Consumer Federation of America

CENTER for ECONOMIC JUSTICE | FAIR ACCESS FAIR TREATMENT

United Policyholders
Empowering the Insured

February 4, 2022

By Electronic Filing (TrueFiling)

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: Letter in Support of Review — *State Farm General Insurance Company v. Ricardo Lara, as Insurance Commissioner of the State of California* (S272151) (Ct. App. No. D075529)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Consumer Federation of America, Center for Economic Justice, and United Policyholders — which have expertise in insurance regulation and insurance consumer protection laws in California and around the United States — write to urge the Court to grant Commissioner Ricardo Lara's and Consumer Watchdog's petitions for review of the Court of Appeal's decision. The dispute meets the standard for review set forth in Rule 8.500(b) as it is a matter of significant public concern and impact and because there is a conflict between the ruling of the Court of Appeal and prior rulings of this Court.

Californians spend approximately $30 billion annually on auto insurance and are required by law to purchase and maintain that coverage. Californians spend an additional $10 billion on home insurance,[1] which mortgage lenders require as a condition for securing a loan. Insurance

[1] National Association of Insurance Commissioners (2021). 2020 Market Share Reports for Property/Casualty Groups and Companies By State and Countrywide.

companies derive commercial advantage from the fact that auto and/or home insurance are essentially mandatory purchases for a very substantial number of state residents.

Among the issues at stake in this matter is whether the Insurance Commissioner can order insurance companies to provide refunds to those Californians, as well as individuals and businesses purchasing other types of property and casualty insurance, after an official determination has been made by the state's regulator that they have been charging consumers excessive rates. Further, the Court must reconcile this case with its decisions in two seminal cases that construed Proposition 103 and resolved the issues here decades ago by upholding the Commissioner's refund authority: *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, and *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216.

Relevant expertise.

Consumer Federation of America (CFA), based in Washington, D.C., is comprised of more than 250 national, state, and local consumer organization members. CFA has conducted research, education, and advocacy on behalf of consumer interests since its founding in 1968. Its Insurance Director Emeritus, J. Robert Hunter, an actuary and nationally-recognized authority on rate regulation, was the former Insurance Commissioner of Texas in 1993 and 1994, served as the Federal Insurance Administrator in the 1970s, and former President of the National Insurance Consumer Organization (1980-1993). He was a central figure in the nation-wide insurance-reform debate of the mid-1980s, which was reflected in California through the four insurance-related initiative measures on the November 1988 ballot, of which only Proposition 103 passed.

Although this letter in support of review focuses on the refund authority of the Insurance Commissioner, it is noteworthy that Mr. Hunter was appointed to review the issue of insurance company investment income by the Investment Income Task Force of the National Association of Insurance Commissioners (NAIC), the organization governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Mr. Hunter's position was adopted by the Task Force and

later unanimously adopted by the NAIC.[2] That report first recommended that states that regulate insurance rates reflect investment income in their analysis. The words of Proposition 103 also at issue here — that "the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income" — echo the text of the 1984 NAIC Investment Income Report adopting Mr. Hunter's positions, language capturing the mandate that investment income be considered but avoiding prescription of any specific manner for doing so. (Proceedings of the National Association of Insurance Commissioners, vol. II, pp. 723-725.)

As the California Legislature searched for solutions to the insurance crisis that destabilized California in the 1980s and led to the 1988 adoption of Proposition 103, Mr. Hunter was retained by the California State Assembly to prepare the report "Insurance in California: A 1986 Status Report for the Assembly," which similarly recommended recognition of investment income in rate regulation but did not prescribe which of the various ways investment income may be considered the commissioner must employ. Amici understand that the Final NAIC Report and Mr. Hunter's report for the California Assembly were made available to the Court of Appeal by Intervenor-Appellant Consumer Watchdog in a request for judicial notice, but that the court declined to grant it.

Consumer Federation of America's Director of Insurance, Douglas Heller, is a member of the U.S. Treasury's Federal Advisory Committee on Insurance and an appointed Public Member of the California Automobile Assigned Risk Plan Advisory Board.

