petition to consider whether the district court erred in certifying Small's class action. Pet.App.8a.

In August 2024, after the *Small* appeal was fully briefed but prior to oral argument, Moriarty—who is represented by the same counsel as Small—moved to certify the following question to the California Supreme Court: "Can insurers that fail to comply with the requirements of California Insurance Code sections 10113.71 and 10113.72, lawfully terminate life-insurance policies for unpaid premiums?" No. 23-3650, ECF 50.1 at 1.

Small moved to join Moriarty's certification motion, noting that the same question is outcome determinative in several appeals pending in this Circuit. No. 23-55821, ECF No. 60 at 2.[4] Small attached a copy of Moriarty's certification motion to her motion to join. *Id.*

But the *Small* panel reversed the district court's ruling without certifying the case to the California Supreme Court. Pet.App.1a-38a.

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4. The appeals are listed supra at n.1.

The panel began by acknowledging that "[i]t is undisputed that Allianz did not notify Small, or her late husband, of the right to designate a third party to receive notices of unpaid premiums or impending termination, *as the Statutes require*." Pet App.5a (emphasis added).

But, the panel held, the propriety of class certification *vel non* hinges on "whether, to make out a claim, a plaintiff need only show the Statutes were violated, or, whether a plaintiff must also show that the violation caused them harm." Pet.App.10a.

That issue was ripe for certification: The *Small* panel observed that "the California Supreme Court has not declared what is required to recover for violations of the Statutes," Pet.App.20a-21a, and that federal district courts faced with this issue were deeply split between two competing theories of recovery: "the 'violation-only' theory (sometimes called 'strict compliance;') and what we now term the 'causation' theory." Pet.App.11a (footnote omitted); *see also* Pet.App.12a-13a n.2 (citing cases); Pet App.14a-15a n.3 (same). In the panel's view, only the former theory allows class certification, because it does not require any showing of individual causation. Pet.App.11a-12a.

Despite the absence of California Supreme Court authority on point and the deep split between federal district courts on this controlling state-law issue—which, notably, the panel attributed to the lack of any "authoritative appellate decisions to guide them," Pet. App.13a, the panel refused to certify this question to the California Supreme Court, as Small had requested; instead, it predicted that the California Supreme Court

would likely "adopt the 'causation' theory" (Pet.App.13a)—and on that basis held that the district court erred in certifying the class. Pet.App.29a, 32a, 36a.

The *Small* panel acknowledged that its ruling conflicted with (1) a "provision of the Statutes that states life insurance policies 'shall' not lapse due to non-payment unless the Insurer has sent one of the required notices[,]" Pet.App.12a, (2) a long line of "California state court opinions endorsing a 'violation-only' theory for non-compliance with notice-before-lapse statutes[,]" *and* (3) the Ninth Circuit's ruling in *Thomas v. State Farm Life Insurance Co.*, No. 20-55231, 2021 U.S. App. LEXIS 30035 (9th Cir. Oct. 6, 2021), which "adopted the 'violation-only' theory in affirming summary judgment for a plaintiff alleging breach of contract for violation of the Statutes." Pet.App.13a-14a. And although Small cited them in her briefs, the panel ignored statements in California Supreme Court opinions suggesting it endorsed a violation-only theory for noncompliance with pretermination notice provisions in insurance policies generally, and the Statutes in particular.[5]

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5. In dicta, the California Supreme Court in *McHugh II* endorsed the violation-only theory of the Statutes: "Those provisions clearly establish . . . insurers cannot terminate policies for a premium lapse until they give . . . notice[.]" 494 P.3d at 45 (emphasis added); *id.* ("When the Legislature enacted [the Statutes], it . . . kept such policies from being revoked when policy owners lapsed in paying premiums."); *id.* at 47 (Jenkins, J., concurring) ("This language states a substantive rule of law . . . that precludes lapse or termination of any policy absent provision of the required notice."). And in *Transamerica Insurance Co. v. Tab Transportation, Inc.*, 12 Cal.4th 389 (1995), *abrogated by statute as recognized by Allied Premier Ins. v. United Fin. Cas. Co.*, 15 Cal.5th 20 (2023), the California Supreme Court—construing an auto-insurance statute

The panel nonetheless held that "nothing in California law convinces us" that the "causation theory" is incorrect. Pet.App.15a.

Rather than heeding the text of the Statutes, the California Supreme Court's statements in other cases, the long line of published California intermediate appellate decisions, or the Ninth Circuit's own prior opinion in *Thomas*—all of which pointed to a violation-only theory—the *Small* panel relied on an unpublished decision from a California appellate court holding, contrary to numerous other state and federal rulings, that to state a claim under the Statutes, the "plaintiffs had the burden of proving they were harmed by the breach." Pet.App.21a (quoting *McHugh v. Protective Life Ins.*, 2022 WL 6299640, at *9 (Oct. 10, 2022) ("*McHugh III*")). Notably, the *Small* panel relied on *McHugh III* even though it acknowledged that statement was technically dicta insofar as the decision concluded "[w]ithout explicitly declaring what is required to recover" under the Statutes. Pet.App.20a.

In a separate (and unpublished) ruling, Pet.App.37a-38a, the *Small* panel denied Small's motion to certify the controlling question of state law on the ground that she "has not satisfied Federal Rule of Appellate Procedure 27, which requires that a motion 'must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it,'" without acknowledging Small had moved to join the 15-page certification motion in *Moriarty* and attached a

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analogous to section 10113.72(c)—concluded that, because "there was no compliance with the notice requirements," the "policy was still in effect at the time of the accident." *Id.* at 400.

copy of same to her joinder motion. No. 23-55821, ECF 60. The *Small* panel then said: "because the Court declines to certify a question to the California Supreme Court, Small's motion is denied as moot." Pet.App.38a.

Small moved for panel rehearing and rehearing en banc, arguing (inter alia) that the panel's decision violated the Statutes' plain text; ignored relevant statements from the California Supreme Court; ignored relevant precedent from California appellate courts; conflicted with a decision from another Ninth Circuit panel; and inexcusably relied on an unpublished, intermediate California appellate decision (*McHugh III*, 2022 WL 6299640, at *6) that conflicted with a host of other appellate rulings, rather than certifying the question to the California Supreme Court, as Small had urged. No. 23-55821, ECF 77.

On the last point, Small pointed out that the panel's decision ran directly contrary to the California Legislature's decree that the best way to prevent unintended lapses was "to protect *all* policy owners from losing coverage[,]" because the decision makes it impossible to certify a class action in this context—and without class-wide relief, individual litigation would be prohibitively expensive. *Id.* at 16 (citation omitted).

Small further argued that certification to the California Supreme Court was warranted because "[t]he question presented has recurred repeatedly among district courts in this Circuit, with courts reaching different answers[, and] even panels in *this* Circuit have reached different answers[.]" *Id.* at 18-19 (emphasis added). Thus, Small argued, the fact that "reasonable judicial minds have reached conflicting conclusions on the

question presented militates in favor of certification to the California Supreme Court." *Id.* at 19.

Small also explained that this case presents heightened federalism concerns because it involves insurance, an area where the states exert uniquely broad police powers subject to reverse preemption. Small explained, moreover, that because of the Class Action Fairness Act and the fact that many insurers reside outside of California, "many cases of this type have been and likely will continue to be removed to federal court and thus evade review by California courts." No. 23-55821, ECF 77 at 19 (citation omitted).

Finally, Small noted that the panel's decision itself is an affront to federalism, because not only did the panel ignore the text of a California state statute, but it also "judicially amended the Statutes consistent with a failed bill that could not even get its foot in the door at the California Legislature." *Id.* at 20.

The *Small* panel denied rehearing without acknowledging any of these arguments. Pet.App.37a-38a.

4. The Appeal in *Moriarty*.

In the wake of *Small*, the *Moriarty* panel held that it was bound by *Small*'s ruling that, "[p]ursuant to the causation theory of recovery, a plaintiff 'must not only allege a violation of the Statutes, but must also show that the violation caused them harm.'" Pet.App.67a (quoting *Small*, 122 F.4th at 1193). The *Moriarty* panel cited *Small* for the proposition that "[t]o recover, 'a plaintiff must demonstrate that they did not knowingly or intentionally

let the policy lapse such that the Insurer's compliance with the Statutes would have caused the plaintiff to pay their premiums and retain the policy.'" Pet.App.67a (quoting *Small*, 122 F.4th at 1193). The *Moriarty* panel then held that, "[i]n the absence of controlling California Supreme Court authority or other intervening authority, this court is bound by *Small*"—and then summarily denied Moriarty's motion to certify the controlling question to the California Supreme Court. Pet.App.67a.

REASONS FOR GRANTING THE PETITION

Review is warranted for three reasons.

First, the question of when federal courts should certify uncertain questions of state law to a state court, and what role federalism should play in that analysis, is an important and recurring question that has gone unaddressed by this Court for one-half a century.

Second, the circuits are in disarray on the proper approach to certification. Some circuits expressly consider federalism, others are inconsistent, and still others, particularly the Ninth Circuit, largely ignore it.

Third, this petition presents an ideal vehicle to address this issue because both *Small* and *Moriarty* decided an unresolved and controlling question of California state law that has heightened federalism implications without certifying that question to the California Supreme Court.

I. This Court's Guidance is Needed to Address a Growing Federalism Problem.

The question presented implicates "an important question of federal law" that has gone unaddressed for over 50 years: namely, under what circumstances should a federal court certify a question of uncertain state law, and what role should federalism interests play in that analysis?

The Court last addressed this issue in *Lehman* in 1974. But *Lehman* did not provide "concrete rules to govern lower federal courts in deciding whether to certify questions[.]" *Lindenberg v. Jackson Life Ins. Co.*, 919 F.3d 992, 997 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc). As a result lower courts "lack" "direction" and "predictability" in this area. *Id*; *see also* Deborah J. Challener, *Distinguishing Certification From Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 866 (2007) ("[The Supreme] Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate."); Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. Wash. L. Rev. 251, 268 (2017) (the Court "has not provided a uniform guidance to lower federal courts in deciding whether to use certification.").

This lack of clarity is of paramount concern because certification is central to a "cooperative judicial federalism." *Lehman*, 416 U.S. at 391; *Pino*, 507 F.3d at 1236 (Gorsuch, J.). This Court has increasingly recognized judicial federalism as a foundational element of our constitutional system. *See*, *e.g.*, *Harrington v. Richter*, 562 U.S. 86,

102-03 (2011) (providing for highly deferential review of state court decisions interpreting state law to protect "state sovereignty"). Further guidance addressing the federalism concerns underlying certification is both warranted and long overdue.

II. Lower Courts Are Divided Over the Role Federalism Interests Should Play in the Certification Analysis.

Division in the lower courts over the standards governing certification further supports granting the petition.

A. Five circuits have yet to develop a framework for deciding whether to certify state law issues.

Five circuits have yet to develop clear guidelines governing when to certify an issue of state law. As a result, litigants and state courts have no idea whether federalism will play a role in the decision.

The Sixth Circuit "trust[s] panels to exercise their experience, discretion, and best judgment to determine when certification is appropriate" and has therefore refused to establish specific "criteria for certification to state courts." *Lindenberg*, 919 F.3d at 993 (Clay, J., concurring in the denial of rehearing en banc).

Four other circuits likewise take a case-by-case approach. The Fourth Circuit makes certification decisions based upon the clarity of the state law issue, without considering other factors or federalism interests. *See*, *e.g.*, *Shears v. Ethicon, Inc.*, 64 F.4th 556, 563 (4th Cir. 2023).

Eighth Circuit panels also usually treat the uncertainty of state law as dispositive. *See*, *e.g.*, *Anderson v. Hess Corp.*, 649 F.3d 891, 895 (8th Cir. 2011). The Eighth Circuit does not provide other criteria that a panel must consider as part of its certification inquiry. *See Kulinski v. MedtronicBio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997).

The Tenth Circuit asks whether existing state law provides "a reasonably clear and principled course" for resolving the state law question. *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 85 F.4th 1034, 1038 (10th Cir. 2023). It emphasizes that state law certification "is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law," but provides no guidance regarding what factors must be considered in deciding whether to invoke the procedure. *Id.*

The Federal Circuit, too, offers little guidance beyond the certainty of state law. It has noted the "desirability" of certifying questions when there is "real doubt about the state's law" but has denied certification where state law is settled, without considering other factors. *Toews v. United States*, 376 F.3d 1371, 1380-81 (Fed. Cir. 2004).

B. Seven circuits have developed frameworks for determining whether to certify a state-law issue, but they vary substantially.

Seven circuits have adopted frameworks to guide state-law certification, but these frameworks vary widely, particularly over the need to ensure that state courts retain the power to shape state law. And no circuit

requires panels to consider the propriety of a federal court deciding issues of state law.

1. One circuit holds that certification is appropriate whenever a panel has substantial doubt about the answer to a state law question.

The Eleventh Circuit stands alone in putting federalism at the forefront in its unusual pro-certification approach. It holds that "[w]hen we have substantial doubt about the answer to a dispositive question of state law, we 'should certify that question to the state supreme court[.]" *Cordero v. Transamerica Annuity Serv. Corp.*, 34 F.4th 994, 999 (11th Cir. 2022) (collecting cases). That approach, the Eleventh Circuit has explained, offers "the state court the opportunity to explicate state law." *Id.* at 999.

2. Three circuits formally consider federalism interests when deciding whether to certify.

The First Circuit will certify when an issue is "important," "complex," and "outcome-determinative." *Plourde v. Sorin Grp. USA, Inc.*, 23 F.4th 29, 37 (1st Cir. 2022). In determining whether an issue is important, the First Circuit is "particularly mindful" of "the interests of federalism" in its certification analysis. *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 119 (1st Cir. 2010).

The Second Circuit has identified "at least six factors that must be considered in deciding whether certification is justified." *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000). Those factors include not only "the absence of authoritative

state court interpretations of the state statute," and "the importance of the issue to the state and the likelihood that the question will recur," but also "the federalism implications of a decision by the federal courts." *Id.*

The Seventh Circuit expressly considers "whether the issue is of interest to the state supreme court in its development of state law[.]" *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001).

3. Three circuits consider public policy interests but do not formally consider whether certification is necessary to ensure that state courts retain the ability to shape state law.

The D.C. Circuit asks (1) whether the law is "genuinely uncertain" and (2) "whether the case is one of extreme public importance[.]" *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001). Accordingly, the D.C. Circuit will certify a question when its resolution would "have significant effects" within the District of Columbia, *DeBerry v. First Gov't Mortg. & Inv'rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999), but will decline to so when the question is not "of substantial interest to the District[,]" *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014).

The Third Circuit only recently "identified what considerations our court should take into account when deciding if certification is appropriate." *United States v. Defreitas*, 29 F.4th 135, 141 (3d Cir. 2022). Although it sometimes discusses "cooperative judicial federalism" when assessing an issue's importance, *id.*, what more often

drives its certification decisions is the importance of the issue to the "public." *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005); *see also Samsung Fire & Marine Ins. Co. (U.S. Branch) v. RI Settlement Tr.*, 2024 WL 4921644, at *4 (3d Cir. Aug. 12, 2024).

The Fifth Circuit applies a three-factor certification test that examines (1) "the closeness of the question and the existence of sufficient sources of state law," (2) "the degree to which considerations of comity are relevant," and (3) practical considerations, including delay. *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 522 (5th Cir. 2015).

