To Be Argued By:
SETH ARD
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CTQ-2022-00002
U.S. Court of Appeals, Second Circuit Docket No. 21-1830

Court of Appeals

STATE OF NEW YORK

ANDREW NITKEWICZ, as Trustee of THE JOAN C. LUPE FAMILY TRUST
on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

—against—

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF RELATED LITIGATION

There are no related cases other than the appeal pending in the United States Court of Appeals for the Second Circuit.

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JURISDICTIONAL STATEMENT

This appeal was certified to this Court under 22 N.Y.C.R.R. § 500.27 [a] and 2d Cir. R. 27.2 [a] by the United States Court of Appeals for the Second Circuit. *Nitkewicz v. Lincoln Life & Annuity Co. of New York*, 49 F4th 721 [2d Cir. 2022]; Record on Appeal ("Rec.") 379. This Court accepted certification. *Nitkewicz v. Lincoln Life & Annuity Co. of New York*, 2022 N.Y. Slip Op. 73207, 2022 WL 11485338 [Oct. 20, 2022]; Rec. 378.

QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit certified the following question to this Court:

> Whether a planned payment into an interest-bearing policy account, as part of a universal life insurance policy, constitutes a "premium actually paid for any period" under the refund provision of New York Insurance Law Section 3203(a)(2).

The Court should answer the question affirmatively.

SUMMARY OF ARGUMENT

New York law prevents insurers from charging owners for life insurance months after insureds are already dead. Insurance Law § 3203 (a) (2), which is applicable to "[a]ll life insurance policies" not expressly excluded from its scope, provides: "[I]f the death of the insured occurs during a period for which the premium has been paid, the insurer shall add to the policy proceeds a refund of any premium actually paid for any period beyond the end of the policy month in which

such death occurred" (the "Statute"). The Statute contains exceptions for certain kinds of policies, but none for universal life insurance.

Plaintiff-Appellant Andrew Nitkewicz ("Plaintiff") owned a universal life insurance policy. It is undisputed that Plaintiff paid an "ANNUAL" $53,877.72 premium – so designated in the Policy – on May 7 of every year that the Policy was in force. And it is undisputed that, as a result of those annual payments, Plaintiff's insured was covered throughout the life of the Policy. Indeed, under a rider to the policy, that coverage was expressly "guaranteed" for one year provided timely payment of the annual premium. The insured died five months after the last annual premium was paid on May 7, 2018. In these situations, the Statute requires a pro-rated premium refund.

Yet Defendant-Respondent, Lincoln Life & Annuity Company of New York ("Lincoln Life"), claims that the annual premium was not "actually paid" and was not "for any period," so Lincoln Life gets to keep $31,428.67 paid for the seven months when it had no coverage obligation. The United States Court of Appeals for the Second Circuit certified to this Court the question of whether the Statute applies to Plaintiff's premium payment.

To an ordinary reader of English, this is a very easy case. How can it be said that the annual premium for which Plaintiff wrote a check on May 7, 2018 was not "actually paid," when Lincoln Life got the money and never returned it? And how

can it be said that that the premium was not "for any period," when the Policy says it is for an "ANNUAL" period, and it was in fact the eighth in a series of premiums paid annually, in identical amounts, as specified in the Policy?

To a person of common sense looking for a fair result, this case is equally easy. Lincoln Life provided insurance coverage for five months, but has been paid for a year of coverage – and the New York Legislature passed a statute squarely aimed at preventing insurers from retaining such a windfall. This case really is that simple. That is why Athene Life, another insurance company in a situation essentially identical to Lincoln's, processed Plaintiff's refund under the Statute.

An affirmative answer to the certified question is warranted for three reasons.

First, Plaintiff "actually paid" the premium. He wrote a check to Lincoln Life for $53,877.72 in May 2018. Lincoln Life cashed the check and kept the money. But Lincoln Life has argued this premium was not "actually paid" because a majority of that premium payment was held in a "policy account" until it was applied by Lincoln Life to the "cost of insurance." Lincoln's Life's internal application of the funds, however, has nothing to do with whether a premium is "actually paid." Plaintiff actually paid the premium

Lincoln Life has also argued that the premium was not "actually paid" because Plaintiff could withdraw the money he paid at any time. This argument is

both legally irrelevant and factually wrong. The Statute says "actually paid"; it says nothing about whether the premium was subject to withdrawal. And, in any event, it is not true that Plaintiff could simply withdraw the money at any time. Rather, Plaintiff could at most partially *cancel* his insurance and *lower* his death benefit – what is called a "partial surrender" – in exchange for getting some money back, after Lincoln deducts hefty fees.

Second, the annual premium was paid "for any period" – here, one year. The word "for," used in a context like this, refers to the "object, aim, or purpose of an action" (*see* American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=for). The Policy itself says that the purpose of the "ANNUAL" planned premium was for it to be paid exactly once per year, on what the Policy calls the "PREMIUM DUE DATE," until the next annual payment became due. And that is exactly what Plaintiff did, every single year.

Lincoln Life does not give coverage for free, and Plaintiff would have received no coverage for any time period if he had not paid the annual premiums. But Lincoln Life, having provided seven years and five months of coverage, claims it is entitled to retain eight annual premiums, in full, despite the Statute's requirement of a partial refund. This does not make sense.

