No. 25-793

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EILEEN GAYLE COLEMAN AND ROBERT CASTRO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION AND USAA GENERAL INDEMNITY COMPANY,

Defendants-Appellees

On Appeal from the
United States District Court for the Northern District of California
The Honorable Robert S. Huie
No. 21-cv-217-RSH-KSC

APPELLANTS' OPENING BRIEF

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Introduction

For more than 35 years, Proposition 103—California's grassroots, landmark insurance reform and rate reduction voter initiative—has helped protect consumers in the state from arbitrary insurance rates and practices.[1] And to safeguard what they enacted, voters required that Prop. 103 be "liberally construed" and prohibited the Legislature from amending it except to "further its purposes." Prop. 103, § 2; *see also Amwest Sur. Ins. Co. v. Wilson*, 11 Cal. 4th 1243, 1249 (1995).

No other state goes as far as California in forbidding its legislature from updating or amending initiatives. Center for Governmental Studies, Democracy by Initiative: Shaping California's Fourth Branch of Government 114 (2d ed. 2008) (California is the only "state in the nation [that] carries the concept of initiatives as 'written in stone' to such lengths."). These constraints derive from California's Constitution. CA Const. Article II § 10(c). And courts have jealously guarded and enforced them, recognizing their essential role in "precluding the Legislature from

[1] Copies of Proposition 103, as adopted by California voters, a section of the California Constitution, and all other enacted bills and the Insurance Code mentioned in this brief are reproduced verbatim in the Addendum to this brief.

undoing what the people have done." *Cnty. of San Diego v. Commission on State Mandates* (2018) 6 Cal. 5th 196, 211. [2]

Yet here, the district court, by misconstruing the Insurance Code, has undone part of what voters achieved with Prop. 103—thereby unconstitutionally frustrating, rather than furthering, Prop. 103's purposes.

Prop. 103 changed the face of insurance regulation in California. For most lines of property and casualty insurance, Prop. 103 rolled back insurance rates by 20% (§ 1861.01(a)[3]), and it subjected all future rate changes to review and pre-approval by an elected insurance commissioner. § 1861.05. It imposed limitations on insurers' ability to cancel or refuse to

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[2] *See Amwest*, 11 Cal. 4th at 1255, 1261 (invalidating purported amendment that supposedly "clarif[ied] the scope of Proposition 103" because "the Legislature lacks the authority to amend Proposition 103 except to further the purposes of the initiative"); *Found. for Taxpayer and Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1354, 1364-65 (2005) (invalidating statute favored by insurance industry because "the Legislature lacks the authority to amend [Prop. 103] … except to further the purposes of the initiative"); *Prop. 103 Enforcement Project v. Quackenbush*, 64 Cal. App. 4th 1485, 1493-94 (1998) ("Any doubts should be resolved in favor of the initiative and referendum power") (citing cases).

[3] The provisions of Prop. 103 at issue in this case, as amended, are codified at §§ 1861.01 to 1861.16. Unless otherwise designated, all statutory references are to the Insurance Code.

renew coverage. § 1861.03(c). And it enacted special rights and protections for "good drivers," which are the focus of this appeal.

Under Prop. 103, every motorist who meets the statutory definition of a "good driver" is entitled to purchase a Good Driver Discount policy from the insurer "of his or her choice." § 1861.02(b)(1). This is commonly referred to as the initiative's "Take All Comers" requirement. In addition, insurers must price these policies "at least 20% below the rate [good drivers] would otherwise have been charged for the same coverage." § 1861.02(b)(2). This provision is known as the "Good Driver Discount" requirement.

The stakes in this case are significant. The district court's summary judgment undermines Prop. 103's Good Driver Discount policy reforms. It permits USAA, alone among insurers in the state, to charge "good drivers" different rates for the same coverage by condoning USAA's practice of consigning statutorily eligible "good drivers" who are or were *enlisted* personnel in the military to a high-priced affiliate, USAA General

Indemnity Corp. ("GIC"), while placing current or retired military *officers* in "United Services," a lower-priced affiliate. "[4]

Between 2018 and 2021, USAA used this scheme to confine approximately 197,000 enlisted personnel who qualified as good drivers to GIC, causing them to pay, on average, 18% more in premiums than they would have paid under United Services' rates. In doing so, USAA has effectively *wiped out Prop. 103's mandated 20% Good Driver Discount policy* for nearly 200,000 policyholders in California.