C. The Ninth Circuit takes a uniquely standardless approach to certification.

"More than any other circuit . . . the Ninth Circuit's approach to [certification] has been inconsistent and poorly reasoned." Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 Denv. U. L. Rev. 139, 163 (2009). Sometimes the Ninth Circuit decides certification requests on public policy grounds. *See*, *e.g.*, *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003). Other times, it certifies questions after considering only the lack of clarity on the state law issue. *See Ruelas v. Cnty. of Alameda*, 51 F.4th 1187, 1190 (9th Cir. 2022). And rarely, some panels consider federalism interests. *See Yamashita v. LG Chem, Ltd.*, 48 F.4th 993, 1002-03 (9th Cir. 2022).

What is most distinctive about the Ninth Circuit, however, is its penchant for issuing "unpublished" or

"inadequately explained" certification rulings. Thomas-Jensen, *Certification After Arizonans*, 87 Denv. U. L. Rev. at 163; *see*, *e.g.*, *Knight v. LM Gen. Ins. Co.*, 770 F. App'x 350, 350-51 (9th Cir. 2019) (declining to certify without providing any reasons).

That's exactly what happened here—and is one of the reasons why this Court should grant this petition.

III. This Case Is an Ideal Vehicle for Clarifying the Certification Analysis.

This case is an ideal vehicle for this Court to develop the law on certification. There are at least four reasons why this is so.

A. The Question Presented is Outcome Determinative

First, the question at the core of the panel's decision—"whether, to make out a claim [under the Statutes], a plaintiff need only show the Statutes were violated, or, whether a plaintiff must also show that the violation caused them harm," Pet.App.10a—is outcome determinative in at least three other appeals in the Ninth Circuit (in addition to *Moriarty*): *Poe v. Northwest Mutual Life Ins. Co.*, Nos. 23-3124, 23-3243; *Siino v. Foresters Life Ins. & Annuity Co.*, Nos. 23-16176, 23-16189; *Farley v. Lincoln Benefit Life Co.*, No. 23-16224; *Lee v. Great American Life Ins. Co.* (No. 24-6617).

As explained in the Motion for Certification filed in *Moriarty* (which *Small* moved to join, *see* ECF 60 at 2), these cases all have the same three salient features:

First, the insurers in each case terminated life insurance policies without first following the Statutes' requirements.[6]

Second, the plaintiffs in these cases all contend, pursuant to the "violation-only" theory rejected by the Ninth Circuit here, that the insurers' failure to comply with the Statutes meant their policies did *not* lapse, and entitled them to relief (reinstated policies or death benefits).[7]

Third, and conversely, the insurers in these cases all contend, pursuant to the "causation theory" adopted by the Ninth Circuit here, that their failure to follow the Statutes did *not* prevent the policies from lapsing, and

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6. *See Farley v. Lincoln Benefit Life Co.*, No. 2:20-CV-02485-KJM-DB, 2023 WL 3007413, at *1–2 (E.D. Cal. Apr. 18, 2023); *Siino v. Foresters Life Ins. and Annuity Co.*, No. 20-CV-02904-JST, 2023 WL 4410948, at *1, 3 (N.D. Cal. July 7, 2023); *Poe v. Nw. Mut. Life Ins. Co.*, No. 8:21-CV-02065-SPGE, 2023 WL 7273741, at *2, 3 (C.D. Cal. Oct. 19, 2023); *Lee v. Great Am. Life Ins. Co.*, 745 F. Supp. 3d 1006, 1011 (C.D. Cal. 2024).

7. *See* Brief for Appellee, *Farley v. Lincoln Benefit Life Co.*, No. 23-16224 (9th Cir. April 22, 2024), ECF 31 at 1–2, 4; Brief for Appellee, *Siino v. Foresters Life Ins. & Annuity Co.*, Nos. 23-16176 & 23-16189 (9th Cir. June 12, 2024), ECF 37 at 1–2, 4; Brief for Appellant/Cross-Appellee, *Poe v. Nw. Mut. Life Ins. Co.*, Nos. 23-3124 & 23-3243 (9th Cir. Mar. 12, 2024), ECF 26.1, at 1–2, 4; *Lee v. Great Am. Life Ins. Co.*, 745 F. Supp. 3d at 1011 (noting plaintiffs "seek a declaration, injunction, or judgment that class policies were improperly terminated—that those terminations were not legally effective—and, as such, the policies remain in force today despite nonpayment of premium").

that plaintiffs are *not* entitled to relief unless the insurers' failure to follow the Statutes caused unpaid premiums.[8]

In *Small*, the Ninth Circuit adopted the "causation theory" advocated by the insurance company defendants and their *amici* and, based on that, reversed the district court's certification decision. Pet.App.1a-37a. The related appeals that have already been decided (*Siino* and *Poe*) followed the panel's decision here. The question presented is outcome determinative in all these cases.

B. There is No Controlling Precedent on the Causation Question.

This case also presents an ideal vehicle to consider the question presented because of the lack of controlling precedent on the causation question, which the *Small* panel itself acknowledged.

The *Small* panel specifically noted that "the California Supreme Court has not declared what is required to recover for violations of the Statutes." Pet App.20a-21a. The panel further observed that "[w]ithout any authoritative appellate decisions to guide them[,]" district

8. *See* Brief for Appellant, *Farley v. Lincoln Benefit Life Co.*, No. 23-16224 (9th Cir. Jan. 9, 2024), ECF 12 at 13–15, 18–19; Brief for Appellant, *Small v. Allianz Life Ins. Co. of N. Am.*, No. 23-55821 (9th Cir. Feb. 22. 2024), ECF 20 at 1–2, 22–23; Brief for Appellant/Cross-Appellee, *Siino v. Foresters Life Ins. & Annuity Co.*, Nos. 23-16176 & 23-16189 (9th Cir. Feb. 5. 2024), ECF 22, at 1–6, 18–23; Brief for Appellee, *Poe v. Nw. Mut. Life Ins. Co.*, Nos. 23-3124 & 23-3243 (9th Cir. June 5, 2024), ECF 45.1 at 1–6, 30; *Lee v. Great Am. Life Ins. Co.*, 745 F. Supp. 3d at 1006.

courts have "adopted "two competing theories" on the issue. Pet.App.13a (citing cases).

The *Small* panel also acknowledged that its adoption of the causation theory conflicts with (1) a "provision of the Statutes that states life insurance policies 'shall' not lapse due to non-payment unless the Insurer has sent one of the required notices," Pet.App.12a, (2) "California state court opinions endorsing a 'violation-only' theory for non-compliance with notice-before-lapse statutes";[9] *and* (2) the Ninth Circuit's ruling in *Thomas v. State Farm Life Insurance Co.*, No. 20-55231, 2021 WL 4596286 (9th Cir. Oct. 6, 2021), which "adopted the 'violation-only' theory in affirming summary judgment for a plaintiff alleging breach of contract for violation of the Statutes." Pet. App.13a-14a.[10] And although they were cited in Small's brief, the *Small* panel also completely ignored statements in California Supreme Court opinions endorsing the violation-only theory as to both the Statutes and similar

9. *See Molinar v. 21st Century Ins. Co.*, 318 Cal.Rptr.3d 608, 610 (Cal. Ct. App. 2024); *Mackey v. Bristol W. Ins. Servs. of Cal., Inc.*, 130 Cal.Rptr.2d 536, 543 (Cal. Ct. App. 2003); *Kotlar v. Hartford Fire Ins. Co.*, 100 Cal.Rptr.2d 246, 249 (Cal. Ct. App. 2000); *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 286 Cal.Rptr. 146, 148 (Cal. Ct. App. 1991); *Lee v. Indus. Indem. Co.*, 223 Cal.Rptr. 254, 256 (Cal. Ct. App. 1986); *Nat'l Auto. & Cas. Ins. Co. v. Cal. Cas. Ins. Co.*, 188 Cal. Rptr. 670, 672 (Cal. Ct. App. 1983); *Ohran v. Nat'l Auto. Ins. Co.*, 82 Cal.App.2d 636, 643 (Cal. Ct. App. 1947).

10. In *Thomas*, the Ninth Circuit held that "[a]n insurer's failure to comply with these statutory requirements means that the policy cannot lapse[,]" that an insurer's "fail[ure] to comply with sections 10113.71 and 10113.72 prevented the policies from lapsing," and that "[t]he policies [at issue] did not lapse because [the insurer] failed to comply with sections 10113.71 and 10113.72." 2021 WL 4596286, at *1 (emphasis added).

anti-lapse provisions in other insurance contexts. *See* supra at n.7.

The *Small* panel brushed the foregoing aside by pointing to the unpublished intermediate appellate decision in *McHugh v. Protective Life Ins.*, No. D072863, 2022 WL 6299640 (Cal. Ct. App. Oct. 10, 2022) ("*McHugh III*"), which—in the panel's view—supported the panel's "causation" theory. Pet.App.20a. But the panel acknowledged that *McHugh III* did not resolve whether proof of causation is required under the Statutes. Pet. App.20a (noting *McHugh III* ended "[w]ithout explicitly declaring what is required to recover"). That aside, *McHugh III* is unpublished, and thus may not even be cited or relied on in California. *See* Cal. Rule of Ct. 8.115(a) ("[A]n opinion of a California Court of Appeal that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."). Moreover, even when published, "decisions of intermediate state courts" are only instructive "in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940).

Here, the *Small* panel did not point to any such "convincing evidence." Instead, it held that because nothing in California law convinced it that its causation theory was incorrect, it would decide the issue itself based on tea leaves in an unpublished intermediate appellate decision (*McHugh III*) without asking the California Supreme Court its views on the matter—a direct affront to the federalism principles the certification device was designed to protect.

C. The Rulings Below Will Have Devastating Public Policy Consequences.

Certification is proper if "the question presents important public policy ramifications[.]" *N. River Ins. Co. v. James River Ins. Co.*, 116 F.4th 855, 858 (9th Cir. 2024). Here, the panels' decisions in *Small* and *Moriarty*, if affirmed, will have a devastating impact on California consumers.

The Statutes reflect the California Legislature's policy determination that the best way to prevent unintended lapses was "to protect all policy owners from losing coverage." *McHugh II*, 494 P.3d at 42. But under *Small* and progeny, *no one* will be protected.

First, the decision in *Small* will ensure most owners and beneficiaries of policies terminated in violation of the Statutes will never discover they have a claim. Class notice serves to inform people they may have claim to pursue. *Maracich v. Spears*, 570 U.S. 48, 73 (2013). But *Small*'s special causation requirement precludes class treatment, even one seeking only declaratory relief under Rule 23(b). Pet.App.23a-24a. And without a class, there is no class notice. *See* Fed. R. Civ. P. 23(c)(2)(A).

Second, *Small* will ensure that any owners and beneficiaries who discover their policies were terminated in violation of the Statutes will not be able to obtain relief. Precluding class action makes many cases cost-prohibitive. *See Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 334 & n.6 (1980).

Thus, under *Small*, insurers can violate the Statutes with impunity. This would be no small loss: California is the largest life-insurance market in the United States, with over 10 million policies and $229 billion in life insurance sold annually. *See* Brief of *Amici Curiae* AARP and AARP Foundation in Support of Plaintiff-Appellate/Cross Appellee at 14–15, ECF 32.1, filed in *Poe v. N.W. Mut. Life Ins. Co.*, Nos. 23-3124 & 23-3243 (9th Cir. Mar. 15, 2024).

And the seismic effects of the panel's decision will not be limited to life insurance. On the contrary, *Small*'s core conclusion—that (1) the only way to obtain relief for a violation of a pretermination-notice provision is a breach-of-contract claim, and (2) the only way to prove a breach-of-contract claim for the violation of a pretermination-notice provision is to show a causal connection between the insurer's failure to provide the pretermination notice and the lapsed coverage—would apply with equal force in *any* insurance context. Thus, so long *Small* stands, it could undermine anti-lapse protection for all $3.8 trillion in insurance coverage in California. *See* Brief of *Amici Curiae* Association of California Life and Health Insurance Companies and the American Council of Life Insurers in Support of Appellee/Cross-Appellant, at 1, 21, ECF 53.1, filed in *Poe v. N.W. Mut. Life Ins. Co.*, Nos. 23-3124 & 23-3243 (9th Cir. June 11, 2024).

For the same reason, *Small* may also be used to undermine similar anti-lapse statutes in other states. Many states have anti-lapse provisions similar to California.[11] And the driving force in Small's analysis—the

11. *E.g.*, Fla. Stat. § 627.728(3)(a); Me. Stat. § 2739; N.J. Stat. Ann. § 17:29C-10; N.Y. Ins. Law § 3426(e)(1); Wis. Stat. § 344.34.

need to prove causation in a breach-of-contract claim—is not unique to California, but instead a ubiquitous feature of American common law. *See* Restatement (Second) of Contracts § 347. Thus, so long as *Small* may be cited as persuasive authority, it could undermine insurance regulations nationwide.

D. This Petition Involves Heightened Federalism Concerns Due to the States' Strong Interest in Regulating Insurance.

Finally, this petition presents heightened federalism concerns due to the States' unique interest in insurance regulation that make the panel's refusal to certify the controlling question to the California Supreme Court particularly offensive.

Federal law reflects "a policy declaration that it is in the public interest that the primary regulation of the business of insurance be in the states, not in the national government." *Smith v. Pacificare Behavl. Health of Cal.*, 113 Cal. Rptr. 2d 140, 152-53 (Cal. App. 2001) ; *accord Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999); *see also N. River Ins. Co.*, 116 F.4th at 858 (certifying question of Nevada insurance law to Nevada Supreme Court based on recognition that "Nevada may have an interest in regulating its own insurance landscape.") (citation omitted).

Yet, because of the Class Action Fairness Act, and the fact that many insurers reside outside of California, "many cases of this type have been and likely will continue to be removed to federal court and thus evade review by California courts." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013).

Certification, then, may be the only way to allow the California Supreme Court to weigh in on this important issue anytime soon, if ever.

Second, *Small* itself is a massive affront to federalism because it endorsed a result that the California legislature affirmative *rejected*.

As Small explained in her merits briefing below, *see* No. 23-55821 ("*Small*") ECF 37 at 23-26, within months after the California Supreme Court observed in *McHugh II* that the Statutes "clearly establish . . . insurers cannot terminate policies for a premium lapse until they give . . . notice," 494 P.3d at 45, and after the Ninth Circuit itself observed in *Thomas* that "an insurer's failure to comply with these statutory requirements means that the policy cannot lapse," 2021 WL 4596286, at *1, insurance industry lobbyists (including one of Allianz's amici in *Small*) introduced a bill to the California legislature—SB 1320—that sought to abrogate those rulings by adding a causation requirement to the Statutes. *Small*, No. 23-55821, ECF 37 at 36; *see also Small*, No. 23-55821, ECF 40 (Request for Judicial Notice) at 6–8.[12]

SB 1320 was vigorously opposed by consumer advocates, who described it as a blatant attempt to overrule *McHugh II* and *Thomas* by "shift[ing] the burden on to consumers to prove that a carrier's failure to follow the notice requirements caused their policy to lapse."

12. SB 1320 specifically sought to add a new section (section 10113.73) to the Statutes providing that "[n]o insurer shall be liable for failure to meet any requirement of Section 10113.71 or 10113.72 unless an alleged policy lapse occurred as a result of that failure." *Small*, No. 55871, ECF 40 at 7.

Small, No. 23-55821, ECF 40 at 12-23; *see also id.*, ECF 37 at 25-26 (describing consumer advocates' opposition to SB 1320).

But, notably, SB 1320 *failed*. *See id.*, ECF 40 at 4.

Despite taking judicial notice of those events, Pet. App.17a n.4, the *Small* panel proceeded to interpret the Statutes as requiring proof of causation before any policyholder could revive an illegally lapsed policy—which is precisely what the insurance industry sought but failed to accomplish in SB 1320.

