IN THE SUPREME COURT OF FLORIDA

UNITED INSURANCE COMPANY OF AMERICA; THE RELIABLE LIFE INSURANCE COMPANY; MUTUAL SAVINGS LIFE INSURANCE COMPANY; and RESERVE NATIONAL INSURANCE COMPANY,

Petitioners,

v.

JIMMY PATRONIS, in his official capacity as Chief Financial Officer of the State of Florida, and the FLORIDA DEPARTMENT OF FINANCIAL SERVICES,

Respondents.

Case No. SC20-1306
DCA Case No. 1D18-2114

AMICI CURIAE **BRIEF OF AMERICAN COUNCIL OF LIFE INSURERS AND FLORIDA INSURANCE COUNCIL IN SUPPORT OF PETITIONER**

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IDENTITY OF AMICI AND STATEMENT OF INTEREST

Amicus Curiae, American Council of Life Insurers (ACLI), is the nation's largest life insurance trade association, representing nearly 300 member life insurance companies, the majority of which conduct business in Florida. *See* The Am. Council of Life Ins., https://www.acli.com/About-ACLI (last visited Jun. 21, 2021). Over 90 million American families depend on ACLI's members for life insurance, annuities, retirement plans, long-term care, disability income, and other supplemental benefits. *Id.*

The Florida Insurance Council (FIC) is Florida's largest insurance trade association, acting as the voice of Florida's insurance community. *See* Fla. Ins. Council, http://flains.org/about-us.html (last visited Jun. 21, 2021). FIC was established in 1962 to represent insurers in legislative, regulatory, judicial, and executive branch forums. *Id.* FIC represents over 300 businesses in Florida, which collectively write over $50 billion a year in life, health, property, and casualty policies for Florida residents and companies. *Id.*

ACLI and FIC's (collectively "Amici") interest in this case arises

from the Florida Legislature's retroactively imposing new duties and obligations on its member companies, the Department of Financial Services' (Department) decision to retroactively enforce those obligations, and the First District Court of Appeal's decision (Opinion) approving these new obligations as facially valid.

In relevant part, these new obligations, found in section 717.107 of the Florida Disposition of Unclaimed Property Act (new obligations), newly require life insurers to (1) annually search the Social Security Administration's Death Master File (DMF) to determine whether policy holders have died; and, if so (2) attempt to contact policy beneficiaries (collectively, "search and contact requirements"). The new obligations also include a new escheatment obligation. Escheating unclaimed death benefits to the State must now occur 5 years after the decedent's actual death, instead of 5 years after proof of death or after the policyholder reaches the limiting age.

Imposing these new obligations *retroactively* will be extremely problematic for Amici's members, especially for their small- and mid-size members. This is particularly true for older policies issued

before modern technology was available to store information critical to completing the search and contact requirements. If the new obligations apply equally to older policies and prospectively-issued policies, compliance will be impracticable, if not impossible, for Amici's many members.

Further, Amici's members have relied on the Office of Insurance Regulation's (OIR) review and approval of their life insurance forms for decades. These forms have consistently notified policyholders (and informed insurers) that life insurance proceeds are "due and payable" when the insurer is provided proof of death—not "due and payable" on the insured's date of death. Retroactively applying the new obligations to previously issued policies is particularly burdensome because insurers have issued millions of these previously approved policies representing that beneficiaries must provide insurers with notice to recover on their claims.

Petitioners, United Insurance Company of America, The Reliable Life Insurance Company, Mutual Savings Life Insurance Company, and Reserve National Insurance Company have addressed the Act's due process and contract interference concerns,

and Amici will not repeat those arguments here. Instead, Amici submit this brief to provide context and insight into the new obligations' broader—and more harmful—consequences.

SUMMARY OF ARGUMENT

While Amici do not expressly contest prospectively applying the search and contact requirements, they note that the new obligations are unprecedented in Florida. Insurers have never before been required to seek out policyholders and proactively determine whether a valid claim for benefits exists—and the policies themselves (some going back to the 1960s) require notification of death from the beneficiaries for payment.

