

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC20-1306

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

Petitioners,

vs.

JIMMY PATRONIS, in His Official Capacity as Chief Financial
Officer of the State of Florida, and the FLORIDA DEPARTMENT OF
FINANCIAL SERVICES,

Respondents.

ANSWER BRIEF OF RESPONDENTS

On Review from the First District Court of Appeal of Florida
Case No.: 1D18-2114

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PRELIMINARY STATEMENT

Chapter 2016-219 (the “Act”) clarifies the obligations of Florida life insurers to determine when payment of insurance proceeds is due to beneficiaries and their duties to report and remit such funds to the State of Florida in the event the proceeds go unclaimed. Petitioners, United Insurance Company of America, The Reliable Insurance Company, Mutual Savings Life Insurance Company, and Reserve National Insurance Company (“Petitioners”), claim retroactive application of the Act is facially unconstitutional because it violates their due process rights under article 1, section 9 of the Florida Constitution. That constitutional provision states, in pertinent part:

No person shall be deprived of life, liberty or property without due process of law.

Petitioners do not actually allege that applying the Act retroactively deprives them of a life, liberty, or property interest without due process of law. Instead, relying on the judicial test from *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass’n*, 127 So. 3d 1258 (Fla. 2013), they allege “the due process clause . . . prohibits retroactive application . . . because the Act constitutes a

substantive law that . . . *imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties.*” [I.B. at 15]. Petitioners’ due process claim fails because the judicial test in *Maronda Homes* does not create a due process claim where no constitutionally protected interest exists. And no such interest is at issue here. Indeed, Petitioners are not asserting the Act’s retroactive application deprives them of any property interest without due process of law. With no due process right at issue, Petitioners’ facial constitutional challenge must fail.

The judicial test in *Maronda Homes* that Petitioners rely upon is a one of statutory interpretation: it is the first prong of a two-prong analysis of a statute’s retroactive application. As applied by this Court in *Menendez v. Progressive Express Ins. Co.*, 35 So. 3d 873, 877 (Fla. 2010), a statute’s retroactive application is determined by: 1) absent clear legislative intent, whether the statute is substantive (and presumed to apply prospectively) or remedial, and 2) if applied retroactively, whether the statute violates a specific constitutional provision.

Here, the Legislature expressly intended the Act to apply retroactively. Petitioners do not dispute this. With such clear

retroactive intent, the remaining inquiry is whether the due process clause is violated. Without a property interest at stake, it is not.

Even applying the *Maronda Homes* test of statutory interpretation, the Act is not substantive but a remedial statute, as the First District Court held, designed to address the documented failure of the life insurance industry to pay life insurance proceeds owed to beneficiaries or remit unclaimed insurance proceeds to the state as the conservator of the funds. The Act is not substantive because it does not impair a vested right of the insurers, create a new obligation on the insurer-insured policies, or impose a new penalty. Thus, the Court should affirm.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE FACTS

A. Unclaimed property in Florida

For over 100 years, Florida law has recognized the right of the state to take possession of unclaimed property, attempt to locate the rightful owners, and ultimately use the property for the benefit of the public if no owner is found. *See State v. Knott*, 44 So. 744 (Fla. 1907). The United States Supreme Court recognized this state right as well in *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948). *See*

also Delaware v. New York, 507 U.S. 490 (1995) (states have the sovereign right to take custody of abandoned property).

To that end, the Florida Legislature has enacted various iterations of the Uniform Disposition of Unclaimed Property Act (“UDUPA”), which primarily governs intangible unclaimed property in Florida. The “Florida Disposition of Unclaimed Property Act” is Chapter 717, Florida Statutes (“FDUPA”). Pursuant to Chapter 717, holders of unclaimed property have a duty to account for and turn over unclaimed property to the state, so that it may attempt to locate the rightful owners. *See* § 717.118, Fla. Stat. (“It is specifically recognized that the state has an obligation to make an effort to notify the owners of unclaimed property in a cost-effective manner.”).

The FDUPA benefits both the owners and holders of unclaimed property, as well as the public; its objective is:

to protect the interests of owners, to relieve the holders from annoyance, expense and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof.

State v. Green, 456 So. 2d 1309, 1312 (Fla. 3d DCA 1984) (*quoting* Uniform Disposition of Unclaimed Property Act (1954), Prefatory Note, 8A, U.L.A. 215-17 (1983)).

Chapter 717 governs the duties and obligations of holders of property owned by others, whether such holders are banks, insurers, etc. The holders merely maintain possession of the unclaimed property until the owners are located. All holders of unclaimed property have reporting obligations once they learn the property is unclaimed, among other duties, and the Department may fine the holders for failing to meet these requirements. *See* § 717.117, Fla. Stat. Chapter 717 also precludes holders from reaping financial benefits derived from the continued use of the unclaimed property. *Green*, 456 So. 2d at 1312.

Section 717.107, which governs unclaimed insurance proceeds, is the provision challenged in this appeal. Under this provision, insurers are obligated to pay insurance proceeds owed to beneficiaries when they become “due and payable.” *Compare* § 717.107(3), Fla. Stat. (2020) *with* § 717.107(3), Fla. Stat. (2015). They are also required to research, identify, report, and remit unclaimed proceeds to the state if the proceeds go unclaimed after a

five-year “dormancy period” expires. *Compare* § 717.107, Fla. Stat. (2020) *with* § 717.107, Fla. Stat. (2015).

B. Investigations of insurers’ unclaimed property practices reveal that, instead of paying or remitting, they are holding hundreds of millions of dollars of life insurance proceeds

Despite an obligation to pay insurance proceeds under applicable life insurance policies and to remit unclaimed proceeds to the state, Florida’s insurers for decades failed to do so for a staggering number of their policies. The scope of the problem was uncovered beginning in the late 1990s in connection with mutual insurance companies’ decisions to “demutualize.” [R. 532]. These companies were owned and controlled by their policyholders, rather than stockholders, and the demutualization process required conversion to stock ownership. [R. 532-33]. This enabled the policyholders to obtain cash, stock, or both. [R. 532-33]. To complete the distribution to their policyholders, the insurers had to first locate and contact their policyholders. [R. 533].

But several large mutual insurers were unable to contact hundreds of thousands of policyholders, and as a result, they ultimately remitted the unpaid insurance proceeds to the state as

unclaimed property. [R. 533]. Indeed, in a two-year period alone, the state of Florida received nearly 200,000 unclaimed accounts valued at over \$184 million. [R. 533].

In 2008, Respondent, the Florida Department of Financial Services (the “Department”), along with unclaimed property offices in 45 other states, contracted with Verus Financial, (“Verus”) to conduct industry-wide audits to understand why the insurance proceeds had either not been paid or had not been turned over as unclaimed property in accordance with section 717.107. [R. 533, 538]. These audits revealed large numbers of insureds listed as deceased on the United States Social Security Administration Death Master File (“DMF”) whose life insurance policy benefits had neither been paid to beneficiaries nor remitted to the state. [R. 538].