The *Small* panel thought SB 1320 was irrelevant because it "did not make it to a vote[.]" Pet.App.17a n.4. But as Small pointed out in her Petition for Rehearing, if federalism means anything, it means that a federal court sitting in diversity should be cautious about an "*Erie* guess" that would do to a state statute precisely what the state's legislature declined to do when it had the opportunity. Accordingly, as Small urged, in light of the uncertainty surrounding the issue, SB 1320's demise should have caused the panel to certify the controlling state law question to the California Supreme Court. The panel's refusal to heed that plea further illustrates its disregard for the federalism interests the certification doctrine is supposed to address.

* * *

For all these reasons, this case presents an ideal vehicle for this Court to ensure that the federal courts of appeals give federalism interests the respect they deserve when considering an outcome-determinative and unsettled question of state law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should vacate *Small* and remand with instructions to certify the controlling question of state law to the California Supreme Court. *Moriarty* should be vacated and stayed pending resolution in *Small*.

Respectfully submitted,

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Dated: 5/23/25

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55821
D.C. No. 2:20-cv-01944-TJH-KES

LAWANDA D. SMALL, INDIVIDUALLY,
AND ON BEHALF OF THE CLASS;
CLASS REPRESENTATIVE,

Plaintiff-Appellee,

v.

ALLIANZ LIFE INSURANCE
COMPANY OF NORTH AMERICA,
A MINNESOTA CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted October 21, 2024
Pasadena, California

Before: Richard C. Tallman, Ryan D. Nelson, and
Daniel A. Bress, Circuit Judges.

Opinion by Judge Tallman

Filed December 10, 2024

Appendix A

OPINION

TALLMAN, Circuit Judge:

We are asked to decide whether the district court below erred in certifying a class challenging loss of life insurance for failure to pay premiums where the Insurer failed to strictly comply with statutorily mandated notice provisions. The answer lies in determining whether a plaintiff alleging a violation of California Insurance Code sections 10113.71 and 10113.72 ("Statutes") need only show the insurance company violated the notice requirement(s), or, whether the plaintiff must also show that the violation caused them harm. We believe it to be the latter and reverse the class certification order.

Defendant-Appellant Allianz Life Insurance ("Allianz") challenges the district court's certification of a class brought by universal and term life insurance policyholders and beneficiaries alleging breach of contract by Allianz. Plaintiff-Appellee LaWanda Small is a beneficiary purporting to represent the two subclasses: (1) the "Living Insured Subclass" seeking equitable relief to reinstate coverage and for whom the district court awarded a declaration stating the policies "were improperly lapsed by Allianz because it failed to strictly comply with the Statutes before it lapsed those policies"; and (2) the "Beneficiary Subclass" seeking damages from death benefits where the Insured is now deceased. Small alleges that Allianz violated the Statutes, which require that Insurers abide by a series of notice procedures to prevent policies from inadvertently lapsing due to an Insured's nonpayment of premiums.

Allianz argues the district court erred in certifying the class under Federal Rule of Civil Procedure 23 because both Subclasses fail to meet the commonality, typicality, and adequacy requirements of Rule 23(a) and the predominance and appropriateness-of-relief provisions of Rule 23(b). Small responds that the district court correctly found all requirements are satisfied.

Allianz separately argues the class should be decertified because the district court issued summary judgment orders before opt-out notices were sent to the Beneficiary Subclass. Allianz argues this violated the one-way intervention prohibition. For the reasons discussed below, we reverse the district court's order certifying the class and vacate the orders on summary judgment, which renders the one-way intervention prohibition issue moot.

I

A

In 2012, the California Legislature enacted Insurance Code sections 10113.71 and 10113.72 to prevent "people who hold life insurance policies from inadvertently losing them" due to non-payment of premiums. *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 283 Cal. Rptr. 3d 323, 494 P.3d 24, 45 (Cal. 2021) (*McHugh II*); *see* Cal. Ins. Code §§ 10113.71–.72. The Statutes took effect January 1, 2013, providing three primary procedural safeguards against unintentional lapse. First, all life insurance policies must "contain a provision for a grace period of not less than 60 days from the premium due date."

§ 10113.71(a). Second, "[a] notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed . . . at least 30 days prior to the effective date of termination if termination is for nonpayment of premium." § 10113.71(b)(1). Third, all Insureds must "be[] given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium," including "annual[] [notice] of the right to change the written designation or designate one or more persons." § 10113.72(a)–(b).

The Statutes do not explain whether these procedures apply retroactively to policies already in place, or whether they only apply to policies created after the Statutes went into effect. Many insurance companies adopted the latter interpretation and consequently did not fully comply with these notice requirements for policies issued before 2013. Their interpretation was based in part on guidance from the California Department of Insurance confirming as much, and the subsequent 2019 California Court of Appeal ruling in *McHugh v. Protective Life Ins.*, 40 Cal. App. 5th 1166, 1177, 253 Cal. Rptr. 3d 780 (2019) (*McHugh I*), holding the same.

Then, in 2021, the California Supreme Court held that the Statutes "apply to all life insurance policies in force when [the Statutes] went into effect, regardless of when the policies were originally issued." *McHugh II*, 494 P.3d at 27. This means that the language of the Statutes is engrafted into all policies in force as of 2013 as terms of the contract. *See id.* at 45. Since *McHugh II*, policyholders and beneficiaries ("Insureds") have filed an onslaught of

suits based on insurance companies' ("Insurers") non-compliance with the Statutes. These Insureds generally allege breach of contract and related claims against Insurers based on their failure to comply with one or more of the notice requirements in the Statutes. As a remedy, Insureds typically seek equitable relief in the form of reinstatement of the policy if the policyholder is still alive, or damages in the amount of the death benefit if the policyholder is deceased.

B

Plaintiff LaWanda Small is a Beneficiary and additional Insured of her deceased husband's $75,000 universal life insurance policy purchased in 1990 from Allianz's predecessor, LifeUSA Insurance Company. The Smalls paid the premiums due under the policy for 26 years until they missed a payment in August 2016 and the policy was thereafter terminated. In November 2018, Small, on behalf of herself as an additional Insured, applied for reinstatement of the policy and was denied. In December 2018, Small's husband died. Then, in January 2019, Small filed a death claim for the policy's death benefit. Allianz denied the claim because coverage had lapsed due to nonpayment of premiums.

It is undisputed that Allianz did not notify Small, or her late husband, of the right to designate a third party to receive notices of unpaid premiums or impending termination, as the Statutes require. In fact, Allianz originally took the position (before the California Supreme Court decided *McHugh II*) that the Statutes did not apply to policies like Small's that were issued before 2013.

Then, in 2020, Small sued Allianz in the Central District of California for declaratory relief, breach of contract, and violations of California's Unfair Competition Law ("UCL") alleging that Allianz failed to comply with the Statutes' notice requirements. Small moved to certify a class of approximately 1,800 members consisting of "owners or beneficiaries of life insurance policies issued before 2013 whose policies were terminated for nonpayment of premiums without receiving an opportunity to designate one or more persons to receive notices of unpaid premiums." The class sought payment of any death benefits due under the policies, and a judicial declaration that the policies were wrongfully terminated and thus continue in full force despite non-payment. Allianz opposed certification, arguing the class did not satisfy the required provisions of Federal Rule of Civil Procedure 23(a) or 23(b).

On May 23, 2023, the district court granted class certification and *sua sponte* divided the class into two subclasses. The first is defined as "owners of policies with currently living Insureds" seeking "to have their policies reinstated" ("Living Insured Subclass"). The second is defined as "beneficiaries of policies with deceased Insureds," seeking "breach of contract money damages in the amount of the death benefit" ("Beneficiary Subclass"). The court found both Subclasses satisfied the numerosity, commonality, adequacy, and typicality requirements of Rule 23(a). The court certified the Living Insured Subclass seeking equitable relief under Rule 23(b)(2), finding it satisfied the appropriateness-of-relief requirement. And it certified the Beneficiary Subclass under Rule 23(b)(3), finding it satisfied the predominance and superiority requirements.

The case schedule provided that the parties submit dispositive motions by June 15, 2023. Both parties filed motions for summary judgment by the deadline. But due to delays in the proceedings, the opt-out period for potential class members had not yet ended and notices had not yet been sent out when both parties moved for summary judgment. Allianz raised the timing issue with the court on one-way intervention grounds in an objection to Small's motion for summary judgment. Small raised the same objection in its opposition to Allianz's motion for summary judgment. The district court denied the parties' requests to extend the scheduling deadline and kept the dispositive motion deadline as previously set. In their replies, both parties requested that the court defer ruling on the merits of the summary judgment motions until after opt-out notices had been sent.

Despite those requests, the district court issued its summary judgment rulings before class opt-out notices had been sent to potential Beneficiary Subclass members. The court granted summary judgment for Small and the class on their breach of contract and declaratory relief claims. The court ruled that Small and the Beneficiary Subclass "are entitled to money damages . . . for their breach of contract claims," and "are not entitled to equitable relief." The court also ruled that Small and the Living Insured Subclass "are entitled to a declaration that their life insurance policies were improperly lapsed by Allianz because it failed to strictly comply with the Statutes before it lapsed those policies." The court granted summary judgment for Allianz on statute of limitations grounds, holding that class members whose policies were

terminated before February 27, 2016, were time barred. The court also granted summary judgment to Allianz on Plaintiffs' UCL claims.

Allianz now appeals the district court's order certifying the class. We granted Allianz permission to appeal under Rule 23(f). In its appeal, Allianz alternatively challenges class certification on the ground that the district court's summary judgment orders issued during the opt-out period for the Beneficiary Subclass violated the one-way intervention prohibition, arguing the proper remedy is class decertification.

We reverse the district court's grant of class certification and vacate the orders on summary judgment. On remand, the district court should reconsider the summary judgment orders in light of this decision. We do not decide whether those orders violated the one-way intervention prohibition, which is now moot.

II

The district court had jurisdiction to hear this case under 28 U.S.C. § 1332(d)(2) because the parties are diverse and the requested relief exceeds $5,000,000. We have appellate jurisdiction to hear this interlocutory appeal of a grant of class certification under 28 U.S.C. § 1292(e) as permitted by Federal Rule of Civil Procedure 23(f).

III

We "review the decision to certify a class and any particular underlying Rule 23 determination involving a

discretionary determination for an abuse of discretion." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc) (internal quotation marks and citation omitted). "[T]he district court abuses its discretion if it applie[s] an incorrect legal rule or if its application of the correct legal rule [i]s based on a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *White v. Symetra Assigned Benefits Serv. Co.*, 104 F.4th 1182, 1191 (9th Cir. 2024) (alteration in original) (internal quotation marks and citation omitted). While we "review the district court's decision granting class certification with more deference than [we] would a denial of class certification," *id.* (citation omitted), "the district court never has discretion to get the law wrong," *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022) (citation omitted).

IV

To determine whether the class can be certified under federal law we must first determine what Plaintiffs must show to recover for alleged violations of the Statutes under California law. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011) ("Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action."); *see also B.K. v. Snyder*, 922 F.3d 957, 968 (9th Cir. 2019); *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014).

Critically, the Statutes do not authorize a private right of action and the California Insurance Code classifies an insurance policy as a contract. *See* Cal. Ins. Code §§ 380, 10113.71–.72; *McHugh II*, 494 P.3d at 29. Thus, the cause of action is breach of contract. And for breach of contract, there must be damages *caused by* the breach. *See, e.g.*, *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1352–53, 90 Cal. Rptr. 3d 589 (2009). On the face of the legal claim that the Plaintiffs here are asserting, then, it would seem clear that Plaintiffs must show that the breach (in the form of a statutory violation) caused them to lose their policy coverage.

But in the district courts, this issue has led to disagreement. The key issue is whether, to make out a claim, a plaintiff need only show the Statutes were violated, or, whether a plaintiff must also show that the violation caused them harm. The theory of recovery is crucial. As the record here makes clear, and as other cases confirm, it is a life insurance industry norm that policyholders intentionally cancel their policies (or intentionally allow the policies to lapse) before the Insured dies and the death benefit is payable. This is because, for term life insurance, premiums rise dramatically as the Insured ages, and so many Insureds decide they no longer want or can afford the cost of continuing the policy. For universal life insurance, policyholders often terminate early to use their policy's loan feature to fund expenditures, which is a method of withdrawing cash that can serve as an alternative to withdrawal by surrender or as funds to pay the higher premiums. And when policyholders cancel their policies, they commonly let the unwanted policies lapse

by not paying premiums rather than informing Insurers of their intent to cancel.

Here, we face the problem of what to do with a class of Insureds that contains many of these people. How can they recover for procedural violations of Statutes meant to prevent unintentional lapse when the Insureds intended for their policies to lapse? For example, "although the Statutes require Insurers to give Insureds an opportunity to designate a designee, if the Insured would never have designated a designee anyway, then the damages cannot be said to result from the Insurer's failure to provide an opportunity to designate." *Steen v. Am. Nat'l Ins. Co.*, No. 2:20-cv-11226-ODW (SKx), 2023 U.S. Dist. LEXIS 105592, at *37 (C.D. Cal. June 14, 2023). If "a significant number of policy lapses were likely intentional on the part of the class members" does "[a] class member who intentionally chose to let her policy lapse suffer[] no damages"? *Nieves v. United of Omaha Life Ins. Co.*, No. 21-cv-01415-H-KSC, 2023 U.S. Dist. LEXIS 53397, at *23–24 (S.D. Cal. Mar. 28, 2023).

District courts faced with this issue have split between two competing theories of recovery—the "violation-only" theory (sometimes called "strict compliance") and what we now term the "causation" theory.[1] For the reasons stated below, we believe that the California Supreme Court would adopt the "causation" theory. This means a plaintiff must

1. The "causation" theory has also been referred to as the "subjective intent approach." *See, e.g., Lee v. Great Am. Life Ins. Co.*, No. 5:20-cv-01133-SPG-SHK, 2024 U.S. Dist. LEXIS 149997, at *22 (C.D. Cal. Aug. 20, 2024).

not only show an Insurer's *violation*, but that the *violation caused* them harm.

A

To understand our reasoning, we provide some background on the two theories. The "violation-only" theory stems in part from one provision of the Statutes that states life insurance policies "shall" not lapse due to non-payment unless the Insurer has sent one of the required notices. Cal. Ins. Code § 10113.72(c). As the theory goes, an Insurer's noncompliance with the Statutes keeps the policy in perpetual force even after nonpayment of premiums. District courts that adopt this theory[2] thus

2. *See, e.g., Grundstrom v. Wilco Life Ins. Co.*, No. 20-cv-03445-MMC, 2023 U.S. Dist. LEXIS 156972, *3 (N.D. Cal. Sep. 5, 2023) ("[T]he Court finds unpersuasive [the Insurer's] argument that [the Insured] has failed to show a triable issue as to causation, namely, that 'any failure of [the Insurer] to provide [the Insured] written notice of the annual right to designate,' 'caused the [p]olicy to lapse.' Rather, the Court finds persuasive the authority, cited by [the Insured], holding a defendant Insurer's failure to comply with the above-referenced third-party-designee requirement sufficient to support a breach of contract claim, irrespective of the plaintiff's ability to show a causal relationship between the lack of statutorily required notice and the lapse") (alterations in original); *Farley v. Lincoln Ben. Life Co.*, No. 2:20-cv-02485-KJMDB, 2023 U.S. Dist. LEXIS 68482, at *11–12 (E.D. Cal. Apr. 18, 2023) (*Farley I*) (finding "[q]uestions of causation, i.e., whether the policy would have lapsed even if defendant had complied with the statutes, are not relevant to whether there was a violation of a procedural right"), *reconsideration denied*, No. 2:20-cv-02485-KJM-DB, 2023 U.S. Dist. LEXIS 149067, at *11 (E.D. Cal. Aug. 24, 2023) (*Farley*

find that causation and damages are "immaterial for the simple reason that the policy did not lapse." *See Moriarty*, 686 F. Supp. 3d at 1032–33.