The Opinion overstates the unclaimed funds held by insurers. In reality, unclaimed life insurance benefits represent only one percent of overall policy proceeds. On the other hand, nationwide research shows that state governments are the parties (1) cashing in on unclaimed property, (2) factoring it into their annual budgets, and (3) underachieving in their efforts to locate owners and return property.

The Opinion wrongly reasons that the new obligations will not

overly burden insurers because insurers are already using the DMF to ascertain whether annuity holders have died. This reasoning fails to account for (1) the legitimate business concerns particular to annuities, but not life insurance policies, and (2) the fact that searchable information is readily available for annuitants, which is not equally true for life insurance policyholders.

Because annuitants receive checks, no incentive exists for families to notify insurers of the annuitant's death. In addition, annuitants have an incentive to keep their contact information updated because annuitants regularly receive checks—thus insurers generally have the information needed to search the DMF for annuitants. Because beneficiaries of life insurance policies have every incentive to collect and thus notify insurers upon the policyholder's death, insurers depend on beneficiaries for notification. Insurers often do not have the information needed to search the DMF for life insurance policyholders.

In fact, before modern technology, data was collected with paper punch cards, and only the most pertinent information was collected. This frequently did not include data critical to performing

a DMF search, such as social security numbers and birth dates. This is especially true for industrial life policies, which were purchased in the 1960s about as fast and as simply as a lottery ticket can be purchased today. Critical search information is simply not available for these policies.

To require insurers to search retroactively for life insurance policyholders when they may have little or no information about insureds who may have died decades ago will require substantial resources. The new obligations will be especially burdensome for smaller insurers with fewer resources. Searching the DMF is labor intensive, and search results for older policyholders are frequently inaccurate—especially when the information needed to search the DMF is unavailable.

Finally, the law has always been that insureds must contact the insurer to report a claim, and the OIR, an arm of the Department, has expressly approved this process for decades. Every life insurance policy must be reviewed and approved by OIR before it can be used by an insurer. Millions of OIR approved policies in force today plainly state "settlement shall be made upon receipt of

proof of death." Yet the new obligations essentially replace that language with "settlement is due and payable on death" language. The new obligations thus interfere with these decades-old contracts and render provisions within them inconsistent with chapter 627.461, Florida Statutes, which states "settlement shall be made upon receipt of due proof of death."

The Department should be estopped from enforcing the new obligations retroactively because it represents a substantial change in position from its long-standing, official view that life insurance proceeds are "due and payable" upon receipt of death.

For all these reasons, this Court should reverse the Opinion and hold these new obligations cannot be imposed retroactively.

ARGUMENT

I. THE NEW OBLIGATIONS ARE UNPRECEDENTED AND SHOULD NOT BE APPLIED RETROACTIVELY BECAUSE THEY ARE OVERLY BURDENSOME, AND NOT REASONABLY CALCULATED TO CURE THE PERCEIVED PROBLEM.

A. Claimants Under All Types Of Insurance Policies Historically Have Been Required To File A Claim And Show Proof Of Loss Before Recovering Benefits.

Virtually all insurance policies, including life insurance policies, contain conditions precedent with which beneficiaries must

comply before receiving payment for a claim. *See* Couch on Insurance § 186:1 (2013). Policy conditions limit the insurer's promise to pay or perform; and the most common conditions include the requirement that those seeking to recover proceeds file a proof of loss with the company. *See generally Starling v. Allstate Fla. Ins. Co.*, 956 So. 2d 511, 513 (Fla. 5th DCA 2007) (explaining requirement to comply with proof of loss provision to recover proceeds); Williston on Contracts, § 49:89 (4th Ed. May 2021) ("Insurance policies … frequently include provisions requiring the insured to file a proof of loss [as] a condition precedent to an insured's suit against the insurer.").