USAA is not the first company to try this scheme. Within two years after voters adopted Prop. 103, legislative hearings uncovered that several large insurers were circumventing the initiative's Good Driver Discount

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[4] Both the parties and the district court have used the shorthand that USAA charges "officers" more than "enlisted personnel" for Good Driver Discount policies. But to be precise, USAA insures "[c]ommissioned and warrant officers in the U.S. Armed Forces [and] [s]enior non-commissioned/petty officers, *defined as E-7 or above* in the U.S. Armed Forces … on active duty … or retired from active duty … or separated with a discharge type of 'Honorable' from active duty" through its parent company, United Services Automobile Association ("United Services"), while insuring "[e]nlisted and junior non-commissioned officers, *defined as E-1 through E-6* in the U.S. Armed Forces … on active duty …or retired from active duty … or separated with a discharge type of 'Honorable' from active duty" through a higher-priced affiliate, USAA General Indemnity Corporation (or "GIC"). (Emphases added.).

Policy requirements by assigning some statutory good drivers to higher priced affiliates, defeating the initiative's core purpose of providing all good drivers access to the lowest-priced Good Driver Discount policy. 2-ER-32, 40, 44.

The insurance commissioner adopted emergency regulations under § 1861.02(b)'s Good Driver protections to stop this evasion, but some insurance companies sued, challenging the regulations. In response, the Legislature swiftly stepped in to protect the initiative by amending Prop. 103 to add a new "lowest rate rule," which it codified as § 1861.16(b). 2-ER-32. Section 1861.16(b) requires an insurance group to "sell[] a good driver discount policy to a good driver from an insurer within that common ownership, management, or control group, which offers *the lowest rates for that coverage*." § 1861.16(b) (emphasis added).

This appeal arises because the district court's ruling improperly exempts USAA from complying with §§ 1861.02(b) and 1861.16(b) by allowing it to charge some statutorily eligible good drivers (enlisted personnel) more than others (officers) despite § 1861.16(b)'s prohibition of exactly that practice. The district court based this exemption on a different section of the Code, § 11628(f)(1), adopted in response to Prop. 103. But the

district court misconstrued § 11628(f)(1) and wrongly discounted its history and context. And if despite the statutory words and history the district court properly construed § 11628(f)(1), then that section is unconstitutional as frustrating the purposes of Prop. 103. Either way, the district court erred.

Jurisdictional Statement

The district court had diversity jurisdiction over this suit under 28 U.S.C. § 1332(a) and (d). The district court entered summary judgment, a final judgment, on January 9, 2025. Plaintiffs filed a timely notice of appeal on February 3, 2025. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Questions Presented

1. Did the California Legislature exempt USAA from §§ 1861.02(b) and 1861.16(b) of California's Insurance Code by enacting Code § 11628(f)(1)?

2. If the Legislature exempted USAA from §§ 1861.02(b) and 1861.16(b), was that an impermissible amendment of Prop. 103 because it frustrates rather than furthers Prop. 103's purposes?

3. Should this court certify Questions 1 and 2—which the district court recognized are legal questions of first impression under state law—to the California Supreme Court?

Motion to Certify Questions

The California Supreme Court "may decide a question of California law" at the request of a United States Court of Appeals when two conditions are met: "(1) the decision could determine the outcome of a matter pending in the requesting court; and (2) [t]here is no controlling precedent." Cal. R. Ct. 8.548(a). In deciding whether to certify such questions, this Court considers those factors, along with the significance of the questions to California law. *See Busker v. Wabtec Corp.*, 903 F.3d 881, 884 (9th Cir. 2018) (certifying question to California's Supreme Court where statutory text was "susceptible to opposing interpretations" and there was no controlling California precedent); *Meza v. Portfolio Recovery Assoc's, LLC,* 860 F.3d 1218, 1220, 1221 (9th Cir. 2017) (certifying question to California Supreme Court that satisfies the two 8.548(a) requirements and "presents an issue of significant importance to the State of California"); *Pitzer College v. Indian Harbor Ins. Co.*, 845 F.3d 993, 996 (9th Cir. 2017) (certifying questions to California Supreme Court where "[t]he answers to these

questions are dispositive of the case, without clear California precedent, and important to protections for California insureds").