Without any authoritative appellate decisions to guide them, district courts have supported the "violation-only" theory with two main sources: (1) the reasoning and law behind California state court opinions endorsing a "violation-only" theory for non-compliance with notice-before-lapse statutes for short-term policies like auto and homeowner insurance; and (2) the unpublished memorandum disposition in *Thomas v. State Farm Life Insurance Co.*, No. 20-55231, 2021 U.S. App. LEXIS 30035 (9th Cir. Oct. 6, 2021), that with minimal discussion adopted the "violation-only" theory in affirming summary

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II) (reiterating "[a]lthough the Ninth Circuit has not formally decided whether any procedural violation of the statutes prevents a policy from lapsing, in a memorandum decision, a Circuit panel has suggested it does"); *Larone v. Metro. Life Ins. Co.*, No. 2:21-cv-00995-AB (AGRX), 2022 U.S. Dist. LEXIS 29749, at *19 (C.D. Cal. Feb. 9, 2022) ("Because [the Insurer] failed to comply with this requirement, the Policy could not lapse. Accordingly, Plaintiff has alleged that [the Insurer] was in breach by refusing to accept the [late payment] and terminating the Policy."); *Poe v. Nw. Mut. Life Ins. Co.*, No. 8:21-cv-02065-SPG-E, 2023 U.S. Dist. LEXIS 145642, at *21 (C.D. Cal. Aug. 14, 2023) (*Poe I*) (agreeing that "while the Statutes do not provide a private right of action, they nonetheless confer strict liability if an Insurer fails to provide the Designation Notices"); *Moriarty v. Am. Gen. Life Ins. Co.*, 686 F. Supp. 3d 1027, 1032 (S.D. Cal. 2023) ("By refusing to pay the benefits of [the Insured's] life insurance policy—another undisputed fact—Defendant breached the contract, entitling Plaintiff to summary judgment on this claim.").

judgment for a plaintiff alleging breach of contract for violation of the Statutes.

In contrast, the "causation" theory prescribes that the plaintiff must not only allege a violation of the Statutes, but must also show that the violation caused them harm. In other words, a plaintiff must demonstrate that they did not knowingly or intentionally let the policy lapse such that the Insurer's compliance with the Statutes would have caused the plaintiff to pay their premiums and retain the policy. District courts adopting this theory[3] generally cite

3. *See, e.g., Wollam v. Transamerica Life Ins. Co.*, No. 21-cv-09134-JST, 2024 U.S. Dist. LEXIS 44575, at *13 (N.D. Cal. Mar. 13, 2024) (agreeing that "California law requires plaintiffs to demonstrate causation of damages to establish a claim for breach of contract" for recovering under the Statutes); *Poe I*, 2023 U.S. Dist. LEXIS 145642, at *16–17 (denying motion for class certification because class contained Insureds that intended policies to lapse without suffering injury, and so individual questions predominate over common ones), *reconsideration denied*, No. 8:21-cv-02065-SPGE, 2023 U.S. Dist. LEXIS 188287, at *7 (C.D. Cal. Sept. 27, 2023) (*Poe II*) ("It is because of this legal framework requiring a showing of harm (rather than strict liability), in conjunction with Plaintiff's broad proposed class definition, that led the Court to find that individualized inquiries would predominate whether the class members had actually been harmed by the Defendant's violation of the Statutes."); *Steen*, 2023 U.S. Dist. LEXIS 105592, at *36–37 ("[B]reach of contract claims require a causal link between the breach and the damages.") citing *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 124 Cal. Rptr. 3d 256, 250 P.3d 1115, 1121 (Cal. 2011)); *Nieves*, 2023 U.S. Dist. LEXIS 53397, at *23–24 ("Plaintiff must prove damages resulting from the defendant's breach to establish liability for breach of contract. . . . A class member who intentionally chose to let her

the California appellate and Supreme Court decisions in *McHugh I–III*, and argue this theory is the only logical way to recover for a breach of contract action.

We now examine the policy and case law supporting these two competing theories in an effort to explain why we think the California Supreme Court would likely adopt the "causation" theory. Given the lack of a private cause of action in the Statutes, nothing in California law convinces us that a breach of contract claim in this context should operate any differently than it usually would: by requiring a breach that caused the plaintiff's injury.

1

Small and the district courts adopting the "violation-only" theory nonetheless rely on California state court opinions interpreting statutory notice requirements for short-term, often mandatory, insurance policies like auto or home. These cases hold that because the auto or home insurance company failed to comply with statutory notice obligations, the Insurer's termination of a policy due to the Insured's nonpayment is ineffective—the policy remains in perpetual force even after nonpayment because the

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policy lapse suffers no damages."); *Pitt v. Metro. Tower Life Ins. Co.*, No. 20-CV-694-RSH-DEB, 2022 U.S. Dist. LEXIS 233896, at *21 (S.D. Cal. Dec. 1, 2022) (explaining that a "violation of one of the several requirements contained in the Statutes does not by itself establish all the elements of a claim for breach of contract" because, for example, "the termination of the policy might be due to the policyholder's request rather than to nonpayment of premiums").

Insurer never sent the required notices after nonpayment occurred. *See, e.g., Mackey v. Bristol W. Ins. Servs. of Cal., Inc.*, 105 Cal. App. 4th 1247, 1254–55, 1259, 1266, 130 Cal. Rptr. 2d 536 (2003) (concluding that Insurer's notice was "invalid and unenforceable" where auto Insurer attempted to cancel policy but failed to provide requisite notice to Insured even though Insured admittedly did not pay the premium on time); *Kotlar v. Hartford Fire Ins. Co.*, 83 Cal. App. 4th 1116, 1121, 100 Cal. Rptr. 2d 246 (2000) (holding "[i]f a cancellation is defective, the policy remains in effect even if the premiums are not paid" for one-year commercial general insurance where non-payment of the premium resulted in premature termination).

Relying on this case law, one of the most recent federal district court cases to interpret the Statutes held that "under longstanding principles of California insurance law, the strict compliance approach governs," citing *Mackey* and *Kotlar* among others. *Lee*, 2024 U.S. Dist. LEXIS 149997, at *22–25; *see also Siino v. Foresters Life Ins. & Annuity Co.*, No. 20-cv-02904-JST, 2023 U.S. Dist. LEXIS 117071, at *15, 18–19 (N.D. Cal. July 7, 2023) (*Siino II*) (relying on *Mackey* and *Kotlar* in support of "violation-only" theory for declaratory relief claims without ruling on breach of contract). The district court below also relied in part on *Mackey* and similar cases for adopting the "violation-only" theory in its orders on summary judgment.

We believe these California short-term insurance cases have distinguishable facts that make the reasoning behind these rulings less persuasive in the life insurance

context. Because life insurance policies are voluntary and long-term, deliberate termination by the Insured is common. And as we explained above, it is an industry norm that Insureds intentionally cancel unwanted policies by not paying premiums. If policies never lapse and remain perpetually in force even after non-payment simply because the Insurer did not send required notices, policies can accrue for years—potentially until the Insured is deceased—even if an Insured *intended* to cancel the policy in the first place by declining to pay higher premiums. We do not think that the Statutes were designed to protect this class of Insureds.[4]

2

Next, we examine our unpublished decision in *Thomas v. State Farm Life Insurance Co.*, which district courts have also cited to support the "violation-only" theory. It affirmed summary judgment for a plaintiff alleging breach of contract for violation of the Statutes based on the "violation-only" theory. *Thomas*, 2021 U.S. App. LEXIS 30035, at *3. As an unpublished disposition, *Thomas* is not

4. Nonetheless, Small argues that if the California legislature had intended a causation requirement in the Statutes, it would have included one. In support, Small asks that we take judicial notice of an unenacted amendment to the Statutes, SB 1320, that did not make it to a vote and was withdrawn. But an "unenacted bill" provides "little clarity," *Lara*, 25 F.4th at 1140, "because we do not know why a specific bill was not passed," *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1075 (9th Cir. 2020). While we granted Small's motion to take judicial notice of this evidence (ECF No. 70), we afford the evidence little weight.

a binding interpretation of the theory of recovery under the Statutes. And its truncated reasoning did not fully analyze the issues raised above.

The *Thomas* panel concluded that "[a]n Insurer's failure to comply with these statutory requirements means that the policy cannot lapse." *Id.* Thus, because the Insurer "failed to comply with sections 10113.71 and 10113.72, which prevented the policies from lapsing," it "breached its contractual obligations by failing to pay benefits to [the Beneficiary] under the policies after [the Insured's] death." *Id.* at *3–4. Many district courts have relied on this language to support adopting the "violation-only" theory, including the district court below. *See, e.g.*, *Grundstrom*, 2023 U.S. Dist. LEXIS 156972, at *3; *Farley I*, 2023 U.S. Dist. LEXIS 68482, at *11–12; *Farley II*, 2023 U.S. Dist. LEXIS 149067, at *11; *Larone*, 2022 U.S. Dist. LEXIS 29749, at *19; *Poe I*, 2023 U.S. Dist. LEXIS 145642, at *21; *Moriarity*, 686 F. Supp. 3d at 1032. Because *Thomas* is non-precedential and did not fully analyze the issues raised above, we respectfully decline to adhere to it here.

3

Finally, we turn to the California Court of Appeal and Supreme Court *McHugh* cases interpreting the Statutes at issue, which we think suggest the California Supreme Court would adopt the "causation" theory. At the very least, nothing in the *McHugh* decisions causes us to conclude that California courts would not apply the usual requirements for a breach of contract claim in cases based on claimed violations of the Statutes.

McHugh I was an appeal from the California Superior Court where Beneficiaries sued a life insurance company for breach of contract alleging the Insurer violated the Statutes. *McHugh I*, 40 Cal. App. 5th at 1170. The Insurer denied the Beneficiaries' claim to pay out a death benefit because the policy had terminated due to nonpayment of premiums before the Policyholder's death. *Id.* While the Insurer argued that the Statutes did not apply to the policy because it was issued before the Statutes took effect in 2013, the trial court disagreed and ruled the Statutes *did* apply. *Id.* Through a special verdict framed around breach of contract elements, the jury found that, although the Insurer "did something the contract prohibited," the plaintiffs were not harmed by the Insurer's failure, and found for the Insurer. *McHugh II*, 494 P.3d at 28. The Beneficiaries appealed on various grounds, but the Court of Appeal in *McHugh I* affirmed the judgment on other grounds: the verdict could not be overturned because the Statutes *did not* apply to policies issued after the Statutes became effective. *McHugh I*, 40 Cal. App. 5th at 1169–71.

Next, the California Supreme Court in *McHugh II* granted review solely to resolve whether the Statutes applied to policies in force when the Statutes became effective in 2013. *McHugh II*, 494 P.3d at 29. Reversing the Court of Appeal in *McHugh I*, the California Supreme Court found the Statutes *do* apply to policies in force as of 2013. *Id.* at 46. Thus, the statutorily mandated terms are incorporated into the existing contracts. *See id.* at 27. Without addressing whether the jury verdict was correct, the court remanded the proceedings consistent with its decision that the Statutes applied to the policy. *Id.* at 45 n.10, 46.

On remand, the California Court of Appeal reversed and remanded for a new trial based on an inconsistent verdict in an unpublished decision. *McHugh v. Protective Life Ins.*, 2022 Cal. App. Unpub. LEXIS 6109, at *6 (Oct. 10, 2022) (*McHugh III*). Without explicitly declaring what is required to recover, the Court of Appeal affirmed the trial court in declining to instruct the jury with "the plaintiffs' special instructions on 'strict compliance,'" reasoning that it was correct to simply instruct based on the language of the Statutes (which do not contain "strict compliance" language). *Id.* at *23. The court then rejected the plaintiffs' reliance on California case law like *Mackey* and *Kotlar*, explaining that "this is an action for breach of contract that must be decided on its own particular facts" and that these cases are "factually distinguishable from the present case and therefore have no applicability." *Id.* at *23–24. The court found no error in the trial court's instruction because it "instructed the jury on the plaintiffs' burden of proof to prevail in an action for breach of contract." *Id.* at *24. Notably, "in addition to proving [the Insurer] breached the contract, *plaintiffs had the burden of proving they were harmed by the breach*." *Id.* (emphasis added).

No other California appellate or Supreme Court cases have since weighed in on what is required for recovery for violations of the Statutes.

B

Now, we turn to the case before us. Because the California Supreme Court has not declared what is

required to recover for violations of the Statutes, we "must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990). Considering the case law and reasoning discussed above, we think the California Supreme Court would adopt the "causation" theory and reject the "violation-only" theory.

We think it significant that the California Supreme Court in *McHugh II* had the opportunity to rectify the formulation of the plaintiffs' claim and clarify that only a violation is required to recover, but it did not. We also think it significant that on remand, the California Court of Appeal in *McHugh III* proceeded under a breach of contract analysis. The court notably affirmed the trial court in declining to instruct the jury on strict compliance and rejected plaintiffs' reliance on *Mackey* and *Kotlar*. *McHugh III*, 2022 Cal. App. Unpub. LEXIS 6109, at *24. Then, it clearly stated that "[i]n addition to proving [the Insurer] breached the contract, plaintiffs had the burden of proving they were harmed by the breach." *Id.* This statement supports the "causation" theory because "[i]mplicit in the element of damages is that the defendant's breach *caused* the plaintiff's damage." *Troyk*, 171 Cal. App. 4th at 1352 (emphasis added). And "[c]ausation of damages in contract cases" requires the "causal occurrence" between damages and the defendant's breach "be at least reasonably certain." *Vu v. Cal. Com. Club, Inc.*, 58 Cal. App. 4th 229, 233, 68 Cal. Rptr. 2d 31 (1997).

In sum, considering that (1) the Statutes contain no private cause of action and thus require a breach of contract theory for which causation is a key element; (2) *McHugh I-III* suggest that California favors the "causation" theory; (3) there are no California Supreme Court or Court of Appeal cases adopting the "violation-only" theory for the Statutes; (4) several federal district courts have adopted the "causation" theory for the same reasons we do; (5) district courts that have adopted the "violation-only" theory predominantly rely on non-precedential *Thomas*; and (6) public policy favors the "causation" theory and weighs against the "violation-only" theory given the realities of the life insurance industry, we think that the California Supreme Court would similarly adopt a "causation" theory to recover for violations of the Statutes.

C

With "the elements of the underlying cause of action" in hand—now including causation—we can determine whether the district court erred in certifying Small's Subclasses. *See Erica P. John Fund, Inc.*, 563 U.S. at 809. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (internal quotation marks and citation omitted). To certify a class, plaintiffs bear the burden of satisfying each of the four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy—and at least one requirement of Rule 23(b). *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 663.

Rule 23 is more than "a mere pleading standard; plaintiffs cannot plead their way to class certification through just allegations and assertions." *Black Lives Matter L.A. v. City of L.A.*, 113 F.4th 1249, 1258 (9th Cir. 2024) (citing *Wal-Mart*, 564 U.S. at 350, 359). Instead, plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23" by a preponderance of the evidence. *Id.* (citations omitted). Certification is then only appropriate if the district court is "satisfied, after a rigorous analysis" that Rule 23 is met. *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 664 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)); *see also Black Lives Matter L.A.*, 113 F.4th at 1258 ("Class certification is thus not to be granted lightly."). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351. "[A] district court must consider the merits if they overlap with the Rule 23(a) requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Wal-Mart*, 564 U.S. at 351).