The essence of Lincoln Life's argument is that, in universal life policies, the premium payment is not "for any period" since only monthly cost-of-insurance deductions extend the coverage, and only one month at a time. But the Statute calls for a refund of premiums, not deductions. And an annual premium payment is plainly for a year. The Statute further forecloses Lincoln Life's argument by expressly contemplating that universal life premiums can be paid to keep a policy "in force for three months" (*see* Ins. L. § 3203 [a] [1]).

Third, on both the "actually paid" and "for a period" issues, Lincoln Life has sought to turn this simple case into a complicated one by dwelling on some features of universal life insurance. But Lincoln Life's arguments lead, if anywhere, to the conclusion that the Statute does not apply to universal life policies at all – and it is clear, from the Statute's text and context, that it does apply to universal life, particularly because the Statute expressly applies to "[a]ll life insurance policies, except as otherwise stated herein," and universal life is not one of the listed exceptions. A ruling for Lincoln Life effectively rewrites the Statute to make universal life a new exception.

Finally, at a minimum, the answer to the certified question is "yes" "on the facts presented" by this case and Policy (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC*, 93 NY2d 229, 236 [1999]). Plaintiff paid for a feature called a Coverage Protection Guarantee Rider

("CPGR"). The CPGR is what it sounds like: a way of *guaranteeing* the Policy stays in force for a certain period of time. Plaintiff's annual planned premium amount – $53,877.72 – was set up to match the amount needed to keep the CPGR in place. Under the terms of the CPGR, Plaintiff's policy was *guaranteed* to stay in force for one year at a time, for the duration of the policy, provided he timely paid the annual planned premium. Accordingly, his annual premium payment *guaranteed* coverage for a full year and was functionally equivalent to a premium paid into a term life policy, which Lincoln Life agrees is covered by the Statute.

For all these reasons, this Court should answer the certified question affirmatively.

THE FACTS

A. Plaintiff's Life Insurance Policy and Its "Annual" Premium

In 2011, Plaintiff's predecessor and then-trustee of the Joan C. Lupe Family Trust, purchased a life insurance policy for the Trust from Defendant-Appellee, Lincoln Life (Rec. 8-9, Compl. ¶¶ 4, 9). The Policy is a "flexible premium adjustable" (i.e., "universal life") permanent-life insurance policy with a $1.5 million death benefit (Rec. 8, Compl. ¶ 4; Rec. 62). This Policy had a $53,877.72 "annual" "planned premium."

The "annual" period for this premium is emphasized throughout the Policy. At the beginning of the Policy is a specification page listing the "ANNUAL" period in capital letters:

INSURED:	JOAN C LUPE
POLICY NUMBER:	LJ7197774
FORM NUMBER:	UL 5049N
PLANNED PREMIUM:	$53,877.72 ANNUAL
MINIMUM SPECIFIED AMOUNT	$100,000

(Rec. 65). Likewise, the application for the Policy, in a section titled "Billing Instructions," asked Plaintiff to indicate whether the planned premium would be "Annual," "Semi-Annual," "Quarterly," or "Monthly" (Rec. 10, Compl. ¶ 15, Rec. 100). Plaintiff elected "Annual":

BILLING INSTRUCTIONS *(As available per product)*

23. Premium Mode: ☑ Annual ☐ Semi-Annual ☐ Quarterly ☐ Monthly (EFT) ☐ Other ________

(Rec. 100).

Various other Policy provisions make clear that Plaintiff's premium was for an "annual" period. The term "planned premium" is defined as "the amount of premium You intend to pay," and the "premium frequency" is defined as "how often You intend to pay the Planned Premium" (Rec. 75). Further, Lincoln Life promised to send "payment reminder notices" when the annual planned premiums

were due, which is described as the "PREMIUM DUE DATE" (Rec. 64, 75). Because this was a universal life policy, Plaintiff could make "changes in premium frequency and increases or decreases in the planned premium" by first providing a "written notification" to Lincoln Life (Rec. 75). But for the duration of this Policy, Plaintiff made no such change. Instead, Plaintiff timely paid the $53,877.72 annual premium every year (Rec. 11, Compl. ¶ 18).

B. Lincoln Life Used Plaintiff's Premium Payments to Provide Insurance Coverage.

Because this was a universal life policy, it included a cash value component, known as the "Policy Value" or policy account (Rec. 62). This account is "where your premiums go" (*id*). But before the premiums go there, a significant portion (15%) goes to a load charge that Lincoln Life always keeps—here, $8,081.66—which never makes its way to the policy account (*see* Rec. 65 [defining the "guaranteed net premium factor" as "85.00% of premium paid"]; Rec. 62 [explaining that this charge is "assessed against the premium before it is applied to the Policy Value"]). This load charge is "applied to cover the company's cost of insurance and other expenses" (Rec. 62). So in this case, $8,081.66 (15%) of Plaintiff's annual $53,877.72 premium payment became immediate revenue to Lincoln Life.