The first requirement of Rule 8.548—that the certified questions of state law may be outcome determinative—is clearly satisfied here. The district court based summary judgment on its construction of §§ 1861.16(b) and 11628(f)(1). A decision by this Court to affirm or reverse based on those sections would fully resolve this appeal.

The second requirement—that there be no controlling precedent—is also met. In its summary judgment ruling on the issues presented, the district court acknowledged that the legal issues here are unsettled. The court noted: "This case presents a legal question of first impression: Whether Section 1861.16(b) requires USAA to assign all statutory good drivers to the USAA subsidiary with the lower rate, or whether Section 11628(f)(1) protects USAA's ability to assign insureds, including good drivers, in accordance with its placement rules." 1-ER-4. And compounding the uncertainty, as discussed below, the first district court judge assigned to this case reached the opposite conclusion on a motion to dismiss earlier in the case—highlighting the absence of controlling

California authority and the possibility for divergence in judicial interpretation. 3-ER-291-92.

Finally, although not required by Rule 8.548, the importance of these issues to Californians is substantial. About 197,000 California policyholders, comprising the certified class in this case, were adversely affected by USAA's scheme between 2018 and 2021 and many more have likely been harmed since. 2-ER-74-75. More broadly, disputes over the interplay of Prop. 103 and related statutes enacted after the initiative's adoption are a matter of statewide importance implicating citizens' constitutional right to legislate through the initiative process.

Therefore, the Class asks this Court to certify the following questions to the California Supreme Court:

1. Did the California Legislature exempt USAA from §§ 1861.02(b) and 1861.16(b) of California's Insurance Code by enacting § 11628(f)(1)?

2. If the Legislature exempted USAA from §§ 1861.02(b) and 1861.16(b), was that an impermissible amendment of Prop. 103 because it conflicts with and frustrates rather than furthers Prop. 103's purposes?

Statement of the Case

I. Statutory Background

1. California voters adopted Prop. 103 in November 1988. Its original provisions are now codified as §§ 1861.01 through 1861.14 of the state's Insurance Code. Amendments intended to prevent insurers from evading the Good Driver provisions are at §§ 1861.15 and 1861.16.

2. Prop. 103 brought about fundamental changes in the regulation of auto insurance in California, including by introducing requirements that:

a. All licensed drivers who have accrued no more than one "violation point count" during the last three years are entitled to buy a statutory Good Driver Discount auto insurance policy from the insurer "of [their] choice," and the insurer must sell to that good driver. §§ 1861.02(b)(1), 1861.025. This requirement is known as Prop. 103's "Take All Comers" mandate.

b. Good Driver Discount policies must be priced "at least 20 percent below" the premium the driver "would otherwise have been charged for the same coverage." § 1861.02(b)(2). This is Prop. 103's separate "Good Driver Discount" mandate. And,

c. Prop. 103 must be "liberally construed" to "fully promote its underlying purposes." Prop. 103, § 2.

3. Article II section 10, subd. (c) of the California Constitution provides that the Legislature's power to amend an initiative is determined by the initiative's terms: "The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors *unless the initiative statute permits amendment or repeal without the electors' approval*." (Emphasis added.) Prop. 103 specifies that: "The provisions of this act shall not be amended by the Legislature except to further its purposes by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electorate." Prop. 103, § 8(b).

4. Ten months after voters adopted Prop. 103, and at USAA's behest, the California Legislature passed and California's Governor signed Assembly Bill 327, originally codified as § 11628(e), becoming effective on Sept. 29, 1989. As enacted, § 11628(e) provided that:

> (e) Except as provided in article 4 [of the Insurance Code] (commencing with section 11620), *nothing in this section or in article 10* [of the Insurance Code] (commencing with section

> 1861.01) of chapter 9 of part 2 of division 1 *precludes an insurer from limiting the issuance of its insurance to persons who engage in, or have formerly engaged in, governmental or military service* and their spouses, dependents, and former dependents.