The Center for Economic Justice (CEJ) is a Texas non-profit organization whose mission is to advocate on behalf of lower-income consumers on issues of availability, affordability, and accessibility of basic goods and services such as utilities, credit, and insurance. CEJ's Director David "Birny" Birnbaum is a member of the Federal Advisory Committee on Insurance, a former member of the Federal Reserve Board's Insurance Policy Advisory Committee and served as Chief Economist and Associate Commissioner for Policy and Research at the Texas Department of Insurance. He has authored reports and testimony for numerous public agencies and consumer organizations, including the California Department of Insurance,

[2] Proceedings of the National Association of Insurance Commissioners, vol. II, pp. 721-804.

the Florida Insurance Commissioner's Task Force on Credit Scoring, the Ohio Civil Rights Commission, the Cities of New York and Philadelphia, and the United States Department of Justice. These reports and testimony have covered a wide variety of topics, including insurance rates, force-placed insurance, consumer credit insurance, title insurance, insurance credit scoring and insurance markets.

United Policyholders (UP) is a California-based non-profit organization founded in 1991 that is a voice and an information resource for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work. UP does not accept funding from insurance companies. The organization's mission is to educate and empower consumers to successfully navigate the insurance marketplace and claims process and support insurance statutes, regulations and decisional laws that prescribe fair practices and uphold the indemnification purpose of insurance products. UP Founder and Executive Director Amy Bach is a member of the Federal Advisory Committee on Insurance.

UP is divided into three program areas: *Roadmap to Recovery™* (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org. UP coordinates with state insurance regulators, local, state and federal agencies and officials and trade associations and non-profit partners to help insurance consumers and advance our mission.

Interest in the case.

Consumer Federation of America, Center for Economic Justice, and United Policyholders are non-profit organizations that represent consumer interests before policymakers and regulators throughout the United States and have long been involved in insurance consumer protection efforts. Over the past several decades, these organizations have issued or presented dozens of reports, testimony, letters, and analysis of insurance markets and insurance regulation in California and around the country. Through their research and advocacy, the organizations have sought to ensure that personal lines insurance such as homeowners and auto

insurance are accessible, affordable, and fairly priced for all consumers, with a particular emphasis on insurance affordability for low- and moderate-income customers.

Each of these organizations and their staffs have been actively engaged in a variety of Proposition 103 related issues, including legislative matters, rulemaking proceedings, and rate proceedings and has deep familiarity with the questions raised by this case. CFA has closely followed the implementation of Proposition 103 in California, issuing three extensive reports on Proposition 103, most recently in February 2019.[3] As an example of their ongoing engagement with California insurance ratemaking matters, all three organizations provided separate testimony at the November 10, 2021 Department of Insurance Prenotice Public Discussions on Mitigation in Rating Plans and Wildfire Risk Models (REG-2020-00015).

Because California law requires all drivers to purchase auto insurance and lenders require all homeowners with a loan to purchase home insurance, the organizations believe it is incumbent upon the insurance commissioner and the courts to adopt and enforce market guardrails that help to ensure affordable insurance.

Specifically, with respect to this case, the organizations have a deep interest in making sure that the voter-approved Insurance Rate Reduction and Reform Act of 1988 (Proposition 103) continues to serve the public interest in having access to insurance rates that are not excessive. That protection would be diminished if the Court of Appeal's decision were to be upheld and remain intact. By negating a key element of Proposition 103 and weakening the rate accountability tools adopted by the voters, this decision would lead to significantly higher premiums for Californians and authorize insurers to maintain excessive rates over the course several policy terms with no accountability.

[3] Hunter, J.R., and Heller, D. (2019). Auto Insurance Regulation: What Works 2019. https://consumerfed.org/wp-content/uploads/2019/02/auto-insurance-regulation-what-works-2019.pdf

Argument in support of review.

While there are a range of significant errors in the decision of the Court of Appeal, which have been identified by other parties and *amici* seeking review of this case, we aim to focus the Court's attention on the importance of preserving the voter's will when weighing the interests of consumers and insurers to determine enforcement of Proposition 103.

We begin with the language of Proposition 103's overarching regulation of insurance rates. Section 1861.01(c) directed that, "Commencing November 8, 1989, insurance rates subject to this chapter must be approved by the commissioner prior to their use." Section 1861.05(a) states, "No rate shall be approved *or remain in effect* which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." [Emphasis added.]