As for the balance, although that money initially goes to the policy account, Lincoln Life deducts monthly charges from that policy account, including for the

cost of insurance, and then transfers the charged amount to Lincoln Life's own account, where it becomes revenue to Lincoln Life. The remaining policy value accumulates interest (Rec. 62). As will be shown below, the movements between Lincoln Life accounts of money Plaintiff had already paid are irrelevant to the question raised in this case: whether the premiums were "actually paid" and paid "for any period."

The policyholder may partially "*surrender*" the Policy in exchange for withdrawing some of the funds in the account. But to do so, the policyholder must partially *cancel* the insurance and thereby *lower* the death benefit, in an amount equal to the reduction in the policy account (Rec. 79-80 [in a partial surrender, "[t]he death benefit will be reduced by an amount equal to the reduction in the Policy Value."]). Further, Lincoln Life charges both a "surrender fee" and a "surrender charge" (Rec. 66, 79). A policyholder can also take out a loan against the policy value, which carries a 6% interest rate, and that loan must be repaid into the policy account, or the insurance is forfeited (Rec. 66, 81).

When the insured dies, Lincoln Life must pay the death benefit (*see* Rec. 77 [describing death benefit Option 1, which is what Plaintiff selected here]).

C. Plaintiff's Coverage Protection Guarantee Rider Guaranteed Coverage Provided Timely Payment of the Annual Premium.

There are two main and separate tests for determining whether a universal policy remains in force. First, the policy remains in force provided the annual premium payment generates sufficient cash value in the policy (less any debt) to cover the monthly charges (Rec. 72, 79). Second, and independently, policyholders can purchase coverage riders that guarantee coverage for a specified period of time provided timely payment of what are often fixed premiums. Plaintiff's Policy remained in force under both tests at the time of the insured's death.

Here, Plaintiff paid for a rider called the Coverage Protection Guarantee Rider ("CPGR"). Plaintiff's CPGR guaranteed coverage for each annual period after an annual premium was paid, provided the annual premium was fully paid on each "PREMIUM DUE DATE" (Rec. 64, 87). This is called a secondary guarantee: the CPGR *guarantees* coverage even if the cash account value of the policy is otherwise insufficient to cover the monthly deductions (*see id.* at 87 [the CPGR "can ensure that Your coverage will continue even if the Cash Surrender Values are insufficient to cover the monthly deductions"]).

Summary of Rider Benefits The addition of this Rider to Your policy can ensure that Your coverage will continue even if the Cash Surrender Values are insufficient to cover the monthly deductions.

(Rec. 87).

Because of the CPGR, timely payment in full of the annual planned premium guaranteed coverage for the annual period during which the insured died. When premiums are paid in this way, as Plaintiff did, the policy functions like a term life insurance policy. Every year, Plaintiff timely paid the $53,877.72, annual planned premium, thus guaranteeing coverage for the full annual period (Rec. 11, Compl. ¶ 18).

D. Lincoln Life Retained a Portion of the Annual Premium Paid for the Period After the Insured Had Already Died.

This case is about Plaintiff's 2018 annual premium payment. As he did every year, Plaintiff timely paid this annual premium (Rec. 11, Compl. ¶ 18). On May 7, 2018, he sent Lincoln Life a check for the full $53,877.22 (*id.*). These facts are undisputed.

The insured died on October 6, 2018 – with seven months remaining on the May 2018 annual premium payment (*id.*). In these situations, New York law requires that life insurance companies provide a premium refund for the period after the insured is already dead: "[I]f the death of the insured occurs during a period for which the premium has been paid, the insurer shall add to the policy proceeds a refund of any premium actually paid for any period beyond the end of the policy month in which such death occurred." Ins. Law § 3203 [a] [2] (the "Statute").

Lincoln Life, however, paid only the Policy's death benefit; it did not refund the portion of the May 2018 annual premium paid for the seven months after the insured's death (Rec. 7-8, Compl. ¶¶ 1, 4). Lincoln Life thus retained $31,428.67 of premium paid for the period after the insured was already dead, in violation of the Statute.

E. Another New York Insurance Company Refunded the Remaining Portion of the Annual Premium on Another Universal Life Policy Covering the Same Insured.

By contrast, another New York insurer, Athene Life Insurance Company of New York ("Athene Life"), complied with the Statute by promptly refunding to Plaintiff the portion of the annual planned premium paid for the period after death on another universal life policy covering the same insured (Rec. 9, Compl. ¶ 7). As the Complaint alleges, the circumstances were parallel: the Athene Life policy and Lincoln Life policy were both universal life policies; they covered the same insured; Plaintiff paid annual premiums on both; the insured died before the expiration of the annual premium on both. The only difference is that Athene Life paid the statutorily required premium refund for the remainder of the annual period, but Lincoln Life refused to do so.

Lincoln Life has tried to minimize the import of Athene Life's (correct) interpretation of the Statute by mischaracterizing that refund as a "settle[ment]" (*e.g.*, 2d Cir. Dkt. 38 at 52). That argument is improper because courts must

"accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference" (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). It is reasonable to infer that Athene Life issued the refund because it agrees with Plaintiffs' interpretation of the Statute—namely, that insurance companies may not charge for after the insured is already dead. In any event, Lincoln Life's "settlement" suggestion is baseless. It appears nowhere in the Complaint. And there was no settlement: no release, no settlement agreement, no term sheet, no conditions imposed, no lawsuit, no mediation. Athene Life "didn't dispute" its obligation and "promptly paid the refund" (Rec. 365; *see also* Rec. 25).