In response, the Florida Office of Insurance Regulation (“OIR”) and insurance regulators in other states created a task force to further investigate the industry’s unclaimed property practices. [R. 541-42]. OIR again contracted with Verus in 2011 to do market conduct examinations. [R. 541-42]. The investigation revealed that life insurance companies, who are in the business of paying life insurance benefits to beneficiaries when insureds pass away, were

nevertheless taking no steps whatsoever to determine if insureds had died. [R. 542]. Instead, the insurance companies waited to be contacted before paying out proceeds due under the policies, even though beneficiaries may have been unaware the policies even existed and therefore would have been unaware of the need to notify the insurance company of the insured's death. [R. 542]. This resulted in insurance companies retaining hundreds of millions of dollars in unpaid—but owed—insurance proceeds, rather than either paying the proceeds to beneficiaries or remitting them to the state as unclaimed property.

Under the then-existing version of subsection 717.107(3), insurance proceeds were “due and payable” if: (1) the insurer received proof of death of the insured, (2) “the company knows that the insured . . . has died,” or (3) the insured would have attained the limiting age under the specified mortality table, which was around 100 years of age. § 717.107(3) (2015). Subsection 717.107(1) also provided that funds held were presumed unclaimed property that would be remitted to the state if the proceeds went unclaimed for more than five years after the funds became “due and payable as

established from the records of the insurance company holding or owing the funds . . .” § 717.107(1) (2015).

By taking no action to determine a policyholder’s status, insurance companies essentially construed section 717.107 as permitting them to bury their heads in the sand and passively wait for the insured’s beneficiaries to inform them of an insured’s death or hold the proceeds for decades before they would become “due and payable.” [I.B. at 5 n.1]. In other words, insurance companies contended they had no obligation to take any affirmative steps to determine if an insured had died despite their obligation to pay benefits owed.¹

Yet, insurance companies did take affirmative steps to determine a policyholder’s status where they financially benefitted from doing so. Specifically, the investigation revealed that while insurers did nothing to determine if an insured had died for the purposes of paying out life insurance benefits, they did routinely

¹ By the same token, insurers used non-forfeiture provisions—which are intended to be a consumer-protection feature to keep policies in force when policyholders fail to pay premiums—to deplete cash values and terminate policies. [R. 534-35]. However, insurers did not attempt to determine if the policyholders stopped paying their premiums because they died. [R. 534-35].

search the DMF to determine if annuitants had died so that annuity payments could be discontinued. [R. 542].

In the wake of this investigation, the Department entered into 31 settlement agreements with insurers providing that Verus would conduct audits comparing the insurers' records for all insurance policies in force on or after January 1, 1992 with the DMF to determine if any insureds passed away and policy benefits were owed to beneficiaries. [R. 533, 535-36]. Where beneficiaries cannot be located or cannot supply sufficient proof of death as a condition to payment, the proceeds are remitted to the state five years after the insured's death. [R. 533, 535-36].

This audit has resulted in hundreds of millions in unpaid insurance proceeds being remitted to their rightful owners—the beneficiaries under the policies. [R. 533]. As of January 2018, an estimated \$325 million in payments have been made to beneficiaries in Florida alone. [R. 536]. An additional \$231 million was remitted to the state of Florida as unclaimed property, with \$97 million subsequently being remitted to beneficiaries by the state after it undertook additional efforts at locating the owners of the unclaimed proceeds. [R. 536].

C. The Department's declaratory statement and the *Thrivent* decision

Not all insurance companies doing business in Florida agreed to the settlement and audit process conducted by Verus. Ultimately, Thrivent Financial for Lutherans (“Thrivent”) sought a declaratory statement from the Department that life insurance funds become “due and payable as established from the records of the insurance company” under the then-applicable version of subsection 717.107(1) when the insurer received proof of the insured’s death and surrender of the policy. *Thrivent Fin. For Lutherans v. Dept. of Fin. Servs.*, 145 So. 3d 178, 180-81 (Fla. 1st DCA 2014). Consequently, Thrivent took the position that it was only after this proof of death from the insured’s beneficiaries that the five-year dormancy period was triggered before the remittance to the state. *Id.*

The Department rejected this interpretation and concluded under existing law that life insurance proceeds were “due and payable” upon the death of the insured—regardless of when the insurer received proof of death. *Id.* at 181. And at the date of death, the so-called dormancy period was automatically triggered, and the insurer was required to remit the proceeds to the Department if they

remained unclaimed for five years. *Id.* The Department also stated that insurers should use due diligence in searching databases, such as the DMF, to determine if an insured had died. *Id.*

Thrivent appealed the Department's decision. The First District Court of Appeal found the Department's interpretation was clearly erroneous. *Id.* at 181-82. The court concluded that under the then-applicable version of subsection 717.107(1), proceeds became "due and payable as established from the records of the insurance company" only when the insurer either received proof of death and surrender of the policy in their official records or the applicable mortality table provided for a presumed date of death. *Id.* It also concluded insurers had no affirmative obligation to search the DMF or some other database to determine if a policyholder had died. *Id.* at 182. Consequently, the five-year dormancy period before remittance to the state was not triggered until actual proof of death, which insurers could passively wait to receive from potentially uninformed beneficiaries. *See id.* at 180-82.

D. The 2016 amendments to section 717.107

Shortly after the First District's *Thrivent* decision, the Florida Legislature amended Chapter 717 to explicitly clarify the duties of

insurance companies to determine the status of insureds and when proceeds become “due and payable” both for the purpose of paying proceeds owed and for the date of remittance to the state as unclaimed property following the five-year dormancy period. In sum, the 2016 amendments to section 717.107 provide:

- Insurance proceeds become “due and payable” to the beneficiary under subsection 717.107(3) when (1) the insurer knows the insured has died, (2) ***the presumption of death is not rebutted after identifying the insured’s name in the DMF as deceased***, (3) the policy reaches its maturity date, or (4) the insured reaches the limiting age under the applicable mortality table;
- The five-year dormancy period under subsection 717.107(1) runs from the date of the insured’s death—rather than “after the funds become due and payable as established from the records of the insurance company;”
- Under subsection 717.107(8)(a), insurance companies must perform a one-time comparison of their records for all life insurance policies in force at any time on or after January 1,

1992 to the DMF and use the DMF to update files for future comparisons of new policies on at least an annual basis; and

- Under subsection 717.107(9), upon discovering an insured is listed in the DMF, insurers have 120 days to undertake various acts to confirm the insured's death, to determine if benefits are due, and to make efforts to locate beneficiaries, and eventually, if the beneficiaries cannot be located, to report and remit the unclaimed property to the State of Florida.

See ch. 2016-219, Laws of Fla. (emphasis added). In short, the amendments clarified that insurers cannot rely on their internal, and potentially stale, records and instead must affirmatively search for and contact beneficiaries and remit the unclaimed property to the state if beneficiaries cannot be located.