Section 1861.05 differed substantially from the statute it replaced, which was first proposed by the model rating act developed by the NAIC "All-Industry Committee" in response to the McCarran-Ferguson Act of 1945.[4] "The basic standard imposed by the All-Industry Bills is that the rates shall not be excessive, inadequate or unfairly discriminatory."[5]

As this Court explained in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243:

> California enacted the McBride-Grunsky Insurance Regulatory Act of 1947 which added chapter 9 to part 2, division 1, of the Insurance Code. (§ 1850 et seq.) Employing language from the model act, the McBride-Grunsky Act stated that one purpose of chapter 9 was to regulate the rates of most types of insurance "to the end that they shall not be excessive, inadequate or unfairly discriminatory." (Former § 1850, enacted by Stats. 1947, ch. 805, § 1, p. 1896.) The Legislature emphasized, however, that this goal was to be achieved through open competition in the insurance market rather than by state regulation: "It is the express intent of this chapter to permit and encourage competition between insurers on

[4] Joel N. Simon S. Ed., Insurance - Rate Regulation - Competitors' Standing to Seek Administrative Review of Rate Filings, 58 MICH. L. REV. 730 (1960). Available at: https://repository.law.umich.edu/mlr/vol58/iss5/4

[5] *Id*. at p.735

> a sound financial basis and nothing in this chapter is intended to give the Commissioner power to fix and determine a rate level by classification or otherwise." (*Ibid.*)
>
> This reliance upon competition between insurance companies to control rates also was reflected in former section 1852, which declared that "[r]ates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory," but further provided: "No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." (Stats. 1947, ch. 805, § 1, pp. 1897-1898.) …
>
> The provisions of chapter 9 described above remained essentially unchanged until the passage of Proposition 103.
>
> That initiative declared: "Enormous increases in the cost of insurance have made it both unaffordable and unavailable to millions of Californians. [¶] The existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates. [¶] Therefore, the People of California declare that insurance reform is necessary." (Stats. 1988, p. A-276.) This reform included a reduction of rates to a level "at least 20 [percent] less" than those in effect on November 8, 1987 (§ 1861.01, subd. (a)), as well as the repeal of former sections 1850 and 1852, which had relied upon competition between insurers to regulate rates. The initiative adopted instead a system in which insurance rates would have to be approved by the commissioner (who now was to be elected rather than appointed) "prior to their use." (§ 1861.01, subd. (c).)

(*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1258–1259, alterations in original.)

Proposition 103 also modified former section 1852's substantive standard to provide that "[n]o rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." (§ 1861.05, subdivision (a).) (*Id.* at 1259.)

Thus, when adopted in 1988, Proposition 103 mandated "prior approval" of insurance rates and created a new and unequivocally different standard for regulating insurance rates under the prior approval regime by including the phrase "remain in effect." Section 1861.05 deems rates that are in violation of the excessive, inadequate, and unfairly discriminatory standard invalid immediately upon crossing any of those barriers – and prohibits such rates from *remaining in effect*.

Unlike former Section 1852, which Proposition 103 repealed, California law does not require a regulator or consumer to wait for an insurance company to choose to submit a rate application before a demonstrably excessive rate can be deemed illegal, unusable, and subject to refunds. Under California law an excessive rate must be cured as soon as it becomes excessive, and it cannot remain in effect from that moment forward.

Despite California's unequivocal and inarguable departure from the statute it repealed, the Court of Appeal deemed California's distinct phrasing devoid of meaning. The Court of Appeal ruled,

> This ["remain in effect"] language simply reflects that when a rate is reviewed and does not satisfy prior approval requirements (such as by being excessive), it will not go into effect or will no longer stay in effect. (Opinion, at p.49)

Moreover, the Court of Appeal explicitly lets *insurance companies* determine when their rates can be judged excessive by limiting the application of Section 1861.05 to "when a rate is reviewed." Even when the Insurance Commissioner sets a prospective date from which point forward a rate would be deemed excessive and invalid, as occurred in this case, the Court of Appeal ruled that the "or remain in effect" language would not have force until after the final decision on a new rate was issued and became final. In the rate matter in this case, the Court of Appeal decision blessed a scenario under which the rate remained excessive for approximately 17 months and up to 29 months depending upon policyholders' renewal dates after the Commissioner's prospective

guidance that rates needed to be reduced by July 15, 2015 in order to comply with the prohibition on excessive rates.[6]

If this interpretation were to hold, insurance companies would not just be granted a license to overcharge consumers even after rates became excessive, they would be incentivized to delay the ratemaking process. If an excessive rate is allowed to remain in effect irrespective of demonstrable evidence of its excessiveness, even when the Commissioner has placed an insurance company on notice, then carriers will benefit from extending the ratemaking process as long as possible. The insurance companies, without the full accountability that is mandated by the "remain in effect" standard, recognize that every day of delaying the effective date of an ordered rate reduction is another day of excessive rates they can collect without consequence.