PROCEDURAL HISTORY

Plaintiff filed a class action, suing Lincoln Life for breach of contract, seeking the prorated refund of his $53,877.72 annual premium (Rec. 7). This is a breach of contract case because New York law implies the statutory refund requirement into the Policy (*see* Ins. L. § 3203 [a] ["All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions . . ."].) There is no dispute about this. In Lincoln Life's words: "The Parties to this case do not dispute that the Section 3203(a)(2) language relevant to this case is implied by law (and neither appears nor needs to appear in the Policy itself)" (2d Cir. Dkt. 38 at 32).

Lincoln Life moved to dismiss the claim under Rule 12(b)(6) (Rec. 27). The United States District Court for the Southern District of New York (Cronan, *J.*) granted Lincoln Life's motion and dismissed the Complaint with prejudice and without leave to amend, holding that Ins. Law § 3203 [a] [2] did not apply to Plaintiff's annual premium payment as a matter of law (*see* Rec. 325.; *Nitkewicz v. Lincoln Life & Annuity Co. of N.Y.*, 20-cv-6805 (JPC), 2021 WL 2784551 [SD NY July 2, 2021]).

On appeal, the United States Court of Appeals for the Second Circuit observed that "neither Lincoln Life nor [Plaintiff] can point to any decision of the New York courts in support of their preferred interpretations" of the Statute (Rec. 392). "Whether the statute requires insurance companies to refund Planned Premiums of the sort [Plaintiff] paid here thus presents an unresolved policy decision that the New York Court of Appeals is better situated than we are to make" (Rec. 393). The Second Circuit therefore certified the following question to this Court:

> Whether a planned payment into an interest-bearing policy account, as part of a universal life insurance policy, constitutes a "premium actually paid for any period" under the refund provision of New York Insurance Law Section 3203(a)(2).

(Rec. 398).

Plaintiff respectfully submits this Court should answer the certified question affirmatively.

THE STATUTE

The Statute at the heart of this case is New York Insurance Law § 3203 (a) (2). We quote here the Statute and some preceding context in section 3203 (a), emphasizing the most important language:

> (a) ***All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions,*** or provisions which the superintendent deems to be more favorable to policyholders:
>
> (1) that, ***for policies in which the amount and frequency of premiums may vary***, after payment of the first premium, the policyholder is entitled to a sixty-one day grace period, beginning on the day when the insurer determines that the policy's net cash surrender value is insufficient to pay the total charges necessary to keep the policy in force for one month from that day, within which to pay ***sufficient premium to keep the policy in force for three months*** from the date the insufficiency was determined….
>
> (2) that if the death of the insured occurs within the grace period provided in the policy, the insurer may deduct from the policy proceeds the portion of any ***unpaid premium*** applicable to the period ending with the last day of the policy month in which such death occurred, and ***if the death of the insured occurs during a period for which the premium has been paid, the insurer shall add to the policy proceeds a refund of any premium actually paid for any period beyond the end of the policy month in which such death occurred,*** provided such premium was not waived under any policy

provision for waiver of premiums benefit. ***This paragraph shall not apply to single premium or paid-up policies.***

ARGUMENT

The answer to the certified question is "yes." The payment of a planned annual premium to pay for a universal life insurance policy constitutes a "premium actually paid for any period" under the Statute.

This a very easy case under plain English. The annual premium for which Plaintiff wrote a check on May 7, 2018 was "actually paid" when Lincoln Life got the money and never returned it. That annual premium was "for a period": the Policy says it is for an "ANNUAL" period, and it was in fact the eighth in a series of premiums paid annually, in identical amounts.

Lincoln Life has sought to make the case less simple by dwelling on some of the features of universal life insurance. But Lincoln Life's arguments, at best, imply that the Statute does not apply to universal life policies at all – but it is clear from the Statute's text and context that it does apply to universal life.

This Court "begin[s] our analysis with the language of the statute, recognizing that our primary consideration is to ascertain and give effect to the intention of the Legislature. In this endeavor we are guided by the principle that the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Beck*

Chevrolet Co. v. Gen. Motors LLC, 27 NY3d 379, 389-90 [2016] [citations omitted]).

There is no dispute between the parties that Plaintiff's "annual" "planned premium" qualifies as a "premium" under the Statute (*see* Rec. 333 ["Both parties seem to agree, at least for the purposes of this motion, that the Planned Premium paid on May 7, 2018 was a 'premium' under section 3203(a)."]). The dispute is whether this annual premium payment was "actually paid" and "for any period." The plain language of the Statute demonstrates that the answer is "yes."

I. The Premium was "Actually Paid."

Plaintiff "actually paid" the annual premium when he wrote the check for $53,877,72, and Lincoln Life cashed it. There is no dispute about this (Rec. 11, Compl. ¶ 18; Rec. 39). The term "actually paid" means what it says: a premium is "actually paid" when there is a payment that is actually made, as it was here.