The Act expressly required insurers to search policies in force back to January 1, 1992 for insureds found in the DMF, established the presumed date of death as that determined in the DMF, and provided the insured's date of death as the dormancy trigger. The Act also plainly stated the 2016 amendments were "providing retroactive applicability" and further stated they are remedial in nature and apply retroactively. See ch. 2016-219, Preamble and § 2, Laws of Fla.

However, the Act gave insurance companies a five-year grace period to complete the DMF search, attempt to locate and pay beneficiaries, and report and remit unclaimed proceeds without penalty on or before May 1, 2021. See ch. 2016-219, § 2, Laws of Fla.

The 2016 amendments did not “alter[] when insurance proceeds escheat to the State.” *Patronis v. United Ins. Co. of Am.*, 299 So. 3d 1152, 1163 (Fla. 1st DCA 2020) (Winokur, J., dissenting). Rather, they only amended how the five-year dormancy period is triggered before remittance to the state, which is then obligated to continue to attempt to locate the owners of the unclaimed insurance proceeds.

At bottom, the 2016 amendments to section 717.107 modified existing insurance industry regulatory obligations to better achieve the same objective. First to better determine if the insurance proceeds are being held instead of being paid to owners. Second, if the beneficiaries cannot be located, to remit the unclaimed property to the state so that it can undertake to locate the beneficiaries, and if unsuccessful, use the unclaimed property for the benefit of the public.

II. STATEMENT OF THE CASE

A. The trial court proceeding

In 2016, Petitioners filed suit to challenge the retroactive application of the Act; no challenge was made to the prospective application of the law. [R. 11-20]. Originally, they brought two claims: (1) denial of due process under article I, section 9 of the Florida Constitution, and (2) impairment of their insurance contracts with policyholders under article I, section 10 of the Florida Constitution. [R. 11-20]. Petitioners subsequently dropped their impairment of contract claim. [R. 113-14]. Notably, while the Act requires insurers to check the DMF for both life insurance and annuity contracts, Petitioners did not contest the application of the amendments to their annuity contracts, but only their life insurance policies. [R. 492].

In their claim for violation of due process, Petitioners did not assert the Act's retroactive application deprived them of any property interest without due process of law. Instead, they asserted the Act's requirement to compare their records to the DMF to determine whether insureds had died violated their rights under Florida's due process clause because it imposed new obligations and penalties in connection with past transactions. [R. 67-69].

In response, Respondents noted that insurance companies had no vested rights to the unclaimed insurance proceeds they held for beneficiaries, that they had no more than a mere expectation that the unclaimed property laws would remain unchanged, and that the 2016 amendments imposed no new penalties on past conduct. [R. 503-13, 526-27]. Respondents also noted the 2016 amendments were designed to remedy the insurance industry's documented failure to fulfill their obligations under Chapter 717 and to clarify and confirm the industry's duties to beneficiaries. [R. 521-26].

While acknowledging the 2016 amendments "operate[] to further a remedy and confirm rights of life insurance beneficiaries," [R. 567], the trial court nevertheless granted Petitioners' summary judgment on their due process claim. Upon finding the Legislature intended the Act to apply retroactively, it concluded retroactive application was unconstitutional because the imposition of new obligations and duties in connection with past transactions or considerations was substantive. [R. 568]. The trial court did not consider whether the 2016 amendments subjected insurers to new penalties. Respondents timely appealed.

B. The appeal to the First District

Upon concluding the Act was remedial not substantive, the First District reversed the trial court's judgment. *Patronis*, 299 So. 3d at 1157. The court first noted Florida's unclaimed property laws generally serve a remedial purpose of "safeguarding consumer interests and remedying marketplace imperfections." *Id.* at 1158-59. Then, applying *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) and *Maronda Homes*, the court held the "foremost purpose of the legislation was to further a remedy or confirm rights that already existed that were not being honored by all insurers." *Patronis*, 299 So. 3d at 1158 (internal quotation marks omitted). Concluding the Legislature intended the Act's retroactive application, the court rejected Petitioners' argument that the 2016 amendments were substantive (and not remedial). *Id.* at 1159.

The court noted both parties agreed "the insurers have no vested rights in unclaimed property." *Id.* Addressing whether the Act imposes new obligations, the court found the amendments were generally "consistent with the pre-existing duties of insurers under chapter 717," including the pre-existing duty of "due diligence" under subsection 717.101(9). *Id.* at 1159-60. In particular, the court

emphasized that since 2001, insurers have been required to use “reasonable and prudent methods under the particular circumstances to locate apparent owners of inactive accounts...using a nationwide database, cross-indexing with other records of the holder, mailing to the last known address.” *Id.*

Finally, noting the trial court did not reach the “new penalties” prong and that the case was decided on an undeveloped record, the court rejected the argument it should affirm the trial court’s ruling on that alternative basis. *Id.* at 1160.

The court also addressed *Thrivent Financial for Lutherans v. State, Department of Financial Services*, 145 So. 3d 178 (Fla. 1st DCA 2014) which interpreted the meaning of the pre-amended statute. It observed *Thrivent* did not prevent the Legislature from passing a remedial law that “defines, clarifies or refines the pre-existing and long-standing obligations of insurers to use due diligence to act in good faith to their insureds.” *Patronis*, 299 So. 3d at 1161. The court upheld the retroactive application of 2016 amendments.

The dissent agreed that the Act’s requirements do not affect the insurer’s contracts with insureds but instead regulate when and how the insurer pays beneficiaries. *Id.* at 1165. The dissent nonetheless

found the Act's provisions to be substantive. While the dissent recognized substantive amendments "may have retroactive effect if constitutionally permissible," *id.* at 1165 (citing *Lakeland Reg'l Med. Ctr. v. State, Agency for Healthcare Admin.*, 917 So. 2d 1024, 1031 (Fla. 1st DCA 2006)), it relied on *Menendez* and *Maronda Homes* to find the Act could not be applied retroactively. *Patronis*, 299 So. 3d at 1165-68.

Petitioners timely appealed. The Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

Petitioners' facial challenge is that the retroactive application of the Act violates their due process rights under article I, section 9, Florida Constitution. As described in *Menendez* the proper analysis of this challenge has two prongs: 1) in the absence of the Legislature's expressed intent for the statute's retroactive application, whether the statute is substantive (and presumed to apply prospectively) or remedial; and 2) if the statute applies retroactively, whether that statute violates a specific constitutional right.

In this case, the first inquiry is simple and undisputed. The text of the Act plainly shows the Legislature clearly intended the Act's changes to apply retroactively.

The second prong is equally simple in this case and indisputable. Petitioners' sole claim is that retroactive application of the Act violates their constitutional rights under Florida's due process clause. That clause protects against the deprivation of "life, liberty or property without due process of law." Though they label their claim as a due process violation, it is indisputable that Petitioners do not assert the Act's retroactive application deprives them of any "life, liberty or property." Petitioners admit they have no vested rights in the insurance proceeds.