Here, Allianz challenges the district court's certification of Small's class, arguing that it lacks the commonality, typicality, and adequacy requirements of Rule 23(a),[5] and that the class does not meet the requirements of Rule 23(b)(2) or 23(b)(3). We hold that Small is an inadequate representative and her claim is atypical of both Subclasses. Further, we hold the class

5. Allianz does not dispute numerosity, which requires the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

cannot survive because, under the "causation" theory, neither Subclass satisfies Rule 23(b).

1

We first assess whether the requirements of commonality and predominance are met. *JustFilm, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (addressing those two requirements in tandem). Commonality mandates there be a common question of law or fact among the class members "where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Lara*, 25 F.4th at 1138 (alteration in original) (internal quotation marks and citation omitted). To satisfy commonality, "[e]ven a single [common] question" is enough. *Wal-Mart*, 564 U.S. at 359 (internal quotation marks and citation omitted).

Besides commonality, a class seeking damages—here, the Beneficiary Subclass—must satisfy Rule 23(b)(3), which requires the common question(s) "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). While common questions must be capable of class-wide adjudication, "[a]n individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Lara*, 25 F.4th at 1138 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)). In short, "Rule 23(a)(2) asks whether there are issues common to the class, and Rule 23(b)(3) asks whether these common questions predominate." *Abdullah v. U.S. Sec.*

Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013). "Showing predominance is difficult, and it regularly presents the greatest obstacle to class certification." *Black Lives Matter L.A.*, 113 F.4th at 1258 (internal quotation marks and citation omitted).

a

Examining commonality, the district court certified the class based on the common question of "[w]hether all class members were harmed by Allianz's alleged failure to comply with the Statutes." It later characterized as common the question of "whether Allianz had a corporate policy to terminate life insurance policies for non-payment of premiums without first complying with the Statutes." But the first question cannot be adjudicated on a class-wide basis. For the reasons discussed below, establishing that Allianz's alleged conduct caused each class member an injury requires "present[ing] evidence that varies from member to member." *Tyson Foods, Inc.*, 577 U.S. at 453. The district court's first question is not an appropriate question to satisfy commonality.

But the second question—whether Allianz had a corporate policy to terminate life insurance policies for non-payment of premiums without first complying with the Statutes—does satisfy commonality. We have held that whether an insurance company violated a statute giving rise to the action can be a common question to the class. *See Lara*, 25 F.4th at 1138 ("Whether [the Insurer's] condition adjustment violates the Washington state regulations is a common question."). Further, our district

courts interpreting the Statutes in class actions "have repeatedly found that putative class claims concerning Insurers' compliance with the Statutes' notice provisions meet Rule 23(a)(2)'s commonality requirement." *Lee*, 2024 U.S. Dist. LEXIS 149997, at *8–10. And numerous district courts have so interpreted these Statutes. *See, e.g., id.*; *Poe I*, 2023 U.S. Dist. LEXIS 145642, at *11; *Wollam*, 2024 U.S. Dist. LEXIS 44575, at *9; *Farley I*, 2023 U.S. Dist. LEXIS 68482, at *10; *Nieves*, 2023 U.S. Dist. LEXIS 53397, at *11; *Siino I*, 340 F.R.D. at 163; *Bentley v. United of Omaha Life Ins. Co.*, No. CV 15-7870-DMG (AJWx), 2018 U.S. Dist. LEXIS 117107, at *22, 26 (C.D. Cal., May 1, 2018).

Allianz nonetheless argues that this is not a common question because Plaintiffs allege different provisions of the Statutes have been violated. But where the circumstances of class members "vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parsons*, 754 F.3d at 675 (citation omitted). This is a common question here because it is capable of class-wide adjudication, and was, in fact, adjudicated at summary judgment. *See Wal-Mart*, 564 U.S. at 350 ("What matters to class certification is not the raising of common questions but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.") internal quotation marks and citations omitted)).

Commonality is thus satisfied because case law shows that whether a violation of the Statutes occurred is an appropriate common question, and the record here shows that this question can be adjudicated on a class-wide basis.

b

We now turn to predominance because the Beneficiary Subclass seeking damages must show that the common question predominates over individualized questions as required by Rule 23(b)(3). Predominance "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc.*, 577 U.S. at 453. Because "[c]onsidering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying causes of action," *Erica P. John Fund, Inc.*, 563 U.S. at 809 (internal quotation marks and citation omitted), the theory of recovery for violations of the statutes dictates whether the class can be certified.

Since we reject the district court's "violation-only" theory and adopt the "causation" theory, we must reconsider the predominance requirement in light of the latter. We hold that, because Plaintiffs must not only establish a violation but that the violation caused them harm, common questions do not predominate because causation cannot be determined on a class-wide basis.

The record here is clear that determining whether policyholders knowingly let their policies lapse due to nonpayment is an individualized inquiry. Allianz's expert witness conducted a random sampling of 100 class member policies, finding at least 43 had evidence that the policyholder knew the policy would lapse due to nonpayment. The expert stated that Allianz's

electronic policy administration system does not distinguish voluntary from involuntary lapses or other specific circumstances surrounding termination. Thus, as Allianz's expert explained, determining the reason for a lapse generally requires an individual review of a policy file that can take hours. The expert explained that it took approximately 3.5 hours to review an individual policy file to determine whether there was evidence that the policyholder knowingly let their policy lapse due to nonpayment.

It is clear to us that determining whether a policyholder intentionally lapsed their policy is an individual inquiry that cannot be determined at a class-wide level. Numerous district courts following the "causation" theory agree. *Holland-Hewitt v. Allstate Life Ins. Co.*, No. 1:20-cv-00652-KES-SAB, 2024 U.S. Dist. LEXIS 55178, at *37, 45–46; *Wollam*, 2024 U.S. Dist. LEXIS 44575, at *13; *Poe I*, 2023 U.S. Dist. LEXIS 145642, at *24; *Nieves*, 2023 U.S. Dist. LEXIS 53397, at *22–24; *Steen*, 2023 U.S. Dist. LEXIS 105592, at *43. We thus hold that individual questions of causation and injury predominate over the common question of whether Allianz violated the Statutes.

Finally, Rule 23(b)(3) also requires the class action be "superior" to an individual action by weighing "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D)

the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

These factors weigh against Small's class action being superior for the same reasons that individual questions predominate over common ones. Further, as Allianz argues, class members are not barred from bringing individual causes of action—just as Small did—as long as they show not only a violation, but that the violation caused them harm. While individual actions may not be feasible for every class member, that does not weigh against the fundamental problems discussed above with certifying the class. Thus, a class action is not the "superior" means to adjudicate these claims.

For these reasons, the "causation" theory leads to the conclusion that individual questions predominate over common ones. The predominance requirement therefore is not satisfied, and the Beneficiary Subclass cannot be certified.

2

The district court erred when it certified the Living Insured Subclass by holding that it was entitled to class-wide equitable relief as provided in Rule 23(b)(2). The provision applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "These requirements are unquestionably satisfied when members of a putative

class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688; *see also Wal-Mart*, 564 U.S. at 362–63.

Here, the district court found the Living Insured Subclass seeking to have their policies reinstated satisfied Rule 23(b)(2) based on a two-sentence explanation. But this was far from the "rigorous analysis" that certification requires. *See Wal-Mart*, 564 U.S. at 351 (citations omitted). Once again, the problem is that Allianz presented evidence that many members of the class knowingly let their policies lapse as a means of termination. This prevents the Living Insured Subclass from satisfying Rule 23(b)(2) for two reasons.

First, the injunctive relief of reinstating policies is not "appropriate" under Rule 23(b)(2). Because members of a class certified under Rule 23(b)(2) cannot opt-out, *id.* at 362, forced reinstatement of policies means reinstating policies for Insureds who intentionally cancelled and who cannot show that the inadvertent policy lapse caused harm. Further, reinstatement would mean that all members of the Subclass must pay back lost premiums for the policies to be reinstated, and perhaps at much higher rates. *See, e.g., Holland-Hewitt*, 2024 U.S. Dist. LEXIS 55178 at *42 (stating its living insured subclass "would be required to bring premiums current to reinstate their policies which could require these class members to pay thousands of dollars in back premiums"); *Siino II*, 2023 U.S. Dist. LEXIS 117071, at *22 (granting in part plaintiff's individual claim for declaratory relief

and holding plaintiff "must tender back premiums to [the Insurer] within a reasonable time to reinstate her policy"). We agree with the observation that this is because "[a]ny other interpretation would be inconsistent with *McHugh* [*II*]'s finding that the Statutes were retroactive because they did not substantially impair the insurance company's rights under the existing policy. Requiring an insurance company to waive premiums, potentially for almost a decade, would clearly impair the company's rights under the policy." *Holland-Hewitt*, 2024 U.S. Dist. LEXIS 55178, at *42 n.11 (citation omitted).

Second, at summary judgment, the district court here ordered that Small and the Living Insured Subclass "are entitled to a declaration that their life insurance policies were improperly lapsed by Allianz because it failed to strictly comply with the Statutes before it lapsed those policies." But declaratory relief for this Subclass is only appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986).

The district court's declaration does not meet this standard. The declaration improperly adjudicates the breach of contract claim before Plaintiffs established causation and damages by declaring that the policies "improperly lapsed" *because* Allianz failed to comply with the Statutes. But without evidence of causation, we agree that "declaratory relief will serve no useful purpose" in

resolving Plaintiffs' breach of contract claim. *See Holland-Hewitt*, 2024 U.S. Dist. LEXIS 55178, at *15.

For these reasons, neither an injunction forcing specific performance, nor the district court's declaration constitute "indivisible" relief that "benefits all its members at once." *See Wal-Mart*, 564 U.S. at 362. The Living Insured Subclass does not meet the standard for class-wide equitable relief under Rule 23(b)(2) and that Subclass cannot be certified.

3

Having determined neither Subclass meets the requirements of Rule 23(b), we also find the district court erred in certifying the class based on adequacy and typicality under Rule 23(a). While commonality and the requirements under Rule 23(b) relate to the action itself, adequacy and typicality relate to the class representative—here, LaWanda Small. We hold that Small is not an adequate representative with typical questions to represent both Subclasses.

Rule 23(a)(3) requires the class representative's claims or defenses be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative aligns with the interests of the class." *Just Film, Inc.*, 847 F.3d at 1116 (internal quotation marks and citation omitted). "Measures of typicality include whether other members have the same or similar

injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (internal quotation marks and citation omitted).

Rule 23(a) also mandates the representative be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry is addressed by answering two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Kim v. Allison*, 87 F.4th 994, 1000 (9th Cir. 2023) (internal quotation marks and citation omitted). If either answer is no, the representative is inadequate. *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010).

On appeal, Allianz makes several arguments that Small is not an adequate representative and her questions are atypical.[6] Allianz first argues Small is not adequate to represent the Living Insured Subclass because she is

6. The parties dispute whether Allianz waived adequacy. We will consider adequacy because it goes to the legal question of whether the district court abused its discretion in finding Rules 23's adequacy requirement satisfied. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[T]his court has oft repeated that an error of law [in certifying a class] is an abuse of discretion."). Regardless, we do not think the issue was waived.

only a member of the Beneficiary Subclass and is therefore only eligible for damages and not equitable relief.[7]

We agree that this argument defeats adequacy as to the Living Insured Subclass. Numerous district courts interpreting these Statutes and considering this same argument have found a representative of only one Subclass (whether Living Insured or Beneficiary) cannot adequately represent the Subclass to which they do not belong. *See, e.g., Lee*, 2024 U.S. Dist. LEXIS 149997, at *35 (holding representatives of living insured subclass "are not the correct parties to represent the proposed damages class" and that "if [p]laintiffs wish to continue to seek certification of a damages class" they must "move to add a new class representative who can adequately represent" that class); *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *13 (plaintiff was not typical because she was a beneficiary seeking damages and 97% of the class were living insureds seeking reinstatement of their policies); *Holland-Hewitt*, 2024 U.S. Dist. LEXIS 55178, at *41 (finding no adequacy because "[p]laintiff is seeking damages in this action, and

7. Small disputes that she is a member of only the Beneficiary Subclass, arguing that she was insured on her family policy as an "other Insured" and was therefore a co-owner with her now deceased husband. But the policy application lists Small's husband as the sole owner and provides that the "owner is solely entitled to exercise all policy rights." The fact that Plaintiff's life was insured with term coverage under the policy does not confer ownership rights on her. Further, once her husband died, that policy terminated. Thus, she is no longer an Insured on her own policy, and, as the district court recognized, she is not a member of the Living Insured Subclass.

ninety-eight percent of the putative class will be seeking declaratory and injunctive relief to which [p]laintiff is not entitled"). We agree that Small cannot adequately represent a Subclass to which she does not belong. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 625–26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Nor does she "possess the same interest" or "suffer the same injury" as the Living Insured Subclass. *Id.*

Allianz argues Small lacks typicality because her questions are atypical of members whose policies were intentionally terminated because Small alleges hers lapsed inadvertently. We agree that adopting the "causation" theory leads to the conclusion that Small, who alleges her policy lapsed inadvertently, does not have typical questions of members whose policies lapsed intentionally because they do not "have the same or similar injury," the action is "based on conduct which is [] unique to the named plaintiff[]," and "other class members have [not] been injured by the same course of conduct." *See Torres*, 835 F.3d at 1141 (internal quotation marks and citation omitted). Numerous district courts adopting the "causation" theory also agree. *See, e.g., Poe I*, 2023 U.S. Dist. LEXIS 145642, at *17; *Wollam*, 2024 U.S. Dist. LEXIS 44575, at *16–17; *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *11; *Steen*, 2023 U.S. Dist. LEXIS 105592, at *14; *Nieves*, 2023 U.S. Dist. LEXIS 53397, at *13.

For these reasons, we find that Small is not an adequate representative with typical questions to represent both Subclasses.

V

We conclude the district court erred in granting class certification because Small has not shown that either Subclass meets the requirements of Rule 23(a) and (b). Because we vacate the summary judgment orders, whether the district court violated the one-way intervention prohibition is moot. The district court's order certifying the class is REVERSED. The orders on summary judgment are VACATED and the matter is REMANDED for further proceedings.

APPENDIX B — DENIAL OF JOINDER TO MOTION TO CERTIFY QUESTION TO THE CALIFORNIA SUPREME COURT, FILED DECEMBER 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55821
D.C. No.
2:20-cv-01944-TJH-KES
Central District of California,
Los Angeles

LAWANDA D. SMALL, INDIVIDUALLY,
AND ON BEHALF OF THE CLASS;
CLASS REPRESENTATIVE,

Plaintiff-Appellee,

v.

ALLIANZ LIFE INSURANCE COMPANY
OF NORTH AMERICA, A MINNESOTA
CORPORATION,

Defendant-Appellant.

ORDER

Before: TALLMAN, R. NELSON, and BRESS, Circuit Judges.

Plaintiff-Appellee LaWanda Small has moved this Court to join a motion to certify a question to the

California Supreme Court. [Dkt. 60]. Appellee has not satisfied Federal Rule of Appellate Procedure 27, which requires that a motion "must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). In addition, because the Court declines to certify a question to the California Supreme Court, Appellee's motion is DENIED as moot.

Appellant Allianz Life Insurance Company of North America separately moves for the Court to strike Appellee's motion. [Dkt. 63]. Appellant's motion to strike is also DENIED as moot.