Indeed, insurance policies state with particularity what is required to recover on a claim because insurance companies have always relied on policyholders or their beneficiaries to provide proper notice when a loss occurs. *See generally Hickman v. London Assur. Corp.*, 195 P. 45, 49 (Cal. 1920). Under Florida law, if an insured breaches a policy's notice provision, prejudice to the insurance company from the lack of notice is presumed. *See, e.g.*, *Stark v. State Farm Fla. Ins. Co.,* 95 So. 3d 285 (Fla. 4th DCA 2012)

(prejudice for late notice to insurer by insured is presumed, and burden is on insured to prove lack of prejudice).

Historic practices show unequivocally that claimants must file (and always have filed) claims to recover benefits. The Opinion fails to address this precedent and the prejudice presumed by lack of notice, and it wrongly criticizes insurers for not taking affirmative steps to determine whether policyholders have died. That is not only an erroneous characterization, it is unfair because insurers have always had the right to rely on notice from their policyholders and beneficiaries regarding claims. Indeed, one could never imagine that an automobile insurer should be required to actively search for accident reports using the insured's Vehicle Identification Number. Nor could one imagine that a property insurer would be required to regularly search for storm damage reports in the insured's area. The responsibility has always been on the insured to make a claim.

Requiring insurers to perform costly and burdensome searches for life insurance beneficiaries and decedents is not a solution properly calibrated to solve the perceived problem.

B. Unclaimed Unpaid Life Insurance Proceeds Represent Just A Fraction Of Covered Protection and Benefits Paid.

The Opinion's notation regarding the *millions* of dollars in unclaimed funds retained by life insurance companies paints a distorted picture because it fails to take into account the *billions* of dollars insurers pay out. As reported by the United States Chamber Institute for Legal Reform, life insurers hold over $18.4 *trillion* in life insurance protection at any given time. In 2010, for example, insurers paid out over $58 billion in death benefits, $70 billion in annuities, $16 billion in disability benefits, and $7 billion in long-term care benefits. *See* Maeve O'Connor *et al.*, for the U.S. Chamber Inst. for Legal Reform, *Land Rush! The Latest Frontier of Unclaimed Property Enforcement and Litigation*, at 3 n.1 (Oct. 2012).

In sum, and placed in context, the "millions" of dollars in unpaid unclaimed life insurance benefits represents less than 1% of policy proceeds overall. *See* James M. Carson et al., *Dead or Alive? The Law, Policy, And Market Effects Of Legislation On Unclaimed Life Ins. Benefits*, 31 Notre Dame J. L. Ethics & Pub. Pol'y 1 (2017) (noting "the percentage of death benefits that goes unclaimed is

quite small—approximately 1% according to industry estimates").

C. The New Obligations On Insurers Result In A Windfall For The State.

While the Opinion calls out insurers for not performing searches for life insurance beneficiaries (which has never been required) the Opinion does not recognize or question the State's converse motivation to impose retroactive search obligations on insurers. Indeed, transferring unclaimed life insurance policy benefits to the State results in new, easily-gained, state revenue.

In theory, the State will now act as the funds' guardian for the benefit of the rightful absent owner—as insurers had previously done until five years after receiving proof of death or five years after the policy owner reached the mortality limiting age. But in practical terms, these fund transfers represent interest-free loans to the State. And if no one comes forward, the funds ultimately are spent by the State even though they do not belong to the State. As Justice Alito recently observed, "[s]tates appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property." *Taylor v. Yee*, 136 S. Ct. 929 (2016) (Justice Alito *concurring*). Justice Alito further noted "[c]ash-

strapped States undoubtedly have a real interest in taking advantage of truly abandoned property to shore up state budgets. But they also have an obligation to return property when its owner can be located. … States must employ notification procedures designed to provide the pre-escheat notice the Constitution requires." *Id.*

Tellingly, many states (including Florida) are factoring unclaimed property into their annual budgets and counting on it as revenue. *See, e.g.*, Fla. Sch. Tr. Fund Fin. Outlook Statement 2020-2021 (factoring $165 million in unclaimed property) *available at* http://edr.state.fl.us/content/revenues/outlook-statements/state-school-tf/210319_SSTFoutl.pdf (last visited Jun. 21, 2021). But unfortunately, states are not concomitantly seeking the rightful absent owners. Apparently, "[i]n the face of increasing fiscal challenges, states have worked to increase their collection of unclaimed property via [this] new escheat legislation that appears to bear little or no relation to protecting the interests of owners." Teagan J. Gregory, *Unclaimed Property and Due Process: Justifying Revenue Raising Modern Escheat*, 110 Mich. L. Rev. 319, 319