Instead of asserting deprivation of a vested property interest without due process of law, Petitioners argue Florida's due process clause prohibits the Act's retroactive application "because" the Act "imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties." [I.B. at 15]. This argument fails because the *Maronda Homes* test only addresses the first prong of the proper analysis: absent clear legislative intent, is the statute substantive (and presumed to apply prospectively) or remedial? The *Maronda Homes* test does not determine the second prong: does applying the statutory change retroactively violate a specific constitutional right? Here, it does not.

Even under the *Maronda Homes* test, the Act is clarifying legislation that is remedial in nature. Its purpose was to address and correct the insurance industry's well-documented failure to meet their pre-existing statutory obligations to pay life insurance proceeds to the rightful beneficiaries or remit unclaimed funds to the state. The legislation merely confirms and protects the existing rights of beneficiaries to obtain insurance benefits owed and the longstanding right of the state to receive unclaimed proceeds, and it requires insurers to conduct an additional, reasonable search for the owners of the property, and if none is found, allows the property to be remitted to the state.

The Act is not substantive because it does not impair vested rights, create new obligations in connection with prior transactions or consideration, or impose new penalties for past conduct. The legislation does not impose new statutory obligations because it is generally consistent with insurers' pre-existing obligations under Chapter 717. Also, the statute does not impose new penalties for past conduct. The Act permits penalties for noncompliance prospectively and only after the expiration of a five-year safe harbor. Petitioners' theoretical examples of potential penalties for past conduct make no

sense in practice and, at any rate, can be asserted only through an as applied challenge if and when penalties are enforced.

At bottom, the Legislature expressly intended the statute's retroactive application. Absent any allegation that retroactive application deprives them of a life, liberty, or property interest without due process of law, Petitioners' due process claim fails.

Accordingly, the First District Court's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW FOR FACIAL CHALLENGES TO THE CONSTITUTIONALITY OF LEGISLATION

The constitutionality of a statute is a pure question of law subject to *de novo* review. *City of Fort Lauderdale v. Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016). Petitioners assert the Act is facially unconstitutional under the due process clause. [I.B. at 46]. To prevail on this claim, Petitioners must demonstrate there is no possible lawful applicability of the statute. *See Fraternal Order of Police v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018) (noting challenger "must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid").

II. TWO-PRONG ANALYSIS FOR RETROACTIVE APPLICATION

A two-prong analysis applies when determining whether a statute should apply retroactively: the “first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively,” and the second is whether the retroactive application is constitutional. *Metro. Dade County v. Chase Fed. Housing*, 737 So. 2d 494, 499 (Fla. 1999); *see also Menendez*, 35 So. 2d at 877; *Sowell v. Panama Commons*, 192 So. 3d 27, 30 (Fla. 2016).

III. FLORIDA’S DUE PROCESS CLAUSE DOES NOT BAR RETROACTIVE APPLICATION OF THE ACT

Petitioners’ assertion that retroactive application of the Act violates Florida’s due process clause fails for two reasons. First, Petitioners do not allege retroactive application deprives them of a right to “life, liberty or property without due process of law.” They do not make this allegation because requiring Petitioners to search for and pay insurance proceeds to beneficiaries or remit unclaimed proceeds to the state does not deprive them of “life, liberty, or property without due process of law.”

Second, the statutory retroactivity test applied in *Maronda Homes* that Petitioners rely upon does not create such a due process right. Instead, that statutory retroactivity test is applied when analyzing the first prong of the proper two-prong analysis. It determines, in the absence of clear legislative intent, whether a statute is substantive and therefore presumed to apply prospectively.

If the Legislature intended the statute to apply retroactively and the change in the law is substantive, the second prong of the analysis is performed to determine if allowing its retroactive application violates a specific constitutional provision.

A. Retroactive application of the Act does not violate Petitioners' due process rights because it does not deprive insurers of life, liberty, or property

Petitioners do not argue retroactive application of the Act deprives them of life, liberty, or property without due process of law. They assert no constitutionally protected property interest – indeed, the insurers concede they have no vested rights to the beneficiaries' unclaimed insurance proceeds. *Patronis*, 299 So. 3d at 1159 (“The parties agree that insurers have no vested rights in unclaimed property.”). And, there is no allegation the insurers' “life” or “liberty” is impacted by the Act. As Petitioners have only sought relief under

the due process clause, this Court's review should be completed at this point.

Tellingly, Petitioners' brief completely ignores and fails to cite the actual text of Florida's due process clause which is:

Due process.—No person shall be deprived of life, liberty or property without due process of law.

Art. I, § 9, Fla. Const. Instead of relying on what the plain, unambiguous text of the due process clause prohibits, Petitioners argue:

The due process clause of the Florida Constitution prohibits retroactive application of the Act to life insurance policies issued before the statute's effective date because the Act constitutes "a substantive law that adversely affects a vested right; *imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties.*" *Maronda Homes*, 127 So. 3d at 1272 (emphasis added).

[I.B. at 15]. This is not what Florida's due process clause prohibits and is a misapplication of the precedent cited.

The due process clause does not prohibit, as Petitioners assert, retroactive application of a law just because it is "a substantive law." Petitioners do not and cannot allege the pre-existing law created a

property interest for insurers as they admit having no vested rights to hold the beneficiaries unclaimed proceeds.² *See also Patronis*, 299 So. 3d at 1165 (“Here, the question is not whether the Act impairs vested rights”). And Petitioners cannot claim a property interest when they do not have a “legitimate claim of entitlement to it.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

With no assertion, in this facial challenge, that the retroactive application of the Act deprives them of “life, liberty or property without due process of law,” this Court must reject Petitioners’ claim the Act violates Florida’s due process clause.

B. The *Maronda Homes* test Petitioners rely upon is a statutory interpretation test, not a due process constitutionality test

Instead of the text of the due process clause or an analysis developed to determine due process violations, Petitioners’ claim relies on a test applied in *Maronda Homes*, and *Menendez*, to determine if statutory changes are “substantive.” [I.B. at 15-16]. That

² In fact, the Act protects the property rights of insureds and beneficiaries as well as the state’s right to serve as the conservator of unclaimed property. *See Delaware v. New York*, 507 U.S. 490 (1995) (citing case law beginning in 1890s recognizing right of escheatment); *Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948).

test applies only to the first prong of the proper analysis: whether the changes are interpreted to apply retroactively. That test has never been applied to decide the second prong: whether the change in law, if applied retroactively, would violate the due process clause (the constitutional right asserted in this case).

Understanding the history and usage of the statement in *Maronda Homes* and other cases Petitioners rely upon demonstrates tests of statutory interpretation applied to determine whether a statute operates retrospectively. The language in that test does not apply to the second prong. In other words, the *Maronda Homes* test does not determine whether retroactive application would be constitutional.