That is the plain meaning of the term, but the Statute makes this even more clear. In the very same subsection, the Statute distinguishes a premium that is "actually paid" from a three-month grace-period premium that was not paid, which the Statute refers to as an "unpaid premium" (*see* § 3203 [a] [2]). Here, there was no unpaid premium; rather, Plaintiff paid the annual premium – a check was actually written and cashed – and hence the premium was "actually paid" (*see also* American Heritage Dictionary,

https://ahdictionary.com/word/search.html?q=actually [Definition of "Actually": "in fact; in reality"]).

Lincoln Life's argument on "actually paid" was summarized in the Second Circuit's opinion. In short, Lincoln Life claims that only the monthly deductions "actually pay" for insurance.

> Lincoln Life argues that the phrase denotes "the actual transfer of funds in exchange for insurance coverage." In support, the company quotes the District Court's observation that "funds do not actually pay for any insurance until they are taken from the Policy Account via the monthly deduction." "Unless and until the monthly deduction is charged against the Policy Account," says Lincoln Life, "the Policy Account value is not 'paid' but held in consideration of the non-insurance component of the Policy."

(Rec. 391).

This argument lacks merit. Surely any purchaser or seller of insurance understands that a premium is "actually paid" when the policyholder sends the insurance company a check, not when the insurance company transfers the proceeds of the check from one account to another. As an example, if someone actually pays their mortgage once per year into an account controlled by the mortgagee, each annual mortgage payment is still "actually paid" and "for" the annual period, even if the bank only deducts 1/12 of that amount monthly. Nor is there any basis, in the text of the Statute, the Policy, or common sense, for saying that a premium is not "actually paid" so long as the insurer is holding it in

consideration of what Lincoln Life calls "the non-insurance component of the Policy."

Indeed, the Second Circuit's summary of Lincoln's argument exposes a fundamental flaw in Lincoln Life's position: its assumption – which it merely asserts, but tellingly does not defend – that the investment aspect of universal life insurance is "non-insurance" and therefore, that premiums attributable to the savings aspect are non-premiums and are not "actually paid." But the Policy does not allocate premiums as between the savings and death benefit aspects of the policy; there is just one "annual" planned premium. And Lincoln Life does not suggest making such an allocation: to the contrary, it suggests that "there is no non-arbitrary way" to do so (Rec. 390). Lincoln's argument thus boils down to claiming that the Statute does not apply to universal life policies at all, which is meritless for the reasons discussed below (*see infra Section III*).

Lincoln Life has also argued that Plaintiff's premium was not "actually paid" because Plaintiff could withdraw the funds after they were paid. To be clear: it is undisputed that Plaintiff never did so. Regardless, that argument cannot be squared with the statutory text: a premium is "actually paid" when it is paid to the insurer, as opposed to an "unpaid premium" that is not paid. There is nothing in the statutory text that makes it relevant whether part of an "actually paid" premium could be withdrawn. By comparison, a shopper has "actually paid" for her

groceries when she pays cash for those groceries, regardless whether the store has a policy allowing her to return some or all of the groceries.

Lincoln Life's argument also misreads the Policy. Once the premiums are paid, they cannot simply be withdrawn. To begin, a significant portion of every planned premium payment (15%) goes to a load charge that Lincoln Life always keeps—here, $8,081.66—which never makes its way to the policy account (*see* Rec. 65 [defining the "guaranteed net premium factor" as "85.00% of premium paid"]; Rec. 62 [explaining that this charge is "assessed against the premium before it is applied to the Policy Value"]). This load charge can never be withdrawn because it becomes immediate revenue to Lincoln Life, which (not surprisingly) Lincoln Life "applie[s] to cover the company's cost of insurance and other expenses" (Rec. 62).

As for the remaining portion of the premium, that also cannot simply be withdrawn. Rather, in some circumstances a policyholder may partially "*surrender*" the Policy in exchange for a portion of the funds in the policy account, but only after further reductions for surrender charges and fees (*see* Rec. 66, 79). Importantly, a surrender is what it sounds like: a surrender results in the partial *cancellation* of the policy with a corresponding decrease to the policy's death benefit (*see* Rec. 79-80 ["The death benefit will be reduced by an amount equal to the reduction in the Policy Value. If Death Benefit Option I is in effect, the

Specified Amount will be reduced by an amount equal to the reduction in the Policy Value."]).

So, while legally irrelevant, as a factual matter, Lincoln Life is incorrect to argue that premium payments are not "actually paid" because they allegedly "remain accessible to the owner" (Rec. 37). The premium here was "actually paid" when the check was sent, and Lincoln cashed that check.

II. The Premium Was Actually Paid "For Any Period."

Applying the plain meaning of the words in the Statute and Policy, the annual "planned premiums" were also "for" a period—one year.

The Policy makes clear that Plaintiff's annual premium was paid "for a period" of one year. The Policy's specifications page lists an "ANNUAL" "PREMIUM" of $53,877.72.

INSURED:	JOAN C LUPE
POLICY NUMBER:	LJ7197774
FORM NUMBER:	UL 5049N
PLANNED PREMIUM:	$53,877.72 ANNUAL
MINIMUM SPECIFIED AMOUNT	$100,000

(Rec. 65).

The application for the Policy required Plaintiff to indicate whether the premium would be "Annual," "Semi-Annual," "Quarterly," or "Monthly" (Rec.