(2011); *see also* Katie Orr, *Forgotten Funds and Unclaimed Property Boost State's Budget*, The California Report (Feb. 23, 2016) (noting "[u]nclaimed property is the fifth-largest revenue source for California's general fund, bringing in about $400 million a year. That is money the state counts on" and also stating "[o]n the one hand" the unclaimed funds program is meant to protect consumers but "on the other hand" unclaimed funds are counted in the general fund revenue and "spen[t] each year in the budget"); Adam Geller, *States go after unclaimed property to patch budgets*, The Detroit News (Oct. 17, 2015) ("many states have changed laws to let them take control of more unclaimed property more quickly … [t]he real motivation is for the state to get money for the state to use when they're in financial difficulty … [t]hey want to get their hands on the money") *available at* https://www.detroitnews.com/story/news/nation/2015/10/17/unclaimed-property/74140596/; Paul Muschick, *Unclaimed Property is boon for state budget, as Forks resident with lost stocks finds out*, The Morning Call (June 30, 2017) (state sold resident's "unclaimed" stock shares even though the State had the resident's address and other contact information; also

noting that the amendments shortening the dormancy period "had the state budget, not consumers, in mind").

In fact, in apparent attempts to increase state revenues, several states, including Florida, tried to impose an affirmative search obligation even before state statutes were amended to require one. *See, e.g.*, *Thrivent Fin. for Lutherans v. State of Fla., Dep't of Fin. Servs.*, 145 So. 3d 178 (Fla. 1st DCA 2014); *Perdue v. Nationwide Life Ins. Co.*, 77 S.E. 2d 11 (W. Va. 2015); *Andrews v. Nationwide Mut. Ins. Co.*, 2012 WL 5289946 (Ohio Ct. App. Oct. 25, 2012). These efforts were made even though, at the time and for all preceding time, Florida never had "a law imposing an obligation on [the insurer] to engage in elaborate data mining of external databases … in connection with payment or escheatment of life insurance benefits [or] a law requiring [the insurer] to consult the Death Master File." *Total Asset Recovery Servs., LLC v. Metlife, Inc., et al.*, No. 2010-CA-3719, at *4 (Fla. 2d Cir. Ct. 2013), *per curiam affirmed*, 149 So. 3d 8 (Fla. 1st. DCA 2014).

D. Searching For Annuitants Through The Death Master Files Is Wholly Different From Searching For Life Insurance Policyholders And Their Beneficiaries.

The Opinion's reasoning that insurers should perform searches for life insureds because insurers have historically searched for annuitants through the DMF fails to recognize that *insurers are required to search for deceased annuitants as part of the State's anti-fraud requirements*. *See* § 626.9891, Fla. Stat. That is, the government's justification for retroactively imposing new obligations on life insurers was premised on a false equivalence. Unfortunately, the district court failed to acknowledge the false equivalence in the Opinion, and also failed to recognize that legitimate fraud and other business concerns particular to annuities do not apply to life insurance policies. For example, annuitants' survivors have no incentive to notify insurers of an annuitant's death because survivors can continue to collect payments as long as the insurer continues to make them—that is, as long as the insurer remains unaware the annuitant is deceased. No such lack of incentive exists for life insurance beneficiaries. In sum, failing to report a death event is a significant concern for

annuities whereas the same is untrue for life insurance policies.

Further, current contact information is readily available for annuitants because insurers regularly send checks to annuitants, and those checks are cashed. The same is not true for the majority of insurance policies issued decades ago, where the information collected when policies were issued is frequently not current today.