1. U.S. Supreme Court interpretation of a provision's retroactivity.

As outlined below, the common law and canons of statutory interpretation recognize a presumption against laws applying retroactively. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 41 (2012) (noting the presumption against retroactivity “is a canon of interpretation and not a rule of constitutional law . . . [and] [i]ts retroactive operation may, but will

not necessarily, violate” the United States Constitution or similar provisions of state constitutions). Canons of construction recognize a general presumption, and in some cases even a hostility, against retrospective legislation. *See id.*

While a retroactive law may raise general fairness concerns, only an ex post facto criminal law is unconstitutional simply due to its retroactive application. *See Calder v. Bull*, 3 U.S. 386, 391 (1798). Early on, the U.S. Supreme Court recognized the presumption against retroactivity:

Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive, and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement.

Id.

To overcome the presumption against retroactivity, it is the legislative role to assess the dangers of retroactive laws. *Id.* at 394 (“It is not presumed that the federal and state legislatures will pass laws to deprive citizens of rights vested in them by existing laws unless for the benefit of the whole community.”). When the legislative branch

considers and enacts retroactive laws, they are allowable if specific constitutional provisions are not otherwise violated. *Id.* at 393-394.

As the U.S. Supreme Court more recently observed when addressing a retroactive statute, while disfavored “[a]bsent a violation of one of those specific [constitutional] provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give the statute its intended scope.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994) (“[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.”). In the absence of clear legislative intent to overcome the presumption, the court admitted it is not always easy to determine when a statute operates “retroactively.” *Id.* at 268. To do so, the court referenced Justice Joseph Story, sitting on Circuit, interpreting a particular state constitution’s prohibition of all retroactive laws both criminal and civil, finding that provision embraced not only explicitly retroactive laws but also:

every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to

transactions or considerations already past,
must be deemed retrospective.

Id. at 268-269, quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 12, 156) (CC NH 1814). The court presciently recognized that “similar functional conceptions of legislative ‘retroactivity’ have found voice in this Court’s decisions and elsewhere.” *Landgraf*, 511 U.S. at 268.³ While Justice Story interpreted a specific state constitutional provision, *Landgraf* interpreted a federal statute. Neither applied the due process clause.

Landgraf further described the statutory test for retroactivity:

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment [citation omitted], or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.

Id. at 269-70. The court summarized the proper approach as first determining whether the legislative branch expressly intended the statute’s retroactive reach, and if so, “judicial default rules” are unnecessary. If not, the judiciary must determine the statute’s

³ In fact, Justice Scalia in his concurrence questions the “vested rights” (or substantive - procedural) analysis in favor of determining “what is the relevant activity the rule regulates.” *Id.* at 291.

retroactive effect based on whether “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* at 280 (“If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.”). *Landgraf* did not reach a constitutional question.

2. The Florida Supreme Court’s statutory test for retroactivity.

This Court, in *Menendez* and *Maronda Homes*, applied the *Landgraf* tests. Compare *Landgraf*, 511 U.S. at 269-70, with *Menendez*, 35 So. 3d at 877; with *Maronda Homes*, 127 So. 3d at 1272. But those tests interpret text (the first prong); they do not simply analyze due process violations (the second prong).

Laforet relied upon by Petitioners did not involve a constitutional due process claim. In that case, the issue was whether a new motor vehicle insurance statute, subsection 627.727(10), altering the damages available in a bad faith action brought under an existing statute, section 624.155, could have retroactive effect. *Laforet*, 658 So. 2d at 56-57. The new statute sought to interpret the

prior statute “to reaffirm existing legislative intent [of section 624.155], and as such [subsection 627.727(10)] is remedial rather than substantive” and then to apply subsection 627.727(10)’s interpretation to causes of action accruing under section 624.155. *Id.* at 60. The Court addressed the question of whether “the Legislature can modify the definition of damages retroactively [] through a purported clarification of its intent.” *Id.* at 61. The Court considered this to be the role of the courts, not the Legislature, to interpret statutes. In other words, the Legislature’s interpretation through subsection 627.727(10) of the prior statute was not taken to be the retroactive pronouncement of section 624.155’s intent (which would be revealed in its own text). Instead, to prevent legislative usurpation of judicial powers, the Court disregarded subsection 627.727(10)’s attempt to do so retroactively. *Id.*

Turning to whether subsection 627.727(10) was indeed a remedial statute, the *Laforet* Court relied upon the rule of statutory interpretation that a substantive law will not operate retroactively absent clear legislative intent (which was lacking in subsection 627.727(10)). Accordingly “this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new

obligations, or imposes new penalties.” *Id.* citing *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) (where the Court found “nowhere” was intent manifested for the retrospective application of a constitutional amendment affecting the exclusionary rule). Applying this canon of construction to subsection 627.727(10) which lacked the requisite legislative intent to apply retroactively, the Court held it to be substantive and applied it prospectively. *See Laforet*, 658 So. 2d at 61-62. The Court found the Legislature’s “remedial” designation was not a “justifiable interpretation.” *Id.* at 61.

In *Maronda Homes*, the Court held a statute could not apply retroactively because it would deprive respondents of their cause of action in violation of due process under article I, section 9 as well as access to courts under article I, section 21. 127 So. 3d at 1275-76. The Court identified the explicit legislative text for the statute’s limitation on certain causes of action for the breach of implied warranties to apply to “all cases accruing before” its effective date. *Id.* at 1270-1271. The Court acknowledged the constitutional property rights in an accrued cause of action. *Id.* at 1272. Because the Legislature intended to retroactively limit an accrued cause of action,

the deprivation of a property interest would be at issue if the Court found the statute's limitations to be substantive, not remedial. After making these determinations, the Court turned to evaluate the statute's substantive effect.

A statute's nature is substantive law if it "adversely affects or destroys a vested right." *Id.* Accordingly, if the statute at issue was to be saved, the Court provided the rule: "[f]or the retroactive application of the law to be constitutionally permissible, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature" *Id.* Otherwise if the expressly retroactive statute which limited a cause of action was found to be substantive, there would be an unconstitutional deprivation of that cause of action property interest. Unlike a remedial statute, "a substantive law prescribes legal duties and rights" and "once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them" in relation to a cause of action as a protected property interest. *Id.* Left to be determined, the Court found the respondent's cause of action for breach of implied warranties already existed at common law and had accrued; therefore, the right to cause

of action was a vested right. *Id.* at 1272-1276. Because the statute limited accrued causes of action (which are property interests protected under the due process clause), the Court held the statute not to apply retroactively. *Id.* at 1276.