(Emphases added). This addition to the Insurance Code responded to USAA's concern that Prop. 103's "take all comers" mandate would otherwise require the company to sell Good Driver policies to "*all* comers" — not just to active and retired government employees and military personnel and their families. 2-ER-54-55, 58, 60-62, 68. This addition was controversial. State Farm, one of USAA's rivals, objected to it precisely because it would permit USAA "to avoid the 'take all comers' provision," which is a "key provision of Proposition 103." 2-ER-65-66. In the end, however, USAA prevailed. A.B. 327 was enacted. Notably, the fight over A.B. 327 was only about whether USAA had to "take" good drivers who were not current and former military and governmental employees. It was not about whether USAA had to comply with the Good Driver Discount requirement. Indeed, the Senate sponsor of A.B. 327, who introduced the bill at USAA's request, made clear that USAA intended to offer its "eligible 'customers' a good driver discount." 2-ER-54, 63.

5. Within a year, on September 16, 1990, the Legislature passed A.B. 3683. The bill's primary purpose was to prevent insurers from discriminating against motorists who were on active duty in the military, but an amendment to A.B. 3683 "clarif[ied]" the language of § 11628(e). 2-ER-70. This clarification added the words italicized and bolded below:

> (e) ***(1)*** Except as provided in Article 4 (commencing with Section 11620), nothing in this section or in Article 10 (commencing with Section 1861.01) of Chapter 9 of Part 2 of Division 1 ***or in any other provision of this code, shall prohibit*** an insurer from limiting the issuance ***or renewal of*** insurance ***as defined in subdivision (a) of Section 660*** to persons who engage in, or have formerly engaged in, governmental or military service ***or segments of categories thereof***, and their spouses, dependents, and former dependents ***or spouses.*** (Emphases added).

The above provision is currently codified as § 11628(f)(1).

6. Nothing in the legislative reports explained the reason for any of the clarifications to what is now § 11628(f)(1), including the phrase on which the District Court focused: "or segments of categories thereof." 2-ER-70-74.

7. Days later, on Sept. 24, 1990, the Legislature also passed A.B. 2737, codified as §§ 1861.15 and 1861.16(a) & (b). This legislation addressed three strategies that insurers were using to evade Prop. 103's Good Driver

protections. 2-ER-31-33, 43-44. The significant part of A.B. 2737 for this case was the addition of § 1861.16(b). The legislative history makes clear that § 1861.16(b) was intended to address the strategy adopted by several of California's largest auto insurers in the wake of Prop. 103 to place some eligible Good Drivers in higher-priced subsidiaries while placing other Good Drivers in lower-priced subsidiaries. *Id.*; *see also* 2-ER-37-41. The Legislature designed section 1861.16(b) to "stop" that abuse, as the Insurance Commissioner had already attempted. The Commissioner had adopted urgency regulations, including 10 CCR § 2632.14.2 (repealed). Section 2632.14.2 was adopted in furtherance of § 1861.02(b) to require insurers to sell a Good Driver Discount policy to all eligible Good Drivers from its lowest priced affiliate. But a court enjoined the Commissioner's regulations. 2-ER-31-33. A.B. 2737 was the Legislature's retort, statutorily codifying the Commissioner's regulation. 2-ER-32. A.B. 2737 thus required insurer groups with more than one subsidiary to sell *all* good drivers "the cheapest good driver policy" from their subsidiary with the lowest price. 2-ER-33.

II. Factual Background

8. United Services Automobile Association ("USAA") is an insurance group organized as a reciprocal interinsurance exchange. 2-ER-21. It is composed of four affiliated insurance companies specializing in insurance for active and retired members of the military and their families. Two of these four affiliated companies, GIC and United Services, are defendants in this lawsuit. *Id.*

9. Under USAA's placement rules, United Services and GIC sell to mutually exclusive groups of policyholders: a policyholder eligible to buy from one is not eligible to buy from the other. 2-ER-22.

10. As relevant here, United Services insures "[c]ommissioned and warrant officers in the U.S. Armed Forces [and] [s]enior non-commissioned/petty officers, *defined as [pay grades] E-7 or above* in the U.S. Armed Forces … on active duty … or retired from active duty … or separated with a discharge type of 'Honorable' from active duty." *Id.*

11. GIC, in turn, insures "[e]nlisted and junior non-commissioned officers, *defined as [pay grades] E-1 through E-6* in the U.S. Armed Forces … on active duty …or retired from active duty … or separated with a discharge type of 'Honorable' from active duty." (Emphasis added). *Id.*

12. In sum, United Services writes auto policies only for current and retired military with pay grades of *E-7 or higher*, while GIC writes auto policies exclusively for current and retired military at pay grades of *E-6 or lower*. As a shorthand, this brief, as did the district court, refers to the division between United Services' and GIC's policyholders as a separation between officers and enlisted personnel.

