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January 7, 2021

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

Re: *State Farm General Insurance Company v. Lara*, S. Ct. 272151
Court of Appeal for the Fourth Appellate District, Case No. D075529
Amicus Letter from Former California Insurance Commissioners John Garamendi,
Steve Poizner and Dave Jones in Support of Petitions for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Former elected California Insurance Commissioners John Garamendi, Steve Poizner and Dave Jones (“Commissioners”) urge the Court to grant Commissioner Ricardo Lara’s and Consumer Watchdog’s petitions for review of the Court of Appeal’s decision (“Decision”).

I. Interest of the Amici Commissioners

The Commissioners devoted a collective 20 years of public service to enforcing Proposition 103, a consumer protection initiative passed by the voters in 1988. Commissioner Garamendi was the first elected insurance commissioner.¹ He served from 1991-1995 and from 2003-2007. Commissioner Poizner served from 2007-2011. Commissioner Jones served from 2011-2019.

The Commissioners were guided by this Court’s recognition that the:

ultimate goal [of Proposition 103] is the guaranty that “insurance is fair, available, and affordable for all Californians.”²

¹ Proposition 103 changed the office of commissioner from appointed to elected. Ins. Code § 12900, subd. (a).

² *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216, 300 (quoting the Proposition 103 ballot pamphlet).

All three Commissioners relied on the power of refunds and on regulations addressing insurers' investment income to protect consumers and keep premiums low, while at the same time affording insurers a reasonable rate of return. The Court of Appeal nullified both those powers.

Although the Commissioners are currently involved in a wide range of professional and public service activities – Mr. Garamendi is a Member of Congress; Mr. Poizner is, among other things, CEO and Chairman of the Healthcare Consumer Rights Foundation, a nonprofit that educates consumers in navigating the healthcare system and understanding their rights; and Mr. Jones is the Director of the Climate Risk Initiative at UC Berkeley's Center for Law, Energy and the Environment and a Senior Fellow at The ClimateWorks Foundation – all three recognize the harm the Decision poses not only to their two decades of consumer protection but to the future of consumer protection under Proposition 103.³

II. What the Court of Appeal Decision Does

The Decision undermines this Court's affirmation that insurance commissioners are entrusted with enforcement of Proposition 103, including through regulations and other means "as are necessary" to realize the goals of Proposition 103 and "promote the public welfare."⁴ The Commissioners heeded this duty alongside their duty to enforce the insurance laws of California generally.⁵

The Decision specifically repudiates two areas of longstanding consumer protection under Proposition 103 that are at the heart of the mission of the California Department of Insurance ("Department").

First, the Decision nullifies the Department's ability to order refunds to consumers when an insurer's rates for automobile and homeowners' insurance, among other lines, are

³ Counsel for the Commissioners on this letter, Mr. Cole, was General Counsel of the California Department of Insurance for 7½ years (2007-2015), serving Commissioners Poizner and Jones.

⁴ *20th Century*, 8 Cal. 4th at 245 (quoting *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824).

⁵ "The commissioner shall perform all duties imposed upon him or her by the provisions of this code and other laws regulating the business of insurance in this state, and shall enforce the execution of those provisions and laws." Ins. Code § 12921, subd. (a).

found to be excessive and result in unreasonable profits for the insurer. The ability of commissioners to order refunds is essential in many circumstances. A stark example is the current covid pandemic, in which an economic downturn led to fewer claims against insurers and excessive profits.

Second, the Decision repudiates application of longstanding Regulation 2644.20, which requires consideration of the consolidated investment income of the group of related insurance companies of which a specific insurer is a part to assure rates are not excessive.⁶ The Decision opens the door to manipulation by insurance companies of their corporate structures to impose higher rates on consumers.

III. Eliminating the Department's Refund Authority Will Hurt Consumers

The Commissioners relied on refunds to protect consumers. The refund authority stems from Proposition 103, which says that:

No rate shall be approved **or remain in effect** which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter.⁷

Each of the three Commissioners invoked refunds when necessary. For example, in 2015 Commissioner Jones ordered State Farm to pay refunds of excessive premium (this case). In 2011, also under Commissioner Jones, the Department reserved its right to seek refunds for consumers who paid excessive premiums collected by Mercury Casualty Company.⁸ In 2007, Commissioner Poizner notified Allstate that its homeowners' insurance rates were excessive and that among the remedies the Department might pursue were refunds of excessive premium collected by Allstate.⁹ Commissioner Garamendi ordered refunds in numerous cases.

The authority of commissioners to order refunds is essential to protect consumers. A rate that was initially acceptable and approved on that basis can become inadequate or

⁶ Cal. Code Regs., tit. 10, § 2644.20, subd. (a).

⁷ Ins. Code, § 1861.05, subd. (a) (emphasis added).

⁸ *In the Matter of the Rate Application of Mercury Casualty Company*, File No. PA-2009-00009.

⁹ *In re Matter of the Rates, Rating Plans, or Rating Systems of Allstate Insurance Company and Allstate Indemnity Company*, File No. PA-2007-00011.

excessive as the insurer's loss experience diverges from the projections on which the rate approval was based. The only one who knows in real time how loss experience, financial performance and profits are playing out is the insurer. The insurer has an incentive to file for a rate increase when an approved rate is inadequate but does not have a corresponding incentive to file for a rate decrease. In addition, the proceeding to reduce an excessive rate can take months or years and insurers have an incentive to prolong the proceeding.