Menendez was an impairment of contract case under article I, section 10 of the Florida Constitution. 35 So. 3d at 875-76. There, the petitioner challenged the retroactive, presuit notice requirements which the Personal Injury Protection (PIP) statute incorporated into motor vehicle insurance policies to determine the benefits under those policies. *Id.* at 876-877. After acknowledging the statute was intended to apply retroactively to alter the policies themselves, the Court evaluated whether those statutory changes were remedial, as the District court had held, or substantive. *Id.* To do so, the Court turned to the statutory test from *Laforet*, so that “even where the Legislature has expressly stated a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.” *Id.* at 877. Where *Laforet* repudiated the Legislature’s retroactive interpretation of a prior statute (thus denying any meaningful legislative intent in that provision) and

then interpreted the new statute itself finding it substantively instituted a new penalty, the *Menendez* Court stated its concern was whether the statute's retroactive changes unconstitutionally impaired the insurance contracts. *Id.* at 878 fn. 4. Where in *Laforet* the issue was statutory interpretation and where in *Menendez* the ultimate issue was constitutional impairment of the insurance policies, retroactive application in both cases hinged on whether the statute at issue was remedial rather than substantive.

The Court determined “the statute substantively alters an insurer’s obligation to pay and an insured’s right to sue under the contract.” *Id.* at 879. Because the Court had concluded the Legislature intended the statute to apply retroactively and understood the insurance policies to be subject to an constitutional impairment of contract, once the Court determined the statute was substantive, it held the statute would only apply prospectively to avoid an unconstitutional outcome. *Id.* at 880.

3. Petitioners incorrectly conflate the first prong of statutory interpretation with the second prong of constitutional analysis.

Avoiding the two-prong test, Petitioners misapply statements of statutory interpretation from *Laforet*, *Maronda Homes*, and

Menendez posturing those statements as constitutional tests. In *Maronda Homes* and *Menendez*, the basis to invalidate the statutes' retroactive application was a violation of established rights found in Florida's Constitution—due process as well as access to courts and impairment of contract. In neither case did the Court find a constitutional violation solely **because** the statute impaired a vested right, created a new obligation, or imposed a new penalty. Read carefully, in *Maronda Homes* and *Menendez* the Court applied the two-prong analysis. It applied the statutory test on a retroactively intended statute to determine it was substantive, and separately determined the statute's retroactive application would cause a specific constitutional violation.

Unlike the constitutional rights asserted those two cases, here there is no allegation that, if applied retroactively, the Act deprives Petitioners of a cause of action or any other “life, liberty or property” interest without due process of law. Petitioners concede they have no vested right—no property interest—in unclaimed insurance proceeds. And insurers' expectations that the law will not change does not create a due process violation, either. See *Lakeland Reg'l. Med. Ctr.*, 917 So. 2d at 1032 (holding “[v]ested rights are more than

an expectation of continued existing law” and rejecting argument that statute violated due process rights). Further, Petitioners abandoned their impairment of contract claim because the Act’s changes to section 717.107 do not alter the insurance contracts between insurers and insureds.

Thus, the so-called due process test as articulated by Petitioners, cherry-picked from statements in *Laforet*, *Maronda Homes*, and *Menendez*, does not apply to find the Act unconstitutional. That test is instead one of statutory interpretation to determine the retrospectivity of legislation—not to fashion new bases for due process rights not found in the Florida Constitution. Because Petitioners can point to no due process interest that has been violated by the retroactive application of the Act, Petitioners’ facial challenge should be rejected.

And if, and only if, a statute intended to apply retroactively is found to be substantive does a court apply it prospectively because it would otherwise violate specific constitutional rights. Given Petitioners have not even alleged the violation of a due process right, and the plain language of the statute provides that it applies

retroactively, the *Laforet* and *Maronda Homes* statutory tests do not bar retroactive application of the Act.

Petitioners' error is in merging the preliminary question of whether a law should apply retroactively, even when found to be substantive, with the second question of whether it is constitutional to do so. Petitioners assert a retroactive statute violates due process ***whenever*** it is a substantive law. [I.B. at 18 ("The due process clause of the Florida Constitution prohibits the Legislature from retroactively enforcing substantive changes in the law.")]. That is incorrect.

IV. EVEN APPLYING THE MARONDA HOMES TEST AS SUGGESTED BY PETITIONERS, IT DOES NOT BAR RETROACTIVE APPLICATION OF THE ACT

In the first inquiry of the two-prong analysis of a statute's retroactive application, "the Court must ascertain whether the Legislature intended for the statute to apply retroactively." *Menendez*, 35 So. 3d at 877. If the Legislature expressly intends so, that is the end of the statutory construction. *See Chase Fed.*, 737 So. 2d at 499. In the absence of express legislative intent, courts apply the presumption against retroactivity to interpret the statute—if the statute is found to be remedial, the presumption generally does not

apply. See *Landgraf*, 511 U.S. at 275 (“Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. [] We [have] noted the diminished reliance interests in matters of procedure.”). The presumption against retroactivity applies when a statute is found to be substantive. See *Landgraf* at 268-70. This entire matter of interpretation takes place in the first prong of the analysis, distinct from whether a statute’s retroactive application would violate a constitutional right.

A. The Legislature expressly intended the retroactive application of the Act

The Legislature clearly intended its amendments to the unclaimed property statute to “apply retroactively,” unequivocally stating:

Notwithstanding any other provision of law, an insurer shall compare the records of its insured’s life or endowment insurance policies...that were in force at any time on or after January 1, 1992 against the [DMF] once to determine whether the death of an insured... is indicated and shall thereafter use the [DMF] update files for future comparisons.

An insured...is presumed deceased if the date of his or her death is indicated by the comparison required under paragraph (a) unless the insurer

has in its records competent and substantial evidence that the person is living.

§§ 717.107(8)(a), (c). Correspondingly, the Legislature set out that the “date of death of the insured” initiates the five-year period upon which funds owing under a life insurance policy are presumed unclaimed. § 717.107(1). The Legislature thus required insurers to search the DMF back to 1992, to retroactively presume the insured’s date of death to be that in the DMF records, and to retroactively make the date of death the trigger for the five-year dormancy period.

Regarding such retroactive legislation, the U.S. Supreme Court has reasoned “a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.” *Landgraf*, 511 U.S. at 268. Concurring, Justice Scalia confirmed the presumption against retroactive application of a statute affecting substantive rights, “absent clear statement to the contrary” in the legislative text. *Id.* at 286. Regardless of the methodology to interpret a statute as substantive, the statute applies retroactively if the legislature provides a “clear statement” of that intent. *Id.* at 286-87.

Similarly, this Court has recognized the “general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary. *Laforet*, 658 So. 2d at 61; *see also Chase Fed.*, 737 So. 2d at 499; *Menendez*, 35 So. 2d at 877. The parties agree that the Act clearly states the legislative intent that it applies retroactively. [I.B. at 2]; *see also Patronis*, 299 So. 3d at 1156.