The critical error of ignoring the import and impact of the "or remain in effect" language by the Court of Appeal denies voters the new and significantly enhanced consumer protections they demanded when they enacted Proposition 103 in 1988. The People stated their interests clearly:

> The existing laws inadequately protect consumers and allow insurance
> companies to charge excessive, unjustified and arbitrary rates.
>
> Therefore, the People of California declare that insurance reform is necessary. [Text of Proposition 103. Section 1. Findings and Declaration]

The voters were entitled to make that choice, and it must be honored by the Commissioner and the courts.

---

[6] State Farm General implemented the rate decrease on Dec. 8, 2016. See SFG's 05-08-2020 Combined Respondent's and Cross-Appellant's Brief, p. 35, fn. 18. This is approximately 17 months after the July 2015 date from which point on SFG's rates were deemed excessive by the Commissioner. Because SFG was not required to provide the refunds ordered by the Commissioner, the excessive rate being charged to existing policyholders remained in effect until their renewal, which would come up between December 8, 2017 and December 7, 2018, depending upon their original policy start date.

Consumer Federation of America, Center for Economic Justice, and United Policyholders respectfully believe that review by the Court is urgently needed to prevent the excessive insurance rates that will persist (remain in effect) if the Court of Appeal decision gutting the Commissioner's refund authority stands. For these reasons, we urge the Court to review this case.

Sincerely,

Douglas Heller
Director of Insurance
Consumer Federation of America

Birny Birnbaum
Director
Center for Economic Justice

Amy Bach
Executive Director
United Policyholders

PROOF OF SERVICE

STATE OF CALIFORNIA

Re: *State Farm General Insurance Company v. Lara, et al.,*
S. Ct. No. S272151, 4DCA No. D075529,
SDSC No. 37-2016-00041469-CU-MC-CTL

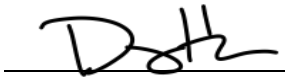
I am over the age of 18 and not a party to the within action. My business address is 1620 I Street, NW – Suite 200. My electronic mail address is douglasheller@ymail.com.

On **February 4, 2022**, I served the foregoing document(s) described as **AMICUS LETTER IN SUPPORT OF PETITIONS FOR REVIEW** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by using the EFS/TrueFiling system as required by California Rules of Court, rule 8.70. Participants in the case who are registered EFS/TrueFiling users will be served by the EFS/TrueFiling system. Participants in the case who are not registered EFS/TrueFiling users will be served by mail or by other means permitted by the court rules.

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this is executed on **February 4, 2022**, at Los Angeles, California.



Douglas Heller

SERVICE LIST

State Farm General Insurance Company v. Lara, et al.,
S. Ct. No. S272151, 4DCA No. D075529,
SDSC No. 37-2016-00041469-CU-MC-CTL

Via (EFS) Vanessa O. Wells Victoria C. Brown Hogan Lovells US LLP 4085 Campbell Avenue, Suite 100 Menlo Park, California 94025 Tel: 650-463-4000 Fax: 650-463-4199 vanessa.wells@hoganlovells.com victoria.brown@hoganlovells.com Theodore J. Boutrous, Jr. Daniel M. Kolkey Kristin A. Linsley Kahn A. Scolnick Gibson, Dunn & Crutcher LLP 555 Mission Street, Suite 3000 San Francisco, CA 94105-0921 Tel: 415-393-8200 Fax: 415-374-8471 tboutrous@gibsondunn.com dkolkey@gibsondunn.com klinsley@gibsondunn.com kscolnick@gibsondunn.com *Attorney for Plaintiff and Appellant State Farm General Insurance Company*	***Via (EFS)*** Rob Bonta, Attorney General of CA Tamar Pachter Sr. Asst. Attorney General Molly K. Mosley Supervising Deputy Attorney General Michael Sapoznikow Deputy Attorney General California Department of Justice 1300 I Street, 10th Floor PO Box 944255 Sacramento, California 94244-2550 Tel: 916-210-7344 Fax: 916-323-7095 michael.sapoznikow@doj.ca.gov *Attorneys for Defendant and Appellant Ricardo Lara*
Via U. S. Mail Honorable Katherine Bacal, Judge San Diego County Superior Court 330 West Broadway San Diego, California 92101	***Via (EFS) Pursuant to CRC, Rule 8.500(f)(1)*** Clerk of the Court Fourth Appellate District, Division One