IT IS SO ORDERED.

APPENDIX C — AMENDED ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, FILED OCTOBER 3, 2023

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

CV 20-01944 TJH (KESx)

LAWANDA D. SMALL,

Plaintiff,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

AMENDED ORDER

The Court has considered Plaintiff LaWanda D. Small's ["LaWanda"] motion for partial summary judgment [dkt. # 109] and Defendant Allianz Life Insurance Company of North America's ["Allianz"] motion for summary judgment or, in the alternative, partial summary judgment [dkt. # 110], together with the moving and opposing papers.

In 1990, LaWanda's then-husband, Carl Small ["Carl"], purchased a $75,000.00 life insurance policy on his life ["the Policy"] from LifeUSA Insurance Company,

a predecessor to Allianz. LaWanda was the Policy's additional insured and beneficiary.

In 2001, Carl and LaWanda separated and Carl moved out of their residence. Carl did not notify Allianz of his new address, but he did continue to pay the Policy's Premiums.

In 2003, according to Allianz's records, the United States Postal Service notified Allianz of a change of address for Carl - 12325 Zeus Avenue, Apartment 18, Norwalk, California 90650 ["the Norwalk address"]. However, the Norwalk address was incorrect for two reasons. First, it was LaWanda's new address -Carl never lived there. Second, there should not have been an apartment number because it is a single-family house. Regardless, mail sent by Allianz to Carl at the Norwalk address was never returned to Allianze as undeliverable.

On January 15, 2016, Allianz mailed a letter to Carl, at the Norwalk address, stating that the Policy's quarterly premium had risen to $414.00 and that Allianz had taken the Policy off automatic bank debit.

On June 25, 2016, Allianz mailed a reminder notice to Carl, at the Norwalk address, that the Policy's quarterly premium was due by July 15, 2016. On July 12, 2016, before the premium's due date, Allianz mailed a "Grace Period Notice" to Carl, at the Norwalk address, stating that the Policy had entered its grace period because the premium was not paid, and warned that the Policy would lapse if the premium was not paid by August 15, 2016. On August 16, 2016, Allianz mailed a policy lapse notice to Carl, at

the Norwalk address, stating that the Policy had lapsed due to his failure to pay the premium.

In November, 2018, LaWanda, on behalf of herself as the additional insured, applied for reinstatement of the Policy. In December, 2018, Carl died. In January, 2019, LaWanda filed a death claim for the Policy's death benefit. Thereafter, Allianz denied the claim.

On February 27, 2020, LaWanda filed this putative class action alleging four claims, individually and on behalf of the class: (1) Declaratory relief under Cal. Code Civ. P. § 1060; (2) Declaratory relief under 28 U.S.C. § 2201; (3) Breach of contract; and (4) Violation of California's unfair competition law ["UCL"], Cal. Bus. and Prof. Code § 17200, et seq. LaWanda alleged that Allianz never notified her or Carl of their right to designate a third-party to receive notices, and that Allianz failed to follow the requirements of Cal. Ins. Code §§ 10113.71 and 10113.72 ["the Statutes"].

On May 23, 2023, the Court certified the class, defined as all owners, or beneficiaries upon a death of the insured, of Allianz's individual life insurance policies issued in California before 2013 that Allianz lapsed or terminated for non-payment of premiums in or after 2013 without first complying with the requirements of the Statutes. The class was divided into two sub-classes. Sub-Class One includes the owners of policies with currently living insureds. Sub-Class Two includes the beneficiaries of policies with deceased insureds.

LaWanda, now, moves for partial summary judgment on her: (1) Declaratory relief claim, individually and on

behalf of Sub-Class One; and (2) Breach of contract claim, individually and on behalf of Sub-Class Two.

Allianz, also, now, moves for summary judgment or, in the alternative, partial summary judgment on: (1) All of LaWanda's individual claims; and (2) Allianz's statute of limitations defense as to the life insurance policies that lapsed, or were terminated, before February 27, 2016.

Summary Judgment Standards

As to LaWanda's motion for partial summary judgment, because she has the burden of proof at trial on her claims, she has the initial burden, here, to establish, with admissible evidence, a *prima facie* case for her claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If LaWanda meets her burden, then the burden will shift to Allianz to show the existence of a triable issue of material fact to avoid the granting of a partial summary judgment. *See Celotex*, 477 U.S. at 323.

As to Allianz's motion for summary judgment regarding its statute of limitations defense, it has the initial burden to establish, with admissible evidence, a *prima facie* case for that defense. *See Tovar v. U.S.P.S.*, 3 F.3d 1271, 1284 (9th Cir. 1993). If Allianz meets its burden, then the burden will shift to LaWanda to show the existence of a triable issue of material fact to avoid the granting of a partial summary judgment. *See Celotex,* 477 U. S. at 323.

As to Allianz's motion for summary judgment as to the substance of LaWanda's claims, because she has

the burden of proof at trial as to those claims, summary judgment should be granted if she fails to produce evidence, here, to establish a *prima facie* case. *See Celotex*, 477 U.S. at 322. Allianz, however, has the initial burden to show that LaWanda does not have enough evidence to establish a *prima facie* case. *See Williams v. Gerber Prods. Co.*, 552 F. 3d 934, 938 (9th Cir. 2008). Allianz has met that initial burden.

At this juncture, the Court cannot weigh evidence or make credibility determinations. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Further, the Court must accept the nonmoving party's facts as true and draw all reasonable inferences in that party's favor. *See Liberty Lobby*, 477 U.S. at 255.

The Statutes

The Statutes – Cal. Ins. Code §§ 10113.71 and 10113.72 – became effective January 1, 2013.

Section 10113.71 mandated that life insurers must: (1) Provide a 60 day grace period for missed premium payments; (2) Send, by first class mail, a notice to policy owners, and any other persons designated by the policy owners to receive notices on their behalf, within 30 days after a premium becomes due but was not paid; and (3) Send, by first class mail, a 30 day notice to policy owners, and their designees, before the insurer can terminate a policy for non-payment of premiums.

Section 10113.72 mandated that life insurers must: (1) Allow policy owners the right to designate at least one

other person to receive notices for unpaid premiums and notices for pending policy lapses or terminations for non-payment of premiums; (2) Inform all applicants of their right to designate another person to receive notices for unpaid premiums and notices for pending policy lapses or terminations for non-payment of premiums; (3) Annually notify its policy owners of their right to change their designee; and (4) Not terminate a policy for non-payment of premiums without first giving at least 30 days' notice to the policy owners and their designee.

Retroactivity of the Statutes

Allianz had, previously, argued that the Statutes did not apply to life insurance policies issued before 2013. However, in 2021, during the pendency of this case, the California Supreme Court, in *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 220 (2021), held that the Statutes applied retroactively to policies issued before 2013.

Because the Statutes were retroactively applicable to the Policy, *see* McHugh, the Statutes, effectively, amended the Policy to conform its language to the new statutory requirements. *See Cal-Farm Ins. Cos. v. Fireman's Fund Am. Ins. Cos.*, 25 Cal. App. 3d 1063, 1071 (1972).

Statutes of Limitations

Allianz argued that it is entitled to summary judgment as to the claims of class members whose life insurance policies lapsed, or were terminated, before February 27, 2016 – four years before this case was filed.

Appendix C

The statute of limitations for breach of a written contract and UCL claims brought by insurance policy owners is four years. Cal. Code. Civ. Proc. § 337(1). Further, the statute of limitations for declaratory relief claims is, also, four years. *See Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1155 (1991). Finally, the statutes of limitations for those claims when brought by the insurance policies' beneficiaries are the same as applicable to the policy owners. *See Skylawn v. Superior Court*, 8 Cal. App. 3d 316, 319 (1979).

Generally, a claim for breach of contract accrues when the contract is breached. *Niles v. Louis H. Rapaport & Sons, Inc.*, 53 Cal. App. 2d 644, 651 (1942). Under California law, a breach of contract claim based on the improper termination of a life insurance contract accrues on the date of the improper termination. *Solomon v. North American Life and Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998).

Because this case was filed on February 27, 2020, any class member's claim that is based on a policy that lapsed, or was terminated, before February 27, 2016, is time barred by the four year statutes of limitations. *See Solomon*.

Generally, time barred claims can be revived only if there is express statutory language of claim revival. *Quarry v. Doe 1*, 53 Cal. 4th 945, 955 (2012). The Statutes do not contain any claim revival provisions. Further, the California Supreme Court, in *McHugh*, was silent as to claim revival.

Finally, LaWanda failed to establish, here, the existence of any issues of material fact to prevent the granting of partial summary judgment in favor of Allianz as to its statute of limitations defense. *See Celotex*, 477 U.S. at 323.

Consequently, Allianz is entitled to partial summary judgment as to the claims of class members whose policies lapsed, or were terminated, before February 27, 2016.

Breach of Contract Claim

The parties filed cross motions for summary judgment on LaWanda's individual breach of contract claim, while LaWanda, also, moved for summary judgment on Sub-Class Two's breach of contract claim. LaWanda seeks a determination as to liability only, with damages to be determined at trial.

Under California law, insurers can terminate insurance policies only if done in strict compliance with all applicable statutory requirements. *See Mackey v. Bristol W. Ins. Servs. of Cal., Inc.*, 105 Cal. App. 4th 1247, 1258 (2003). The Statutes imposed particular pre-termination notice requirements for life insurance policies. *McHugh*, 12 Cal. 5th at 240. And, as stated above, those pre-termination notice requirements were incorporated, as a matter of law, into the policies, here. *See Cal-Farm Ins. Cos.*

Allianz argued that, on June 25, 2016, it mailed a notice to Carl reminding him that he had an upcoming

premium payment due by July 15, 2016; then, on July 12, 2016, Allianz mailed to Carl a grace period notice stating that the grace period would end on August 15, 2016, just 30 days later, and that the policy would lapse on August 15, 2016, if the premium was not paid; and, then, on August 16, 2016, Allianz mailed to Carl a notice that his policy had lapsed.

The evidence, here, shows that, as to the Policy, Allianz failed to comply with the Statutes on two grounds. First, Allianz gave Carl only a 30 day grace period, rather than the 60 day grace period mandated by § 1011371(a). Second, Allianz admitted that it failed to notify LaWanda and Carl of their right to designate a third party to receive notices on their behalf, as mandated by § 10113.72(b).

In *Thomas v. State Farm Life Ins. Co.*, 2021 WL 4596286 (9th Cir. 2021), State Farm appealed the Southern District of California's granting of a summary judgment in a breach of contract case where State Farm had failed to pay death benefits because it had lapsed two life insurance policies for non-payment of premiums before the death of the insured. *Thomas*, 2021 WL 4596286 at *1. In an unpublished opinion, the Ninth Circuit, relying on the California Supreme Court's decision in *McHugh*, concluded that the policies at issue could not have lapsed, as a matter of law, because State Farm failed to give notice to the policy owners regarding their right to designate a third party to receive pre-termination notices, as mandated by § 10113.72(b). *Thomas*, 2021 WL 4596286 at *1. Further, the Ninth Circuit summarily rejected State Farm's argument that its failure to provide the mandated

notice was not the cause of the policy owners' damages because the policies would have, nonetheless, lapsed for non-payment of premiums. *Thomas*, 2021 WL 4596286 at *1. Consequently, the Ninth Circuit held that State Farm breached its contractual obligations by failing to pay death benefits and affirmed the summary judgment against State Farm. *Thomas*, 2021 WL 4596286 at *1.

Here, Allianz admitted that it never notified LaWanda and Carl of their right to designate a third party to receive pre-terminations notices, as mandated by § 10113.72(b). Therefore, Allianz could not have lapsed the Policy. *See Thomas*. Consequently, since the Policy was in effect at the time of Carl's death, Allianz breached its contractual obligation to pay the Policy's death benefits to LaWanda. *See Thomas*.

Likewise, Allianz, also, admitted that it never notified the Sub-Class Two policy owners of their right to designate third parties to receive pre-termination notices, as mandated by § 10113.72(b), before the death of the insureds. Consequently, Allianz, also, breached its contractual obligations to day death benefits to Sub-Class Two's beneficiaries.

Thus, LaWanda established a *prima facie* case for her individual breach of contract claim and Sub-Class Two's breach of contract claim. Further, Allianz failed to establish the existence of any triable issues of material fact to defeat summary judgment in favor of LaWanda and Sub-Class Two. *See Celotex*, 477 U.S. at 322-23.

Consequently, LaWanda is entitled to partial summary judgment on her breach of contract claim and Sub-Class Two's breach of contract claim, except for those class members whose policies lapsed, or were terminated, before February 27, 2016.

Unfair Competition Law Claim

Allianz moved for summary judgment on LaWanda's individual UCL claim. The UCL prohibits unlawful, unfair, or fraudulent business practices. Cal. Bus. &Prof. Code § 17200. The only available remedies for UCL violations are the equitable remedies of restitution and injunctive relief. *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 452 (2005).

The Court previously rejected LaWanda's prayer for injunctive relief for her individual and Sub-Class Two's UCL claim because future violations by Allianz cannot happen again given that the insureds have already died.

As to the entitlement of LaWanda and Sub-Class Two members to restitution, that remedy is available only if an adequate legal remedy is not available. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 843-44 (9th Cir. 2020). Here, LaWanda and Sub-Class Two members are entitled to money damages from Allianz for their breach of contract claims. *See* Cal. Ins. Code § 10111. Because LaWanda failed to argue, let alone establish, that those money damages would not be adequate, she and Sub-Class Two members are not entitled to equitable relief, here. *See Sonner*, 971 F.3d at 842.

Appendix C

Declaratory Relief Claim

The parties filed cross motions for summary judgment as to LaWanda's individual declaratory relief claim, and LaWanda, also, moved for summary judgment on Sub-Class One's declaratory relief claim. LaWanda seeks a declaration that the policies were terminated in violation of the Statutes and are, therefore, still in effect.

Pursuant to 28 U.S.C. § 2201, the Court may declare the rights of parties regardless of other relief sought. Declaratory relief is appropriate if it will: (1) Serve a useful purpose in clarifying and setting the legal relations of the parties, and (2) Terminate or afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986).

LaWanda and Sub-Class One's members, whose claims are not time barred, are entitled to a declaration that their life insurance policies were improperly lapsed by Allianz because it failed to strictly comply with the Statutes before it lapsed those policies.

Accordingly,

IT IS ORDERED that Allianz's motion for partial summary judgment be, and hereby is, **GRANTED** in favor of Allianz as to the claims of class members whose policies lapsed, or were terminated, before February 27, 2016.

I**T IS FURTHER ORDERED** that Plaintiff's motion for partial summary judgment as to her individual breach

of contract claim and Sub-Class Two's breach of contract claim be, and hereby is, **GRANTED** against Allianz as to the issue of liability, with damages to be determined by trial.

IT IS FUTHER ORDERED that Allianz's motion for partial summary judgment as to Plaintiff's individual breach of contract claim be, and hereby is, **DENIED**.

IT IS FUTHER ORDERED that Allianz's motion for partial summary judgment as to Plaintiff's individual unfair competition claim be, and hereby is, **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's motion for partial summary judgment as to her individual declaratory relief claim and Sub-Class One's declaratory relief claim be, and hereby is, **GRANTED**.

Date: September 25, 2023

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, FILED MAY 23, 2023

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CV 20-01944 TJH (KESx)

LAWANDA D. SMALL,

Plaintiff,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

ORDER

The Court has considered Plaintiff Lawanda D. Small's motion to certify class [dkt. # 87] and motion to strike evidence [dkt. # 98], together with the moving and opposing papers.