Foreign cases cited by Petitioners are matters of statutory interpretation easily distinguishable from the Act. In *United Insurance Co. of America v. Kentucky*, No. 2013-CA-000612, slip op. (Ky. Ct. App. Aug. 15, 2014), the court did not apply the statute retroactively because it found it “does not specifically provide for retroactive enforcement to insurance contracts issued prior to its effective date.” [R. 451]. Likewise, in *American Express Travel Related Servs. Co. v. Kentucky*, 730 F. 3d 628, 633 (6th Cir. 2013), the court held the “Amendment does not expressly declare that the change was meant to be applied retroactively.”

This should be the end of the Court’s two-prong analysis of Petitioners’ facial challenge. The Act clearly evidences legislative intent to apply the statute retrospectively; and, without any claim

retroactive application would deprive them of any protected life, liberty or property interest, the Act is constitutional.

B. The Act is remedial and simply clarifies the insurers' existing statutory obligations

Even in the absence of the Legislature's clear statement of intent to apply the statute retroactively, the first prong of this Court's two-prong analysis determines whether it is presumed to apply prospectively, or allowed to apply retroactively, based on whether the statute is substantive or remedial. *See Chase Fed.*, 737 So. 2d at 499, relying upon *Landgraf*, 511 U.S. at 280; *Hassen v. State Farm Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996); *see also Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n*, 67 So. 3d 187, 194-96 (Fla. 2011). Applying the *Maronda Homes* statutory test, the Act simply clarifies insurers' existing obligations and duties to remit unclaimed property to the state, and it is remedial in nature and can be applied retroactively.

Chapter 2016-219 is remedial because it "operate[s] to further a remedy or confirm rights that already exist." *Maronda Homes*, 127 So. 3d at 1258. It is also a procedural because it "provides the means

and methods for the application and enforcement of existing duties and rights.” *Id.* at 1272.

As the First District observed, unclaimed property statutes are “inherently remedial.” *Patronis*, 299 So. 3d at 1157. The FDUPA has the same remedial objective as the Uniform Act enacted by dozens of states, which is:

to protect the interests of owners, to relieve the holders from annoyance, expense, and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall of the holders thereof.

Green, 456 So. 2d at 1312 (internal quotation marks omitted). In other words, its purpose is to protect the vested interests of owners of unclaimed property, and in the event the owners cannot be located, for the unclaimed property to benefit the general public—rather than the holders who have no such vested interest. *See* § 717.139(2), Fla. Stat. (2020) (purpose of Chapter 717 is “protecting the interest of missing owners of property, while providing that the benefit of all unclaimed and abandoned property shall go to all the people of the state”).

This Court has explained that “[a] remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.” *Adams v. Wright*, 403 So. 2d 391, 394 (Fla. 1981). The Act clearly meets this definition. The need for remedial legislation is clear: insurers were not disbursing insurance proceeds to beneficiaries after the death of insureds or remitting unclaimed funds to the state as conservator of those funds. This resulted in hundreds of millions of dollars in insurance proceeds going unpaid or unremitted to the state as unclaimed property.

Retroactive application of the Act accomplishes the Legislature’s desire to correct the insurers’ failure to timely remit unclaimed property, a correction needed if FDUPA’s purpose is to be achieved. As this Court has noted, “[i]f a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes” irrespective of the “procedural/substantive analysis” found in Florida case law. *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1027 (Fla. 1986). Thus, retroactive application should apply here.

Furthermore, the Act is generally consistent with the pre-existing duties of insurers to pay beneficiaries when insureds pass away, settle policy claims upon proof of death, report and remit unclaimed proceeds within the five-year dormancy period, and conduct reasonable searches to identify the insured's status and locate beneficiaries. *Patronis*, 299 So. 3d at 1159. Thus, Chapter 2016-219 remedies or confirms "rights that already exist" for beneficiaries and the state under the Act. *Maronda Homes*, 127 So. 3d at 1258.

For instance, before the Legislature amended section 717.107, Fla. Stat., insurers were already statutorily obligated to: (1) pay beneficiaries the proceeds due under life insurance policies, § 717.107(3) (2015), Fla. Stat.; (2) settle claims upon proof of death and surrender of the policy, § 627.461, Fla. Stat.; (3) report and remit to the Department proceeds unclaimed five years after proceeds became "due and payable," § 717.107(1), Fla. Stat. (2015); (4) use reasonable and prudent methods, including searching nationwide databases, to find the apparent owner of presumptively unclaimed property, § 717.101(9), 717.117(4), Fla. Stat.; and (5) conduct a reasonable search for policyholders if the law or policy terms required

notice that the non-forfeiture provision would be applied, § 717.107(5), Fla. Stat.

The amendments to subsection 717.107(8) ensuring insurers search the DMF or some equivalent to determine if an insured has died not only reflect other search and due diligence obligations already found in Chapters 627 and 717 but also further the statutory purpose of protecting owners of unclaimed property and ensuring payment of insurance benefits owed to beneficiaries under the insurance policies. *See* § 717.139(2). By the same token, the requirement that insurers undertake various acts to confirm insureds' deaths upon identifying their names in the DMF and attempt to contact beneficiaries, *see* § 717.107(9), also furthers the existing statutory purpose of identifying beneficiaries, paying insurance proceeds owed, and remitting unclaimed proceeds to the state where beneficiaries cannot be located. *See* § 717.139(2).

Finally, the amendment to the five-year dormancy trigger is also remedial. Petitioners incorrectly refer to this amendment as a “new escheat right.” [I.B. at 27]. The dissent below similarly refers to this amendment as “a new accelerated escheat obligation.” *Patronis*, 299

So. 3d at 1165 (Winokur, J., dissenting). These characterizations of the amendment are incorrect.

The five-year dormancy period was not amended; the Act simply clarified when the five-year dormancy period begins. *Compare* § 717.107 (2015) *with* § 717.107 (2020). The amount of time insurers hold insurance proceeds after an insured's death but before payment to beneficiaries or remittance to the state will likely decline, but the five-year dormancy period itself has not changed. That the amendment would result in insurers holding insurance proceeds (in which they have no vested rights) for a shorter period of time only underscores the remedial purpose and effect of the Act.

Where the DMF search reveals insureds who died many years or decades before the statute's enactment and therefore after five years from date-of-death dormancy period has elapsed, the 2016 amendments provide a safe harbor that protects insurers. Under the safe harbor, insurers are insulated from fines or penalties for failing to report or remit payment of unclaimed insurance proceeds until May 1, 2021. *See* ch. 2016-219, § 2, Laws of Fla. Thus, insurers receive a new dormancy period for reporting and remitting unclaimed proceeds so long as they perform a comparison of their records with

the DMF sometime within five years of the Act's enactment. Given the remedial objective of this amendment and the protection afforded to insurers through the safe harbor, the Act's retroactive application is reasonable and constitutional. *See City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 444 (Fla. 1978) ("The constitutional objection that retroactive application . . . results in a deprivation of due process is obviated where the statute . . . [provides] a reasonable time to take certain steps to preserve their interest.").