Similarly, data essential for conducting DMF searches, such as social security numbers, is readily available for annuitants because annuities require insurance companies to issue annual tax reporting documents. The same is not true for life insurance benefits, which are generally excluded from taxable income. *See* Carson, *supra* at 1, 20.

In summary, the Opinion's blanket conclusion that "insurers are already doing this anyway" is simply untrue.

E. The Death Master File Is Prone To Error.

Requiring searches for any policy in force as of 1992 presumes that the DMF is accurate and complete, which is untrue. *See, e.g.*, Stephen L. Poe, *Ins. Reg. and Unclaimed Property: A Dilemma For Life Insurers*, 7 S. J. of Bus. & Ethics 160, 167-69 (2015) (noting

the many problems associated with relying on DMF searches for accuracy). The database contains more than 80 million records in which incorrect data—erroneous social security numbers, birth dates, and misspelled names—are quite common. *See* U.S. Gov't. Accountability Office, Preliminary Observations on the Death Master File (2013), *available at* https://www.gao.gov/products/gao-13-574t; *see also* Carson, *supra* at 24 and n. 178 (noting one mid-size life insurer in Nebraska "exposed a significant incidence of false positive matching in search results").

In 2011, for example, *about 1,000 people per month* were reported deceased when they were very much alive. *See* Rae Ellen Bichell, *Social Security Data Errors Can Turn People into the Living Dead*, NPR Health News (Aug. 10, 2016) (citing Office of the Inspector General Audit Report (2011)). Most of the time, the misinformation can be traced to an input error by Social Security staff—"a regular mistake on a regular office day that just happens to kill a person off, at least on paper." *Id.* The consequences of this misinformation are swift and significant including frozen bank accounts, inactivated health insurance, discontinued social security

payments, and cancelled doctor's appointments. *See id.* Thus, data mining by insurers that produces erroneous results, especially false positives, will undoubtedly create more significant problems for consumers than unclaimed funds.

II. THE NEW LEGISLATION IMPOSES ONEROUS, IF NOT IMPRACTICABLE, OBLIGATIONS, ESPECIALLY FOR SMALLER INSURERS.

Amici do not specifically contest applying the new obligations prospectively; rather, they take issue with retroactive application. Whether the Legislature can retroactively impose DMF searches spanning back decades is especially relevant to smaller and mid-size insurance companies and companies with fewer resources. While the Department would have one think a DMF search involves the mere click of a computer mouse, and the Opinion reasons insurers are already searching the DMF anyway, that is not the case. Instead, the search and identity matching process is resource intensive, and search results for older policyholders are frequently inaccurate.

The labor-intensive search process and resulting inaccuracies occur because older polices issued before the advent of modern technology and electronic databases often lack complete or relevant

data needed to conduct DMF searches. *See, e.g.*, Poe, *supra* at 167-69 (2015) (searching DMF databases without accurate social security numbers for policy holders is difficult if not impracticable).

Before modern technology, most data processing was handled with paper IBM punch cards, which contained limited storage capabilities. Thus, only the most critical data was collected, and insurers did not collect social security numbers as a matter of course. *See* Carson, *supra* at 19.

In addition, names were often abbreviated, birth dates were omitted, and many insurers, especially smaller companies, relied solely on paper records. *See id.* As a result, data mining for "policies in force at any time on or after January 1, 1992" (*see* § 717.107(8)(a), Fla. Stat.), which would necessarily include search and contact requirements for a multitude of policies issued decades before then, would be difficult, costly, and much more susceptible to errors.

"Industrial life" policies compound the problem of retroactively searching for older policies, which were sold in large quantities in the 1960s. *See* Joseph M. Belth & E.J. Leverette, Jr., *Industrial Life*

Ins. Prices, 32 J. Risk & Ins. 367 (1965) (noting 98 million of these policies were in force in the 1960s). Industrial life policies were sold in large quantities, but for small face amounts, primarily to cover debts such as burial expenses. *See id.* While currently not as popular, and in fact while most larger insurers have discontinued selling such policies, millions of industrial life policies remain in force today. *See* Carson, *supra* at 21 (approximately twelve million active industrial life insurance policies remained in force in 2014) (citing A.M. Best, 2014 Statistical Study: U.S. Ordinary Life 67 (2014)).