10, Compl. ¶ 15, Rec. 100). Plaintiff elected "Annual." Further, the Policy describes the planned premium as the payment the policyholder "intend[s]" to pay, and the premium frequency as "how often you intend to pay" it (Rec. 75). Each annual premium is therefore designed to be the one and only payment the policyowner pays for that year. And the Policy promises that Lincoln Life will send out "Planned Premium payment reminder notices" when due – here, every year *(id.*). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v. Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). Here, an insured would reasonably understand an "annual" premium to pay for an annual period. It is irrelevant that, as Lincoln Life has emphasized, Plaintiff *could* have chosen to make payments on some other basis. He in fact chose to pay for his insurance one year at a time, Lincoln agreed to that choice, and that is exactly what Plaintiff did every year.

Lincoln Life's argument on this "for any period" issue is similar to its argument on the "actually paid" issue – and it is again a weak argument. As summarized by the Second Circuit:

> With respect to whether the Planned Premium was paid "for any period," Lincoln Life argues that the statute requires the payment to have corresponded to a specific period of coverage, and that it is the monthly deduction, not the Planned Premium, that "actually pays for each monthly period of coverage." Lincoln Life also insists that the Planned Premium "is neither necessary nor sufficient to purchase

> coverage for any period, and [that] there is no non-arbitrary way to assign any particular or identifiable portion of a Planned Premium to any period of coverage."

(Rec. 390). Lincoln Life thus clings to the fiction that no payment occurs until Lincoln deducts money from the policy account. In its view, only monthly deductions pay for insurance, and only one month at a time.

The Statute forecloses that argument. "[W]e construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*Walsh v. New York State Comptroller*, 34 NY3d 520, 524 [2019]). The very first dictionary definition of the word "for" is – "[u]sed to indicate the object, aim, or purpose of an action" (*see* American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=for). An annual insurance premium is paid with the "object, aim, or purpose" of obtaining insurance for a year. Lincoln Life has never provided a competing dictionary definition.

Further, the Statute expressly contemplates that "premiums" (not "deductions") are paid for multi-month periods, including in the context of universal life. And the subsection immediately preceding the refund provision explains that for policies "in which the amount and frequency of premiums may vary" (i.e., universal life insurance policies), the policyholder is entitled to a grace

period "within which to ***pay sufficient premium to keep the policy in force for three months*** from the date the insufficiency was determined" (Ins. L. § 3203 [a] [1] [emphasis added]).

That grace period provision expressly recognizes that a universal life insurance premium can pay for coverage for "for three months," notwithstanding that charges are deducted on a monthly basis. And if a universal life premium can pay for coverage for three months, it can also be paid for six months, or nine months, or (as here) a year.

The Policy also contradicts Lincoln Life's argument that only monthly deductions pay for insurance. The Policy's provision governing reinstatement following termination requires the insured to "pay an amount . . . that is sufficient to keep this policy in force for at least two (2) months" (Rec. 76). This language cannot be squared with Lincoln Life's argument that the duration of coverage is, as a matter of New York law, only extended one month at a time through monthly deductions. If an insured dies two weeks after "pay[ing] an amount that is sufficient to keep this policy in force for at least (2) months," *id.*, then there would be "premium actually paid for a[] period beyond the end of the policy month in which such death occurred" (Ins. Law § 3203 [a] [2]).

Similarly, the Policy recognizes that the "duration of coverage" will "depend on" the "amount" and "timing of premium payments," among other factors (Rec.

64). So the policy itself recognizes that timely payment of premiums pays for a "duration of coverage."

Lincoln Life has also argued "there is no non-arbitrary way to assign any particular or identifiable portion of a Planned Premium to any period of coverage." (Rec. 390). But we can easily think of one, namely, the one the parties adopted, an allocation of $53,877.72 to each year. Lincoln Life effectively admits that there is no possible alternative allocation – and its proposal for dealing with that problem is that it should keep all eight years' worth of premium payments, though it provided coverage for less than seven and a half years. That is not only arbitrary. It is unfair.

The lower court in this case took Lincoln Life's side, but only by improperly rewriting the Statute. The court reasoned that "for a universal life insurance policy crafted like the one at issue here, a Planned Premium simply is not paid for any specific 'period,'" reasoning that a planned premium "**may not necessarily prevent**" the policy from lapsing (Rec. 335 [emphasis added]). The district court thus rewrote the Statute to mean that a refund is only required when the premium is paid "for any period . . . **of coverage guaranteed by the premium payment**."

The bolded phrases are found nowhere in the Statute. The lower court's ruling only makes sense if the Statute *requires* that the premium payment "necessarily prevent" the Policy from lapsing. But there is no statutory support for inserting those words into the Statute. Rather, the Statute says that a premium that

is "actually paid for any period" beyond the policy month after the death of the insured must be refunded – like the annual premium payment here. The Court improperly read the words "guaranteed coverage" into the Statute.