More fundamentally, characterizing the insurers' obligation to remit unclaimed property within the five-year dormancy period as an accelerated escheat obligation conflates the insurers' remittance obligation under Chapter 717 with escheatment by the state in Chapter 716. [I.B. at 27]; *Patronis*, 299 So. 3d at 1165 (Winokur, J., dissenting). Remittance under section 717.107 is an insurer's obligation as the holder of unclaimed property to remit that property to the state as the conservator of those funds. The state then has a statutory obligation to make further efforts to locate the owners of the claimed insurance proceeds. *See* § 717.118, Fla. Stat. ("It is specifically recognized that the state has an obligation to make an effort to notify the owners of unclaimed property in a cost-effective

manner.”). Funds that are not used for the payment of unclaimed property claims and for the costs to administer the unclaimed property program are deposited in the State School Fund to be used for free public schools. See § 717.123(1), Fla. Stat., Art. IX, § 6, Fla. Const.

In sum, Chapter 2016-219 is remedial in nature and addresses the insurance industry’s documented failure to meet their obligations to their insureds. Thus, Petitioners’ claim fails on this alternative basis.

C. The Act does not impair a vested right, impose or create a new obligation in connection with a previous transaction, or impose new penalties

Even if the *Maronda Homes* statutory test applies as Petitioners argue, their claim fails because the Act does not operate in a manner that deems it substantive. See 127 So. 3d at 1272. See also *Laforet*, 658 So. 2d at 61; *Menendez*, 35 So. 3d at 877.

First, the Act indisputably does not impair a vested right of Florida’s insurers. [I.B. at 18-48]. Upon the death of the insureds, insurers have no vested property right to hold beneficiaries’ unclaimed insurance proceeds. Only the State of Florida has a right to hold such unclaimed funds for the benefit of the rightful owners

or use them for the public's benefit if the owners are not found after remittance. See § 717.118 (recognizing obligation of state to make efforts to contact owners of unclaimed property).

Second, the Act does not impose new obligations on the insurers in connection with a previous transaction or consideration. Again, as referenced above, the Act is generally consistent with insurers' pre-existing statutory obligations under Chapter 717. [A.B. at 45-51]. Furthermore, there is no allegation that the Act alters or impairs Petitioners' **contractual** obligations under insurance policies that existed at the time of enactment; if it did, Petitioners would not have abandoned their impairment of contract claim. Instead, the Act's requirements clarify existing statutory obligations relating to searching and paying insurance proceeds owed or remitting such abandoned proceeds to the state. These statutory obligations relate to insurance transactions that are not yet complete because the unclaimed proceeds have not been paid (or remitted).

Third, should the Court address this concern, the statute does not create new penalties for past conduct. Procedurally, as the First District noted, this Court need not reach this question because the

trial court did not address it. Should the Court reach the issue, Petitioners' argument should be rejected.

Petitioners claim the penalties for failing to comply with the Act's requirement to compare company records against the DMF or some equivalent are "particularly problematic" because insurers are only required to retain records for five years after the policies either lapsed or were terminated or after the proceeds became reportable as unclaimed property. [I.B. at 39-40 (citing §§ 626.748 and 717.1311)]. And thus, according to Petitioners, insurers were under no duty to retain many of the insured records they are now required to search. [I.B. at 40].

Petitioners' theoretical problem makes no sense in practice. If a policy had lapsed or been terminated before January 1, 1992, there is no contractual basis to remit insurance proceeds and therefore no basis to perform the comparison of the insurers' records with the DMF. Additionally, prior to the 2016 amendments, unclaimed life insurance proceeds did not become reportable under subsection 717.107(1) until five years after (1) the insurer receives proof of death and surrender of the policy, (2) the insurer learned of the insured's death, or (3) the insured reached the limiting age

according to the mortality table of the policy. *Thrivent*, 145 So. 3d at 180-82 (analyzing § 717.107, Fla. Stat. (2015)). Thus, if the unclaimed benefits had not yet become reportable under the old version of the statute, then insurers were statutorily obligated to maintain the records anyway. As such, the records insurers are required to search should still be maintained.

Petitioners also claim the five-year “grace period” under the Act does not make retroactive application of the statute valid because (1) the statute imposes new penalties on past conduct, and (2) the safe harbor is inadequate because it only applies to insurers’ obligations to report and remit unclaimed property and not their obligation to search and notify beneficiaries. [I.B. at 44]. Petitioners are incorrect.

Again, under the Act, any potential penalties for failing to comply with the 2016 amendments cannot be imposed until May 1, 2021, which was five years after enactment. Thus, the penalties themselves are prospective only and do not apply to past conduct at all. Instead, the statute provides for penalties for future failures to comply with the 2016 amendments and gives insurers five years to do so before any penalties can be imposed. That a life insurance

policy was issued before the enactment of the statute does not create a new penalty for a past transaction. As explained above, a life insurance transaction is not complete until unclaimed life insurance benefits are paid, and even Petitioners do not contend the Act impairs their contractual rights under existing insurance policies.

Additionally, the contention that the five-year safe harbor in the Act, § 2 does not apply to both the insurers' report and remittance obligation and search and notification obligation should be rejected. Petitioners' Initial Brief cites various provisions of Chapter 717 that impose fines for failing to comply with provisions of the chapter. [I.B. at 36-37 (citing §§ 717.132(3), 717.134(1), 717.134(2), 717.134(4)]. All fines under section 717.134 relate to the insurers' reporting and remittance obligation that Petitioners concede falls under the five-year safe harbor. [I.B. at 37 (noting § 717.134 "imposes a potential penalty . . . for each failure to report or deliver unclaimed property.")].

The only remaining statute cited is subsection 717.132(3). [I.B. at 36]. This statute allows for the imposition of a fine for failing to comply with any provision of Chapter 717, which would arguably

include an insurer's search and contact obligation under any provision of the chapter. See § 717.132(3) (noting fines may be imposed against "any person found to have violated any provision of this chapter, any rule or order promulgated under this chapter, or any written agreement entered into with the department").

But the imposition of the fine is discretionary—not mandatory. See § 717.132(3) (noting "the department or a court of competent jurisdiction may impose fines . . ."). Thus, even assuming the absurd result that Chapter 2016-219, § 2's safe harbor does not apply to insurers' search and contact obligations, there is no automatic imposition of a fine for failing to comply with the 2016 amendments.

Thus, even applying the statutory test outlined in *Maronda Homes*, Petitioners' challenge to the retroactive application of the statute fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the First District Court.

DATED this 9th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief complies with the type size and style requirements of Rule 9.45(b), Florida Rules of Appellate Procedure and has been prepared in Bookman Old Style, 14 Point Font. This brief complies with the type volume limitations set forth in Rule 9.210(a)(2)(B), Florida Rules of Appellate Procedure. This brief contains 10,694 words, excluding the parts of the brief exempt by Rule 9.045(e).

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