13. When § 11628(f)(1) was adopted and modified in 1989 and 1990, and when § 1861.16(b) was adopted in 1990, GIC did not exist in California and USAA did not insure enlisted personnel, either through GIC or any other affiliate. USAA began writing enlisted people through GIC in California in about 1998. 2-ER-22, 48, 144.

14. At all relevant times, United Services' auto policy rates have been lower than GIC's. 2-ER-25, 151.

15. Whenever the Insurance Commissioner formally approves insurance rates, it attaches the following caveat:

> If any portion of the application or related documentation conflicts with California law, that portion is specifically *not approved. This approval does not constitute an approval of underwriting guidelines* …. (Emphasis added.)

2-ER-23-24.

16. In an opinion letter in 2018, the California Department of Insurance defined "underwriting" rules and guidelines as:

> … any rule or factor used by an insurer in the process of examining, accepting, or rejecting insurance risks, and classifying those risks selected in order to charge the proper premium for each. "*Underwriting guidelines" shall also include, but not be limited to, the "eligibility guidelines" insurers must maintain* pursuant to 10 CCR section 2360.2. (Emphasis added.)

2-ER-25-26, 3-ER-48.

III. Procedural Background

17. The initial complaint in this case advanced two sets of claims, both brought on behalf of Rule 23 classes. The first set of claims was for violations of California's Insurance Code and its Unfair Insurance Practices Act, § 790 *et seq.* (made actionable through § 17200 of the California Business and Professions Code). The second set was for violations of the Unruh Civil Rights Act, Civil Code § 51, and California's Military and Veterans Code § 394(a), for discrimination based on military pay grade or status. 3-ER-333-42. Defendants moved to dismiss. 3-ER-304-05. The district court, Judge Bencivengo presiding, granted in part and denied in part the motion to dismiss, ruling in relevant part that:

(a) Insurance Code § 1860.1 is not a barrier to claims in this case. That section, she ruled, precludes civil litigation challenges to

the Department of Insurance's ratemaking authority, whereas the claims here relate to *which* DOI-approved rates Defendants should offer to drivers and not to the Department's approval of rates. 3-ER-286-88.[5]

(b) Likewise, Insurance Code § 11628(f)(1) is not a barrier to claims in this case. That section may authorize Defendants to limit sales to particular segments of the military, but nothing in that section indicates that USAA need not comply with § 1861.16(b)'s "lowest price" requirement, and because §§ 11628(f)(1) and 1861.16(b) can be harmonized it would be improper to read them as in conflict. 3-ER-291-92.

(c) "Regardless of what Defendants' Placement Rules authorize (i.e., separating policyholders by pay grade) or whether the Insurance Commissioner approved the Rules, Defendants have not established that they are entitled to bypass the requirements of § 1861.16(b)," and the complaint stated viable claims for violation of § 1861.16(b). 3-ER-292.

(d) The holding in *Zhang v. Superior Court*, 57 Cal. 4th 364 (2013), that the proscriptions of § 790.03 do not provide a basis for a UCL claim barred the complaint's claims based on alleged violations of § 790.03(b) of the Insurance Code for "unfair methods of competition and unfair and deceptive acts or practices." 3-ER-294-95. And,

(e) The complaint's claims for violations of the Unruh Act and of § 394(a) of the Military and Veterans Code stated viable claims. 3-ER-296-98.

[5] The district court did not discuss USAA's arguments based on § 1860.1 in its decision granting summary judgment.

18. USAA then moved the district court to certify for immediate interlocutory appeal two questions, including whether Section 11628(f)(1)'s provision that "'nothing in [the Insurance Code] shall prohibit an insurer from limiting' its offerings only to 'segments' of the military" forecloses Plaintiffs' claims under § 1861.16(b). 3-ER-277-79. The court denied the motion. It reasoned that the lack of any "legal precedent interpreting the statutory meaning of section 11628(f)(1) … 'standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.'" 3-ER-275 (citation omitted). It added that the motion to dismiss had not raised "difficult questions of first impression" because the court had been able to apply "basic principles of statutory interpretation" such as "harmonizing related provisions … in analyzing the California statutes at issue in this case." 3-ER-276.