It is not surprising that minimal data would have been collected from consumers purchasing industrial life policies because purchasing such policies in the 1960s was as common, and almost as simple, as purchasing a lottery ticket today. Yet the Act's new search and contact requirements apply equally to all life insurance policies, including industrial policies, even though critical information is largely unavailable for those policies and will result in a disproportionate use of resources.

For example, the average face value of an industrial life policy is just $903 compared to an average life insurance policy value of over $100,000. *See id.* Placed in context, that means a DMF search and identity verification for a decades-old industrial policy is nearly 100 times more costly per unit than for an ordinary life insurance policy. Thus, retroactive requirements to perform searches for death evidence on such small face value products "would clearly be activity that was not anticipated or legally required at the time the policies were underwritten, priced, and issued." Carson, *supra* at 22 (citing Poe, *supra* at 161). Imposing such a requirement would not only be expensive and unconstitutional, it would be unfair.

Many small and mid-size insurers will bear the brunt of these expenses to their (and their future insureds') detriment. These companies not only sold industrial policies in large quantities, but, because of their more limited technology, the costs for a per-policy search will be higher, resulting, at worst, in insolvency or, at best, in an inability to continue to underwrite affordable life insurance policies. If smaller and mid-size insurers begin disappearing from the market, coverage availability could be severely reduced, again

disproportionately affecting low income consumers who depend on these same insurers to offer policies with lower face values and costs.

Notably, many life insurance policies are written by mutual and fraternal companies, meaning policy holders are actually company owners who will ultimately bear compliance costs. *See* Carson, *supra*, at 23 (citing American Council of Life Insurers, Life Insurers Fact Book 5 (2013)). The new requirements and associated costs of doing business will necessarily be passed on to consumers. Life insurance for many is a necessity, not a luxury paid for with disposable income. In some circumstances, life insurance may become required, such as when a court orders it as a condition of settlement in child custody and divorce cases. Thus, any increase in costs will not likely result in a proportionate decrease in demand. What this means for low income consumers who have historically purchased small value policies, or who are required for some reason to purchase life insurance, is that any small increase in costs could have profoundly detrimental effects.

III. THE DEPARTMENT SHOULD BE ESTOPPED FROM APPLYING THE NEW OBLIGATIONS RETROACTIVELY BECAUSE INSURERS HAVE RELIED TO THEIR DETRIMENT ON OIR'S REPRESENTATIONS THAT LIFE INSURANCE PROCEEDS BECOME DUE AND PAYABLE UPON PROOF OF DEATH.

A. For Decades, OIR Has Approved Insurance Contracts Placing The Burden On The Claimant To File A Claim To Recover And Insurers Have Relied On These Approvals.

OIR, an arm of the Department, reviews all life insurance policy forms to ensure they comply with Florida Statutes, regulations, and other standards. *See* Fla. Office of Ins. Reg., Statement of Agency Org. & Oper., https://www.floir.com/Office/AgencyOrganizationOperation.aspx.; *see also Land O'Sun Mgmt. Corp. v. Commerce & Indus. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007) ("the [OIR] must review and approve insurance policies drafted by insurance companies doing business in Florida"). In fact, any basic contract for insurance applications "may not be delivered or issued for delivery in this state unless the form had been filed with [OIR] by or on behalf of the insurer that proposed to use such form and has been approved by [OIR]." § 627.410(1), Fla. Stat.

OIR is instructed to disapprove any form that does not comply with the Florida Statutes, or that is "inconsistent" with the Florida Insurance Code. *See* § 627.411(1)(a)-(d), Fla. Stat. Yet, for decades (and still today), chapter 627, part of the Insurance Code located within the Florida Statues, has provided that life insurance proceeds are payable once the insurer receives proof that the policyholder has died. Specifically, it states:

> **Settlement on proof of death**. – Every contract shall provide that, when a policy becomes a claim by the death of the insured, *settlement shall be made upon receipt of due proof of death* and surrender of the policy.