In 1990, Plaintiff Lawanda Small's late ex-husband purchased a $75,000.00 life insurance policy on his life ["the Policy"] from LifeUSA Insurance Company, the predecessor to Defendant Allianz Life Insurance Company of North America ["Allianz"]. Small was an

additional insured and the beneficiary of the Policy. When Small failed to make a premium payment in August, 2016, Allianz terminated the Policy.

California Insurance Code §§ 10113.71 and 10113.72 ["the Statutes"] became effective January 1, 2013. The Statues prohibit insurance companies from lapsing terminating individual life insurance policies without first providing: (1) A grace period of at least a 60-days; (2) Pre-termination written notices to the insured; and (3) An option for policy owners to designate a third-party to receive pre-termination notices.

Small filed this putative class action alleging four claims, individually and on behalf of the class: (1) Declaratory relief under Cal. Code Civ. P. § 1060; (2) Declaratory relief under 28 U.S.C. § 2201; (3) Breach of contract; and (4) Violation of California's unfair competition law ["UCL"], Cal. Bus. and Prof. Code § 17200, et seq. Small alleged that Allianz never notified her or her late ex-husband of their right to designate a third-party to receive notices, and that Allianz wrongly failed to apply the Statutes to policies issued before 2013. The California Supreme Court recently held, in *McHugh v. Protective Life Ins. Co.*, 12 Cal.5th 213, 220, 283 Cal. Rptr. 3d 323, 494 P.3d 24 (2021), that the Statutes applied to policies issued before 2013.

Small, now, moves to certify a class:

> All owners, or beneficiaries upon a death of the insured, of Defendant's individual life insurance policies issued in California before 2013 that

> Defendant lapsed or terminated for non-payment of premiums in or after 2013 without first complying with the requirements of Cal. Ins. Code §§ 10113.71 and 10113.72.

Small, also, moves to strike some of Allianz's evidence submitted in opposition to class certification.

Sub-Classes

The putative class is composed of owners of life insurance policies on the lives of insureds who are either still alive or who have already died. Whether an insured has died or is still alive will determine the available remedy if the class is certified and prevails.

If a putative class member's insured has died, as is the case with Small, the appropriate remedy, if the class prevails, would be breach of contract money damages in the amount of the death benefit had the policy not been improperly terminated or lapsed, subject to possible additions for interest and subtractions for past premiums. *See* Cal. Ins. Code § 10111. Further, because those damages would be adequate to redress the breach of contract harm, those class members would not be entitled to equitable relief, which includes declaratory relief. *See Shubin v. U.S. Dist. Ct. for S. Dist. of Cal., Cent. Div.*, 313 F.2d 250, 252 (9th Cir. 1963); *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842 (9th Cir. 2020).

However, if a putative class member's insured is still alive, the member would be entitled, if the class prevails, to declaratory relief because they would not be entitled

to contract damages under Cal. Ins. Code § 10111. Along with declaratory relief, those class members would be entitled to have their policies reinstated upon payment of unpaid premiums.

Consequently, the putative class will be divided into two sub-classes - one for members whose insured has died, and a second for members whose insured is still alive.

Motion for Class Certification

To certify a class action, the plaintiff bears the burden of establishing that the proposed class satisfies all four threshold requirements of Fed. R. Civ. P. 23(a): (1) Numerosity of class members; (2) Commonality of issues of fact and law; (3) Typicality of her own claims; and (4) Adequacy of the class representative and class counsel to fairly pursue the action. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Further, the plaintiff must satisfy at least one of the requirements of Fed. R. Civ. P. 23(b). *Dukes*, 564 U.S. at 345. Small seeks certification under both Rule 23(b)(2) and Rule 23(b)(3). Alternatively, Small seeks certification under Rule 23(c)(4).

Numerosity

Numerosity is satisfied if joinder of all members of the proposed class is impracticable. *Johnson v. City of Grants Pass*, 50 F.4th 787, 803 (9th Cir. 2022). While there is no specific number that satisfies the requirement, "classes of

less than fifteen are too small while classes of more than sixty are sufficiently large." *Johnson*, 50 F.4th at 803. With approximately 1,800 putative class members, here, numerosity is satisfied.

Commonality

Commonality is satisfied if there are "questions of fact and law that are common to the class." Fed. R. Civ. P. 23(a)(2). A common question is one that is capable of class-wide resolution. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022). An individual question, on the other hand, "is one where members of a proposed class will need to present evidence that varies from member to member." *Olean*, 31 F.4th at 663. Here, there is at least one class-wide common question - whether all class members were harmed by Allianz's alleged failure to comply with the Statutes. Therefore, commonality is satisfied.

Typicality

Typicality is satisfied if the class representative has the same or similar injury as the other class members, has been injured by the same course of conduct as the other class members, and the action is based on conduct which is not unique to the class representative. *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). The class representative's claims need not be substantially identical to those of the class members, only reasonably coextensive. *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

Here, Small's claims are reasonably co-extensive with those of the class because she alleged that Allianz committed the same misconduct against all class members-namely, Allianz failed to apply the Statutes to life insurance policies that were issued before 2013 and terminated in or after 2013. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1117 (9th Cir. 2017).

Allianz argued that typicality does not exist, here, because 94% of the putative class members' insureds are still alive and, therefore, those putative class members entitled to a different remedy than Small. However, Small's injury and remedy do not need to be identical to all of the other class members; they only need to be similar and to stem from the same injurious course of conduct. *See Parsons*, 754 F.3d at 685. Here, that alleged injurious course of conduct is Allianz's failure to comply with the Statutes.

Consequently, typicality is satisfied.

Adequacy

Adequacy is satisfied if the class representative will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Courts must determine whether "the representative plaintiff and their counsel have any conflicts of interest with the other class members," and whether the representative plaintiff and counsel will prosecute the action vigorously. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Here, Allianz did not dispute the adequacy of Small or her counsel. Indeed, Small is an adequate representative because she shares the same interests as the other putative class members in showing that Allianz failed to comply with the Statutes. Consequently, adequacy is satisfied.

Rule 23(b)(3) - Certification Based on Predominance

To certify a class under Rule 23(b)(3), there must be "questions of law or fact common to the members that predominate over any questions affecting only individual members," and a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance analysis considers whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013). If, however, the main issues require separate adjudication of each class member's individual claim, then certification under Rule 23(b)(3) is not appropriate. *Zinser*, 253 F.3d at 1189.

To establish class-wide liability, Small will present common evidence that Allianz failed to comply with the Statutes from January, 2013, through October, 2021, when Allianz lapsed or terminated nearly 2,000 life insurance policies issued before 2013.

In opposition, Allianz argued that there are significant factual differences among the various policy lapses and

terminations. Allianz argued that the policy terms were not uniform — some policies, like Small's Policy, had grace periods of at least 60 days, while other policies had only a 30 day grace period — and its business practices varied by policy. Allianz, further, argued that those policy differences cannot be resolved with class-wide, common evidence.

Allianz, also, presented evidence of policyholder behaviors that were not consistent across all putative class members. Dr. Craig Merrill, an Allianz expert, randomly selected 100 policies and determined that there were 15 instances where policyholders affirmatively sought to cancel their policy. Further, Dr. Merrill found 43 instances of active communication between policyholders and Allianz, indicating that those policyholders were aware of their impending policy lapse but, nevertheless, chose not to pay the premium due. Allianz argued that because the policyholders who either intentionally cancelled their policy or were aware of an impending policy lapse did not suffer any harm as a result of Allianz's non-compliance with the Statutes, those policyholders do not share common facts with Small or the rest of the punitive class and, therefore, will be excluded from the class.

The central issue, here, is whether Allianz had a corporate policy to terminate life insurance policies for non-payment of premiums without first complying with the Statutes. The answer "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Class claims that depend on proof of uniform corporate policies have long been held

to satisfy the predominance requirement. *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 611-12 (C.D. Cal. 2015) (citing *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009)).

Further, the presence of individualized damages cannot, by itself, defeat certification under 23(b)(3). *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

Further, class adjudication, here, is superior to individual claim adjudication because it will provide notice to class members who, otherwise, would not know that they have a claim, will reduce litigation costs, and will promote judicial efficiency by resolving the claims in one stroke. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

Consequently, both sub-classes will be certified under Rule 23(b)(3).

Rule 23(b)(2) - Certification Based on Class-Wide Equitable Relief

To certify a class under Fed. R. Civ. P. 23(b)(2), class-wide injunctive or declaratory relief must be appropriate. Fed. R. Civ. P. 23(b)(2). Here, certification under 23(b)(2) is appropriate only for the sub-class with living insureds. As discussed above, the sub-class with deceased insureds is not entitled to declaratory relief because money damages would be adequate for those sub-class members.

Appendix D

Motion to Strike Evidence

Small seeks to strike evidence presented by Allianz in opposition to class certification. Because the class will be certified, the motion to strike is moot.

Accordingly,

It is Ordered that the motion for class certification be, and hereby is, **Granted**.

It is further Ordered that the class shall be defined as all owners, or beneficiaries upon a death of the insured, of Defendant's individual life insurance policies issued in California before 2013 that Defendant lapsed or terminated for non-payment of premiums in or after 2013 without first complying with the requirements of Cal. Ins. Code §§ 10113.71 and 10113.72.

It is further Ordered that there shall be two sub-classes, defined as follows:

Sub-class 1: All owners of Defendant's individual life insurance policies issued in California before 2013, with currently living insureds, that Defendant lapsed or terminated for non-payment of premiums in or after 2013 without first complying with the requirements of Cal. Ins. Code §§ 10113.71 and 10113.72.

Sub-class 2: All beneficiaries of Defendant's individual life insurance policies issued in California before 2013, with deceased insureds, that Defendant lapsed or terminated

for non-payment of premiums in or after 2013 without first complying with the requirements of Cal. Ins. Code §§ 10113.71 and 10113.72.

It is further Ordered that Plaintiff Lawanda D. Small be, and hereby is, **Appointed** as the named class representative.

It is further Ordered that Craig M. Nicholas of Nicholas & Tomasevic, LLP and Jack B. Winters, Jr. of Winters & Associates be, and hereby are, **Appointed** as class counsel.

It is further Ordered that the motion to strike evidence be, and hereby is, **Denied**.

Date: May 23, 2023

/s/ Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX E — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55821
D.C. No. 2:20-cv-01944-TJH-KES

LAWANDA D. SMALL, INDIVIDUALLY,
AND ON BEHALF OF THE CLASS;
CLASS REPRESENTATIVE,

Plaintiff-Appellee,

v.

ALLIANZ LIFE INSURANCE
COMPANY OF NORTH AMERICA,
A MINNESOTA CORPORATION,

Defendant-Appellant.

Filed February 19, 2025

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: TALLMAN, R. NELSON, and BRESS, Circuit Judges,

Plaintiff-Appellee LaWanda Small has filed a petition for rehearing en banc (ECF. No. 77). Judge R. Nelson and Judge Bress have voted to deny the petition for rehearing

en banc, and Judge Tallman so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the Court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

Plaintiff-Appellee's petition for rehearing en banc (ECF No. 77) is DENIED.

IT IS SO ORDERED.

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3650
D.C. No. 3:17-cv-01709-JO-WVG

MICHELLE L. MORIARTY, INDIVIDUALLY, AS SUCCESSOR-IN-INTEREST TO HERON D. MORIARTY, DECEDENT, ON BEHALF OF THE ESTATE OF HERON D. MORIARTY, AND ON BEHALF OF THE CLASS,

Plaintiff-Appellee,

v.

AMERICAN GENERAL LIFE INSURANCE, A TEXAS CORPORATION,

Defendant-Appellant.

Filed March 4, 2025

MEMORANDUM*

NOT FOR PUBLICATION

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix F

Appeal from the United States District Court
for the Southern District of California
Jinsook Ohta, District Judge, Presiding

Submitted February 5, 2025**
Pasadena, California

Before: SCHROEDER, MILLER, and DESAI, Circuit Judges.

American General Life Insurance Company ("American") appeals the district court's grant of summary judgment in favor of Michelle L. Moriarty ("Moriarty") on her breach of contract claim under California Insurance Code §§ 10113.71 and 10113.72. In its summary judgment order, the district court held that an insurer's violation of the notice requirements under §§ 10113.71 and 10113.72 precludes an insurance policy from lapsing.

We exercise jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b) because (1) there is a controlling question of law regarding the theory of recovery under §§ 10113.71 and 10 113.72, (2) there are substantial grounds for a difference of opinion as to that question, and (3) an immediate resolution of the question will materially advance the ultimate termination of this litigation. *See ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130–31 (9th Cir. 2022). We vacate and remand with instructions.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix F

This interlocutory appeal presents a narrow issue: whether a life insurance beneficiary can prevail on a breach of contract claim simply by showing that the insurer did not comply with the requirements of §§ 10113.71 and 10113.72 before terminating the policy and denying benefits. Under our court's recent decision in *Small v. Allianz Life Insurance Company of North America*, 122 F.4th 1182 (9th Cir. 2024), the answer is no. After the summary judgment ruling in the present case, *Small* rejected the violations-only theory for recovery and instead adopted a causation theory. *Id.* at 1192. Pursuant to the causation theory of recovery, a plaintiff "must not only allege a violation of the Statutes, but must also show that the violation caused them harm." *Id.* at 1193. To recover, "a plaintiff must demonstrate that they did not knowingly or intentionally let the policy lapse such that the Insurer's compliance with the Statutes would have caused the plaintiff to pay their premiums and retain the policy." *Id.*

In the absence of controlling California Supreme Court authority or other intervening authority, this court is bound by *Small*. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Thus, we vacate the district court's summary judgment order and remand for the district court to consider causation in light of *Small*.

Moriarty's motion for judicial notice, **Dkt. 37**, and motion to certify a question to the California Supreme Court, **Dkt. 50**, are **DENIED.**

VACATED AND REMANDED.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 14, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 3:17-cv-1709-JO-WVG

MICHELLE L. MORIARTY, AS SUCCESSOR-IN-INTEREST TO HERON D. MORIARTY, DECEDENT, ON BEHALF OF THE ESTATE OF HERON D. MORIARTY, AND ON BEHALF OF THE CLASS,

Plaintiff,

v.

AMERICAN GENERAL LIFE INSURANCE COMPANY, *et al.*,

Defendants.

Filed August 14, 2023

ORDER GRANTING PLAINTIFF'S RENEWED SUMMARY JUDGMENT MOTION [ECF NO. 301]

Plaintiff Michelle Moriarty sued Defendant American General Life Insurance Company for breach of contract after Defendant refused to pay the life insurance benefits on her husband's policy. Plaintiff contends that her husband's policy was still in force at the time of his death

under California Insurance Code Sections 10113.71(b) and 10113.72(c). The Court agrees and reconsiders its September 7, 2022, order denying Plaintiff summary judgment on her breach-of-contract claim.[1] For the reasons set forth below, the Court grants Plaintiff's Renewed Motion for Summary Judgment on her breach-of-contract claim.

I. BACKGROUND

A. Factual Background

On September 20, 2012, Heron D. Moriarty purchased a $1 million term life insurance policy from Defendant American General Life Insurance Company. (ECF No. 301, Exh. A). He designated Plaintiff Michelle Moriarty, his wife, as the primary beneficiary of the policy. (Id.).

Mr. Moriarty timely paid his premiums for about four years; between September 2012 and February 2016, Mr. Moriarty paid the monthly premiums by automatic draft from his bank account. (ECF No. 301, Exhs. C, D, & G). But on March 20, 2016, Defendant was not able to obtain the monthly payment because Mr. Moriarty's bank account had been closed. (ECF No. 301, Exh. C). Around this time, Mr. Moriarty was suffering from mental health issues and had been admitted to two different psychiatric hospitals. (ECF No. 301, Exh. E).