Tellingly, before the Second Circuit, Lincoln Life could not defend the district court's decision without likewise rewriting the Statute, despite acknowledging (correctly) that there is no "guaranteed coverage" requirement in the Statute (*compare* 2d Cir. Dkt. 38 at 25 ["[Plaintiff] argues that the District Court created a requirement that the period of coverage for purposes of Section 3203(a)(2) must . . . 'guarantee' coverage. The Court did no such thing."], *with id.* at 22 (arguing that Plaintiff's premium payment is not a payment "for" a year (nor "for any period") because the "Planned Premium is not the amount **needed to continue** the policy" [emphasis added]]). Lincoln Life's "needed to continue" language is no different than the district court's "may not necessarily prevent" language. Both appear nowhere in the Statute. Lincoln Life's choice of wording proves there is no way to adopt its argument without rewriting the Statute.

The Statute's use of "actually paid" further undermines Lincoln Life's arguments on the phrase "for a period." "Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning" (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). Lincoln Life's interpretation of "for any period" makes "actually paid" superfluous. If only

monthly deductions can be paid for a period, there would be no need to write "actually paid" into the Statute. Unlike premiums, which can be due but not actually paid, monthly deductions are automatically taken from the policy value *by the insurer* (*see* Rec. 62, 327).

Finally, if any doubt still exists about whether the Policy's "ANNUAL" premium was paid for a year, that ambiguity must be resolved in favor of the insured. "[I]f the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer" (*Westview Assocs. v. Guar. Nat'l Ins. Co.*, 95 NY2d 334, 340 [2000]). At best, Lincoln Life's arguments raise ambiguity as to whether the Policy's "ANNUAL" premium was paid "for" a year, and that ambiguity must be resolved in Plaintiff's favor.

III. Lincoln Life's Argument Falsely Implies that There Is a Universal Life Exemption in the Statute.

At bottom, Lincoln Life's arguments rest on the premise that the Statute does not apply to universal life policies. For example, Lincoln Life's argument that the Statute does not apply when a premium payment "increase[s] the Policy Account's value" (2d Cir. Dkt. 38 at 10) would apply to any universal life insurance policy, which Lincoln Life admits "combine[s] life insurance coverage with an investment feature called a Policy Account" (*id.* at 2). Similarly, Lincoln Life's argument that Plaintiff's theory "cannot be squared with the Policy's

‘flexible’ premium structure” (*id.* at 35) would apply to any universal life policy; in fact, Lincoln Life admits that “flexible premium adjustable life insurance” is its “generic name for universal life insurance” (*id.* at 4). There is simply no way to rule for Lincoln Life without taking the position that the Statute does not apply to universal life insurance policies. Recognizing this implication of Lincoln Life’s position, the Second Circuit’s certified question focuses on whether a premium paid for “a universal life insurance policy” can qualify under the Statute. (Rec. 398).

But contrary to Lincoln Life’s position, the plain text of the Statute unmistakably applies to universal life policies. The Legislature could hardly have spoken more clearly. The Statute applies to “[a]ll life insurance policies, except as otherwise stated herein,” and the exceptions “stated herein” do not include universal life policies. Instead, the Legislature expressly excluded two other types of insurance policies from the refund requirement: (1) single premium, and (2) paid-up policies. Those exclusions “implicate[] a long-settled principle of statutory construction: where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded” (*Weingarten v. Bd. of Trustees of New York City Teachers’ Ret. Sys.*, 98 NY2d 575, 583 [2002]).

“If the legislature intended to exclude [universal life policies], it could have easily drafted the statutory language more restrictively” (*Walsh*, 34 NY3d at 526-27). *Walsh* is illustrative of proper statutory interpretation. That case addressed the meaning of the term “any act of any inmate” within Retirement and Social Security Law § 607–c (a). An inmate had fallen as she attempted to exit the back of a van, accidentally injuring a correction officer. The issue was whether the officer’s injuries were sustained by “any act of any inmate,” thereby entitling the officer to disability retirement benefits under the statute. The lower courts answered “no,” reasoning that the “act” must be “volitional or disobedient”—not accidental (*id.* at 523).

This Court reversed, applying the statute’s “plain meaning” to hold that the term “act” “includes both voluntary and involuntary conduct of an inmate, including the accidental fall at issue here” (*id.* at 525). “If the legislature intended to exclude the injuries at issue here, it could have easily drafted the statutory language more restrictively, for example, by adding limitations to the word ‘act.’ In fact, the legislature did just that in subdivision (f) of the same statute” where it referred to “an intentional or reckless act” (*id.* at 526-27).

That reasoning squarely applies here. If the Legislature wanted to treat universal life policies differently for purposes of the refund requirement, it could have easily done so, particularly since “the legislature did just that in [subsection

(a)(1)] of the same statute," where it distinguished "policies in which the amount and frequency of premiums may vary" (i.e., universal life policies) from "all other policies" for purposes of the grace period provision (*Walsh*, 34 NY3d at 526-27; Ins. L. § 3203 [a] [1]).

That subsection is not an anomaly; other New York insurance statutes likewise single out universal life policies for different treatment (*see, e.g.*, Ins. Law § 3211 [a] [1] [imposing a 15-day notice requirement before a policy can lapse "for scheduled premium policies" but a 30-day requirement for "life insurance policies in which the amount and frequency of premiums may vary"]; *id.* § 4510 [a] [1] [imposing a 61-day grace period for "certificates in which the amount and frequency of premiums may vary" but a 30-day grace period "[f]or all other certificates"]).