§ 627.461, Fla. Stat. (2021) (last amended in 1992; emphasis added).

OIR has approved insurance forms including this "upon receipt of due proof of death" language for decades. Because OIR expressly approved this language, insurers naturally relied on it in issuing policies. In turn, insureds were put on notice that they must provide proof of death to the insurer to recover on a claim.

The new obligations, however, essentially replace the "on receipt of due proof of death" language with "due and payable upon death" language in countless contracts, invalidating terms

previously bargained for, and rendering insurers liable for obligations to which they never agreed. Further, it renders those contracts newly "inconsistent" (indeed, at odds) with § 627.461.

For this very reason, Florida courts have upheld insurance contract provisions facing similar challenges. *Land O'Sun* 961 So. 2d at 1079-80, involved a mandatory forum selection clause in an insurance contract providing that any disagreements over coverage must be litigated in New York, even though Land O'Sun was located in Florida. Land O'Sun argued this was against Florida's public policies and its interest in insurance regulation. The court disagreed, reasoning "the [OIR] must review and approve insurance policies drafted by insurance companies doing business in Florida. Because the policy here … was reviewed and approved by [OIR] it cannot be said that the clause violates strong public policy enunciated by statute or judicial fiat. In addition, the clause represents a contract obligation assumed by one of the contracting parties. The contracting parties have the right to demand that the litigation occur in the contractually selected forum." *Id.* at 1080.

Likewise here, OIR reviewed and approved these insurance contracts—to which the parties later agreed. These insurance contracts clearly place the burden on the insured to contact the insurer to make a claim. Insurers have a right to demand adherence to the plain language of these bargained-for contracts.

Indeed, Florida Statutes provide that OIR may "withdraw a previous approval." § 627.410(3). But withdrawal of approval only applies to contracts entered into "after the effective date of the order of the office." *Id.* Withdrawal of approval does not act retroactively to void or change provisions contained in previous contracts, many of which are decades old.

B. The Department Should Be Estopped From Retroactively Applying These New Obligations To Existing Insurance Contracts That OIR Previously And Expressly Approved.

Equitable estoppel may be invoked against a governmental body, such as the Department here, when a party shows "(1) [] good faith reliance on (2) some act or omission of the government and (3) a substantial change in position or the incurring of excessive obligations and expenses so it would be highly inequitable and unjust to destroy the right the property owner acquired." *Lyon v.*

Lake Cty., 765 So. 2d 785, 790-90 (Fla. 5th DCA 2000) (citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 475, 479 (Fla. 1976); *see also* 1 Couch on Ins., Estoppel based on past practices § 2:13 (3d Ed. Jun. 2018) ("The state insurance commissioner may, under certain circumstances, be estopped from changing past administrative practice or conduct.").

The Department should be estopped from retroactively applying these new obligations to life insurance policies that "were in force at any time on or after January 1, 1992" because it represents a "substantial change in position" from (1) its decades-long view that life insurance proceeds are "due and payable" upon receipt of death, and (2) its approval of millions of insurance contracts reflecting that same language.

It is undisputed that OIR, approved forms including language requiring a beneficiary to provide proof of death in order to collect on a life insurance policy. Life insurers in Florida relied upon this approval, entered into countless contracts including this language, and conducted their operations according to the terms of these approved forms in issuing policies to their insureds. Insurers have

relied on OIR's position and its approval of these forms in good faith. This substantial change in the Department's position will impose burdensome obligations and expense on insurers if the Department is not estopped from enforcing the new obligations retroactively.

CONCLUSION

This Court should reverse the First District's Opinion and issue a decision holding that these new obligations cannot be applied retroactively.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation and font requirement set forth in Rule 9.045, Florida Rules of Appellate Procedure. This brief contains 4,920 words. It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Bookman Old Style font.

/s/ *Katherine E. Giddings*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June 2021 that a true and correct copy of the foregoing has been electronically uploaded to The Supreme Court of Florida's e-Portal and furnished by E-mail to all parties listed below.

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