Absent refund authority, insurers would permanently retain premiums and profits which they know to be excessive, a situation forcefully illustrated by the covid pandemic. This would contradict Proposition 103's prohibition that "no rate . . . shall remain in effect which is excessive" Refunds put a proper burden on insurers to monitor rates on an ongoing basis.

In this case, State Farm was put on written notice by Commissioner Jones at the start of the administrative proceeding that its rates were excessive and that State Farm would be responsible for refunds effective shortly after the notice.

IV. Refusing Application of Regulation 2644.20 Will Hurt Consumers

The Commissioners relied on regulations addressing insurers' investment income. Specifically, Regulation 2644.20 derives from a section of Proposition 103 that says:

In considering whether a rate is excessive, inadequate or unfairly discriminatory, . . . the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.¹⁰

The purpose of this part of Proposition 103 is to prevent insurers from reaping undue profits from investment income, a supplementary revenue source above and beyond what the insurer receives in premiums.

Regulation 2644.20 implements Proposition 103's investment income provision by providing that an insurer's "projected yield" (estimated income on investments):

shall be determined using the insurer's most recent consolidated statutory annual statement.¹¹

¹⁰ Ins. Code, § 1861.05, subd. (a).

¹¹ Cal. Code Regs., tit. 10, § 2644.20, subd. (a).

Although technical, Regulation 2644.20 goes to an essential element of consumer protection, which is that investment income must not allow an insurer to receive excessive profits. In most cases, insurers are part of groups. Examining an affiliate's investments in isolation can suggest lower investment income and lead to excessive premiums.

The Court of Appeal concluded that while Regulation 2644.20 may be valid as to some insurers, it is not valid as to State Farm General Insurance Company (the State Farm affiliate in this case) because State Farm General does not "pool" assets with affiliates.

Proposition 103 and Regulation 2644.20 do not support this distinction. Further, the record shows that State Farm General participates with other affiliates in a "liquidity pool" that operates like a money market fund for the benefit of all affiliates and would provide cash infusions to State Farm General as necessary. The record also shows that State Farm General has no employees, has its headquarters in Illinois at the same address as the parent, has managers and directors all of whom are managers and directors of other State Farm entities, and uses employees of the parent or another affiliate to perform all of State Farm General's actuarial, legal, managerial, underwriting and claims handling functions. For purposes of rate regulation, these and other factors support the Department's longstanding use of consolidated statutory annual statements.

The Commissioners further note that a key part of their enforcement of Proposition 103 was issuing rules of *general application* and that permitting exceptions on an insurer-by-insurer basis undermines "formulaic ratemaking," an approach endorsed by this Court and at the core of the Department's effective functioning.¹²

* * *

In sum, the Court of Appeal decision runs counter to the Department's longstanding consumer protection activities which the Commissioners played a critical part in advancing. Based on their years of leadership of the Department, the Commissioners

¹² *20th Century*, 8 Cal. 4th at 285-286 ("One of the purposes of Proposition 103 is 'to protect consumers from arbitrary insurance rates' Formulaic ratemaking furthers that goal. Case-by-case ratemaking does the opposite.") (citations omitted).

believe the Decision will lead to impermissibly high premiums and will hurt millions of Californians. The Commissioners support the petitions of Commissioner Lara and Consumer Watchdog for review by this Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A.C.M.C." with a long horizontal flourish extending to the right.

Adam M. Cole
Attorney for Former Insurance Commissioners
Garamendi, Poizner and Jones

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 a member of the Bar of the State of California. My address is 3401 Clay Street, Suite 405, San Francisco, CA 94118. My electronic email address is acole_email@yahoo.com.

On January 7, 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 in the mail on this date 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 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 January 7, 2022, at San Francisco, California.



Adam Cole

Document received by the CA Supreme Court.

SERVICE LIST

*State Farm General Insurance Company v. Lara, et al.,
S. Ct. No. S272151, 4DCA No. D075529,
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<p><i>Via (EFS)</i> 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</p> <p>Theodore J. Boutrous, Jr. Daniel M. Kolkey Kristin A. Linsley Kahn A. Scolnick Gibson, Dunn & Crutcher LLP 555 Mission Street, Suite 3000 San Francisco, California 94105-0921 Tel•415-393-8200 Fax•415-374-8471 tboutrous@gibsondunn.com dkolkey@gibsondunn.com klinsley@gibsondunn.com kscolnick@gibsondunn.com</p> <p><i>Attorney for Plaintiff and Appellant State Farm General Insurance Company</i></p>	<p><i>Via (EFS)</i> 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</p> <p><i>Attorneys for Defendant and Appellant Ricardo Lara</i></p>
<p><i>Via U. S. Mail</i> Honorable Katherine Bacal, Judge San Diego County Superior Court 330 West Broadway San Diego, California 92101</p>	<p><i>Via (EFS) Pursuant to CRC, Rule 8.500(f)(1)</i> Clerk of the Court Fourth Appellate District, Division One</p>