1. The Honorable Barry Ted Moskowitz issued the September 2022 order denying Plaintiff's motion for summary judgment. (ECF No. 252). The case was transferred to the undersigned after Judge Moskowitz suffered an injury. (ECF Nos. 263 & 298).

Before terminating the insurance policy, Defendant attempted to contact Mr. Moriarty. On March 24, 2016, Defendant sent a letter addressed to Mr. Moriarty explaining that (1) it could not obtain the premium payment because the designated bank account was closed and (2) the policy "may lapse if a new payment is not selected." (ECF No. 301, Exh. C). On May 22, 2016, Defendant mailed Mr. Moriarty a letter providing that his policy was terminated. (ECF No. 301, Exh. D). Defendant only reached out to Mr. Moriarty; it did not send a termination notice to a designated third party. (ECF No. 301, Exh. D). In fact, Defendant had never informed Mr. Moriarty of his right to designate a third party to receive termination notices in the first place. (ECF No. 302). Unfortunately, during this late May time period, Mr. Moriarty was experiencing delusions and other worsening mental health symptoms and was confined in a detention facility. (ECF No. 301, Exh. E). On May 31, 2016, Mr. Moriarty committed suicide while housed in the detention facility.[2] (Id.).

Plaintiff, as the beneficiary of her husband's life insurance policy, tried to collect her benefits but Defendant refused to pay, maintaining that the policy "lapsed on March, 20 2016, and had no value on the date of death." (ECF No. 301, Exh. F).

B. Procedural History

Plaintiff originally filed the instant action as a class action lawsuit in state court. (ECF No. 1). Defendant

2. Suicide was not a policy exclusion at the time of Mr. Moriarty's death. (ECF No. 301, Exh. A).

removed this case to federal court on August 23, 2017. (Id.). Plaintiff asserted four causes of action against Defendant for (1) declaratory relief; (2) breach of contract; (3) bad faith; and (4) violations of the California Business and Professions Code Section 17200. (ECF No. 18).[3] The Court ultimately denied Plaintiff's motion for class certification on September 27, 2022, leaving only her individual claims against Defendant. (ECF No. 253).

Both parties filed cross motions for summary judgment. (ECF Nos. 134 & 135). The Court issued an order granting summary judgment in part and identifying the issues that would need to be tried. (ECF No. 184).[4] The Court ruled that Defendant (1) failed to comply with Insurance Code Section 10113.72(b) because it "never provided Mr. Moriarty with the right to designate [a third party] to receive notices of pending lapses in his policy"; and (2) failed to comply with Section 10113.71(a)'s sixty-day

3. Plaintiff's amended complaint, the operative complaint in this matter, was filed in October 2017. (ECF No. 18).

4. The Court issued its summary judgment order on October 2, 2020. (ECF No. 184). The Court later, on January 26, 2021, issued an order certifying for appeal the question whether Sections 10113.71 and 10113.72 apply to policies first issued before those sections came into effect, and the Court also stayed the case. (ECF Nos. 199). Defendant filed an appeal with the Ninth Circuit addressing that question. (ECF No. 200). The California Supreme Court answered the question first on August 30, 2021. *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24 (Cal. 202 1) (holding that the sections "apply to all life insurance policies in force when the[] . . . sections went into effect, regardless of when the policies were originally issued"). Thus, Defendant filed a motion to voluntarily dismiss its appeal, which the Ninth Circuit granted. (ECF No. 208).

grace period requirement by sending a termination letter on May 22, 2016 with a March 20, 2016 termination date. (Id. at 7-9). Even though the Court found that Defendant failed to properly terminate the policy in accordance with the Insurance Code, the Court ruled that whether Plaintiff suffered damages because of that failure was a factual question for trial. (Id. at 10–11). Thus, the Court denied Plaintiff summary judgment on her breach-of-contract claim. (Id. at 11). The Court did grant Defendant summary judgment on Plaintiff's restitution claims under California Business and Professions Code Section 17200. (Id. at 14). The Court also granted Defendant summary judgment on Plaintiff's bad faith and punitive damage claims based on Defendant's conduct up to August 20, 2021—the day *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24 (Cal. 2021), was decided. (ECF No. 250 at 5–7).

On May 10, 2023, after transfer to the undersigned, the Court accepted briefing on whether it should reconsider its previous ruling that Plaintiff was not entitled to summary judgment on her breach-of-contract claim.[5]

5. Denials of summary judgment are interlocutory and subject to reconsideration *sua sponte* when the case is transferred to another judge for trial. *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 380 (9th Cir. 1960) (holding so); *accord Shouse v. Ljunggren*, 792 F.2d 902, 904 (9th Cir. 1986) (recognizing "that a district court judge may grant a motion for summary judgment that was previously denied by another district court judge" and "that the law of the case doctrine does not apply to pretrial rulings such as motions for summary judgment"); *Preaseau v. Prudential Ins. Co.*, 591 F.2d 74, 79-80 (9th Cir. 1979) (explaining "that an order denying a motion for summary judgment is generally interlocutory and 'subject to reconsideration by the court at any time'" (citation omitted)).

II. LEGAL STANDARD

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *accord Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997) ("Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law."). Material facts "might affect the outcome of the suit," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. DISCUSSION

A. Breach of Contract Claim

In support of her request for summary judgment, Plaintiff argues that her husband's life insurance policy never lapsed because Defendant failed to comply with pretermination notice requirements. And because the policy was still in force as a matter of law, Plaintiff contends, Defendant's failure to pay the benefits on the policy was a breach of contract. The Court will examine this argument and Defendant's counterarguments below.

California law requires life insurance companies to provide certain protections before terminating a term life insurance policy for nonpayment. In 2012, the California Legislature enacted Insurance Code Sections 10113.71

and 10113.72.[6] These provisions require life insurance companies to:

> (1) notify the policy owner of the right to designate a third party to receive notices of lapse or pending termination, § 10113.72(a);
>
> (2) remind the policy owner annually of the right to designate a third party to receive these notices and the right to change designations, § 10113.72(b); and
>
> (3) give at least thirty-day notice to the policy owner and to the designated third party before terminating the policy, § 10113.72(c).

These provisions also dictate that policies shall not lapse or be terminated for the nonpayment of a premium unless the insurer complies with the above requirements, *i.e.*, unless the insurer provides a thirty-day notice of termination to both a policy owner and a designated third party. § 10113.71(b)(1) ("A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life

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6. Although these sections became effective on January 1, 2013, after Mr. Moriarty bought his policy, the sections "apply to all life insurance policies in force when the[] . . . sections went into effect, regardless of when the policies were originally issued." *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24, 27 (Cal. 2021).

insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium."); § 10113.72(c) ("No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination.").

The California Supreme Court has clarified that insurance companies must comply with these requirements to properly terminate a policy for nonpayment. *McHugh v. Protective Life Ins. Co.*, 494 P.3d 24, 45 (Cal. 2021) ("When the Legislature enacted changes to the Insurance Code protecting people who hold life insurance policies from inadvertently losing them, it established limited protections that kept such policies from being revoked when policy owners lapsed in paying premiums."). As a result of these protections, "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." *Id.* In the same case, the California Supreme Court held that these provisions apply to all policies, even those purchased before 2013, in force when these provisions became law. *Id.* at 27.

There is no genuine dispute that Defendant failed to comply with the notice requirements of Sections 10113.71 and 10113.72 before terminating Mr. Moriarty's life insurance policy. As Defendant admits in its

response,[7] Defendant did not notify Mr. Moriarty of his right to designate a third party to receive a termination notice. (ECF No. 301 at 24–25). Thus, Defendant failed to mail a termination notice to a third party as required by law. § 10113.71(b)(1); § 10113.72(c).[8]

As a result of Defendant's failure to give the required notice, Mr. Moriarty's life insurance policy did not lapse. According to the plain language of Sections 10113.71(b)(1) and 10113.72(c), life insurance policies do not lapse for nonpayment if an insurance company fails to mail a termination notice to a designated third party: "*No* individual life *insurance policy shall lapse or be terminated* for nonpayment of premium unless the insurer . . . gives notice to the policy owner and to the person or persons designated . . . ." By refusing to pay the benefits of Mr. Moriarty's life insurance policy—another undisputed fact—Defendant breached the contract, entitling Plaintiff to summary judgment on this claim. *Thomas v. State Farm Life Ins. Co.*, No. 20-55231, 2021 U.S. App. LEXIS 30035, at *3–4 (9th Cir. Oct. 6, 202 1) (affirming summary judgment on breach of contract claim based on holding that the failure to comply with insurance code notice requirements precludes a policy from lapsing).

7. Defendant also conceded at oral argument that it did not terminate Mr. Moriarty's policy in accordance with the sections. (ECF No. 305 at 17:13–19).

8. It also appears that Defendant's March 24 letter was not a valid notice of termination because it merely noted that the policy "may" lapse and thus did not notify Mr. Moriarty that the policy would lapse, as required by § 10113.72(c) (requiring insurance companies to provide notices of a planned termination).

Notwithstanding this failure to comply with California law, Defendant argues that triable issues of fact regarding causation of damages preclude summary judgment. "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011). Defendant argues that whether it caused Plaintiff's damages depends on whether Mr. Moriarty would have paid the premium in time if Defendant had provided proper notice under the sections. Thus, Defendant argues, a jury should determine (1) who Mr. Moriarty would have listed as a designee to receive a termination notice and (2) whether Mr. Moriarty (or the third party) would have paid the premium before the termination date if Defendant had timely mailed a notice to that third party. In short, Defendant argues that Plaintiff needs to convince a jury that Defendant's failure to provide proper notice—as opposed to the Moriartys' inability or unwillingness to pay the premium—caused the policy to lapse.

The Court finds that this line of inquiry —that is, asking a jury to determine who is responsible for the lapse in the policy—and the associated disputes of fact identified by Defendant are immaterial for the simple reason that the policy did not lapse. As discussed above, the California legislature explicitly provided that a policy shall not lapse for nonpayment unless the insurance company provides the required pretermination notice. Given the clear and explicit language of the statute itself, the Court is unpersuaded by the non-binding authority

cited by Defendant to the contrary. *See, e.g.*, *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612, 616 (Cal. 2011) (explaining that statutory interpretation begins with the "words of a statute," which govern when unambiguous).

Because Mr. Moriarty's policy was still in force under California law, Defendant's failure to pay the policy amount is the breaching conduct. *See, e.g.*, *Mackey v. Bristol West Ins. Service of Cal., Inc.*, 105 Cal. App. 4th 1247, 1258 (Cal. Ct. App. 2003) ("In California, there is no such thing as substantial compliance in furnishing notice that an insurance policy has been cancelled. Termination of coverage can only be accomplished by strict compliance with the terms of any statutory provisions applicable to cancellation") (citation omitted). Contrary to Defendant's arguments, there is no dispute regarding causation: Defendant admittedly refused to pay the benefits of this policy, and this refusal is the breach of contract that caused Plaintiff's damages.[9]

B. Declaratory Relief

In her renewed motion for summary judgment, Plaintiff also asks this Court to grant summary judgment on her declaratory relief claim. In her amended complaint, Plaintiff requested a declaratory judgment declaring that Sections 10113.71 and 10113.72 apply to policies issued or delivered prior to January 1, 2013. (ECF No. 18 at

9. The policy provides that Defendant would pay the "face amount of this policy" if Mr. Moriarty died "while this policy is in force." (ECF No. 301, Exh. A at 6).

23). That issue was decided by the California Supreme Court in *McHugh* on August 20, 2021. *McHugh*, 494 P.3d at 27. The Court now grants Plaintiff judgment on her breach-of-contract claim and, in doing so, has applied *McHugh*'s holding that Sections 10113.71 and 10113.72 apply to policies in force when these sections went into effect. Because a declaratory judgment would, thus, be redundant and serve no useful purpose, the Court denies this request. *See Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (ruling that a declaratory claim regarding an underlying cause of action was duplicative and properly dismissed); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004) ("[D]eclaratory judgment without the possibility of prospective effect would be superfluous."); *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) ("Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties.").

C. Class Certification

Plaintiff also asks this Court to reconsider the Court's September 27, 2022, order denying class certification, but Plaintiff has not shown that reconsideration is warranted. Plaintiff's motion for class certification was denied primarily because Plaintiff's proposed class was too broad and included many policyholders still alive and not entitled to the same type of damages as deceased policy holders. (ECF No. 253). The Court held that these differences between purported class members precluded

Plaintiff from satisfying the requirements of Rule 23. (Id.). Plaintiff has not sought to narrow the class or remedy those deficiencies. Nor has she demonstrated that the Court's reasoning in reconsidering the summary judgment decision also necessitates reconsideration of the class certification decision; it does not. The Court therefore declines to reconsider the previous ruling on class certification.

IV. CONCLUSION

For the reasons set forth above, the Court grants summary judgment in favor of Plaintiff on her breach-of-contract claim. Plaintiff's declaratory relief claim is denied as moot. The Court has not reconsidered the previous summary judgment rulings on Plaintiff's UCL and bad faith causes of action.

The parties are ordered to meet and confer regarding pre- and post-judgment interest. Any motions regarding interest must be filed by August 24, 2023, and responses must be filed by August 31, 2023. The motion(s) will be submitted on September 1, 2023, without oral argument.

The parties are to appear by video only on August 23, 2023, at 9:30 a.m. to address whether there are any remaining issues to be tried, such as the portions of the bad faith and punitive damages claims not resolved by summary judgment.[10] If so, the Court will invite discussion

10. The parties may contact chambers if this date and time poses a scheduling problem.

on whether this decision should be certified for appeal under 28 U.S.C. § 1292(b) and whether a stay should be entered.

IT IS SO ORDERED.

Dated: August 14, 2023

/s/
Honorable Jinsook Ohta
United States District Judge

APPENDIX H — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3650
D.C. No. 3: 17-cv-01709-JO-WVG

MICHELLE L. MORIARTY, INDIVIDUALLY, AS SUCCESSOR-IN-INTEREST TO HERON D. MORIARTY, DECEDENT, ON BEHALF OF THE ESTATE OF HERON D. MORIARTY, AND ON BEHALF OF THE CLASS,

Plaintiff-Appellee,

v.

AMERICAN GENERAL LIFE INSURANCE, A TEXAS CORPORATION,

Defendant-Appellant.

Filed May 2, 2025

ORDER

Before: SCHROEDER, MILLER, and DESAI, Circuit Judges.

The panel has unanimously voted to deny Appellee's petition for panel rehearing and petition for rehearing en

banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and rehearing en banc are **DENIED**. Dkt. 83.

APPENDIX I — RELEVANT STATUTORY PROVISIONS

CALIFORNIA CODE, INS 10113.71

ARTICLE 1. General Provisions [10110-10127.20]
(Article 1 enacted by Stats. 1935, Ch. 145.)

10113.71. (a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.

(b) (1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

(2) This subdivision shall not apply to nonrenewal.

(3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.

(c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.

(Amended by Stats. 2013, Ch. 76, Sec. 137. (AB 383) Effective January 1, 2014.)

Appendix I

CALIFORNIA CODE, INS 10113.72

ARTICLE 1. General Provisions [10110-10127.20]
(Article 1 enacted by Stats. 1935, Ch. 145.)

10113.72. (a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

(b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.

(c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.

(Added by Stats. 2012, Ch. 315, Sec. 2. (AB 1747) Effective January 1, 2013.)