Yet, for the refund requirement, the Legislature chose *not* to make any distinction for universal life policies. That choice "is the clearest indicator of legislative intent," and this Court "should construe [the Statute's] unambiguous language to give effect to its plain meaning" (*Beck*, 27 NY3d at 389-90).

Lincoln Life's interpretation would impute arbitrary and irrational intentions to the Legislature. Under its view, the buyer of a term policy who paid (for example) an annual premium of $12,000 a year, but died 32 days after the policy was purchased, would be entitled to the policy proceeds plus a refund of the

$10,000 for the 10 months remaining on the annual premium. In contrast, the buyer of an otherwise identical universal life policy who did the exact same thing – paid an initial annual premium of $12,000 for a year but died 32 days after buying the policy, would be entitled to *only* the policy proceeds, with no premium refund at all. Thus, in this example, where the respective term and universal life policies each have a face value of $100,000, the term policyholder would recover $110,000, but the universal life policy holder only $100,000. There is no indication that the Legislature intended such an irrational and unfair disparate treatment amongst New Yorkers that own term and universal life policies.

Lincoln Life is asking the Court to rewrite the Statute to add an exclusion for universal life policies—and in so doing, give Lincoln a windfall by allowing it to keep a year's worth of premium for only five months of coverage.

IV. At a Minimum, the Facts of this Case Require an Affirmative Answer to the Certified Question.

For the above reasons, this Court should hold that the answer to the certified question is simply "yes." The payment of a planned annual premium to pay for a universal life insurance policy constitutes a "premium actually paid for any period" under the Statute.

But at a minimum, this Court should hold that the answer to the certified question is "yes" under "the facts presented" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC*, 93 NY2d 229, 236 [1999]).

Wholly apart from the question of whether the payment of a universal life planned premium is always paid for a period, Plaintiff's $53,877.72 annual premium payment in the present case was, in fact, paid for a specific period.

Plaintiff's Policy is different from some other universal life policies issued by other carriers because it has a "Coverage Protection Guarantee Rider" ("CPGR"). The Coverage Protective Guarantee Rider is what it sounds like: a *guarantee* of *coverage*. Plaintiff's CPGR would remain in effect so long as Plaintiff timely paid his annual $53,877.72 planned premium, so his annual premiums guaranteed and extended coverage for a full year. ***Lincoln Life has never argued otherwise.*** Therefore, even on the (erroneous) theory that premiums are paid "for a period" only if they *guarantee* coverage for that period, the Statute still applies to policies like Plaintiff's.

The Policy explains how the CPGR works (Rec. 87). The CPGR references an "alternate" or shadow policy account value made up of premium payments less monthly deductions (*id.*) But these monthly deductions, unlike the monthly deductions applied to the Policy's actual account value, are based on fixed charges and interest rates that are guaranteed not to increase (*see* Rec. 89 ["The cost of insurance rates and the interest rates described in the Coverage Protection Guarantee Provisions are fixed and guaranteed for the Initial Specified Amount and are not subject to change."]). As a result, the "initial planned premim" can be

designed to “satisfy the Coverage Protection Gurantee Test” and ensure that the Policy never enters the grace period provided the annual premium is paid in full each year (Rec. 87).

That was the case here. Plaintiff’s timely payment of each planned annual premium ensured the CPGR remained in effect for the following annual period. And because the CPGR remained in effect, Plaintiff was guaranteed coverage each year. The upshot is that Plaintiff’s premium payment passes muster even under the lower court’s incorrect view that payments are only “for” a “period” if they guarantee coverage for that period.

The Second Circuit recognized that the CPGR could overcome many of Lincoln Life’s arguments – including by establishing that the payment was “for a specific period of coverage.” But the Second Circuit did not decide whether the CPGR resolved the “for any period” argument because it believed that the CPGR would not resolve Lincoln’s (otherwise meritless) alternative position that the premium was not “actually paid” (*see* Rec. 392-93 n.4). The “actually paid” argument is meritless for the independent reasons set forth above. The CPGR provision resolves any (meritless) concern that the annual premium was not for any period. Those together are dispositive.

Further, the CPGR helps confirm that the annual premium was actually paid. Lincoln Life has argued that the “partial surrender” feature of the policy somehow

implies that premiums are not actually paid when they are paid. But any partial surrender of the Policy undermines the CPGR guarantee: "If . . . partial surrenders or loans are taken . . . , additional premums will be required to satisfy any guarantee provided by the" CPGR (Rec. 64).

That provision confirms that Plaintiff's premium pament was "actually paid" even under Lincoln Life's erroneous view that payments are only "actually paid" if they cannot be withdrawn (*see supra* Section I). Plaintiff could not partially surrender his Policy, or withdraw any funds, without losing the CPGR and the guaranteed coverage it provided.

In short, where as here the annual premiums are used to keep the CPGR in place, the CPGR turns the Policy into the functional equivalent of a term life policy. No one disputes that term life policies are covered by the Statute. As a result, at a minimum, the answer to the certified question is "yes" under the facts of this case.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question affirmatively.

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CERTIFICATION

I certify pursuant to 500.13 [c] [1] that the total word count for all printed text in the body of the brief, exclusive of the statement of related litigation; the table of contents, the table of cases and authorities, and the statement of questions presented required by subsection (a) of this section; is 7,776 words.

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