19. Following Judge Huie's appointment and confirmation as a district judge, this case was transferred from Judge Bencivengo's docket to Judge Huie's. 2-ER-220-21.

20. The district court then turned to class certification. It initially declined to certify a class for failure to satisfy Rule 23's predominance requirement but added that "The Court is not ruling that Plaintiffs are not

capable of meeting" Rule 23's requirements, "only that they have not done so." 2-ER-218. This time, the court granted it in part. 2-ER-141. It declined to certify a class to pursue Unruh Act and Military and Veterans Code Act claims but certified the following class to pursue claims for violation of § 1861.16(b)'s lowest-price guarantee:

> All enlisted persons who (a) at any time on or after December 28, 2017, purchased or renewed an automobile insurance policy including collision coverage from GIC, (b) qualified as good drivers under Cal. Ins. Code § 1861.025 according to USAA's records, (c) were not offered a good driver discount from United Services, (d) paid more for that policy than they would have paid in United Services, and (e) at any time in which clauses (a) through (d) have been satisfied, garaged vehicles in the State of California.

Id. This appeal is brought on behalf of the certified class.

22. Following the decision not to certify a Rule 23 class as to Plaintiffs' Unruh Act and Military and Veterans Code claims, Plaintiffs voluntarily dismissed those claims. 2-ER-79-82. This case then proceeded to summary judgment.

IV. The Summary Judgment Giving Rise to this Appeal.

21. The parties cross-moved for summary judgment (or partial summary judgment). 2-ER-51-52, 75-77. Judge Huie granted the Defendants' motion and denied Plaintiffs' making the following rulings:

(a) On its face, § 11628(f)(1) is "clear and unambiguous," and its purpose, "as manifest in its language, is to ensure that certain other laws (including Section 1861.16(b)) do not prohibit an insurer from choosing to provide insurance only to members of the military or certain segments of the military, precisely what USAA does here." 1-ER-12, 15, 16.

(b) "As the Court interprets it, Section 11628(f)(1) does not, in any general sense, negate or nullify Section 1861.16(b). Most applications of Section 1861.16(b) would not implicate Section 11628(f)(1) at all." 1-ER-13. In fact, "[t]he manner in which Section 11628(f)(1) serves to limit Section 1861.16(b) … as a practical matter, may only apply to USAA …." 1-ER-14.

(c) "Although it is unnecessary in these circumstances to consider extrinsic evidence like legislative history, the legislative history of Section 11628(f)(1) … does not appear to conclusively address the interplay between that statute and Section 1861.16(b)." *Id.*

(d) Section 11628(f)(1) is not an unlawful amendment of Prop. 103 because "to the extent Section 11628(f)(1) imposes a limitation … on Section 1861.16(b), it is not limiting or otherwise amending Proposition 103" because § 1861.16(b) "is not part of Proposition 103." 1-ER-16.

(e) If § 11628(f)(1) "does not run afoul of Proposition 103" by allowing USAA to issue policies to the military only—thereby creating an exception to Prop. 103's "take all comers" requirement, "then it is no less valid" in limiting the "lowest good driver discount" requirement in § 1861.16(b), which is not part of Prop. 103. *Id.*

Summary of the Argument

The district court erred both by misconstruing § 11628(f)(1) and misanalysing whether that statute, as construed, would be valid. It reached these erroneous conclusions even though it disagrees with little, or nothing, about the recitation of the facts or the law above.

The district court's misconstruction of § 11628(f)(1) rests entirely on the italicized phrase below:

> [N]othing in … [the article that codifies Prop. 103] or in any other provision of [the Insurance] [C]ode, shall prohibit an insurer from limiting the issuance or renewal of insurance … to persons who engage in, or have formerly engaged in, governmental or military service *or segments of categories thereof*, and their spouses, dependents, direct descendants, and former dependents or spouses.

§ 11628(f)(1) (emphasis added).

By virtue of the words "or segments or categories thereof," and those words alone, the district court agreed with USAA on summary judgment (having rejected the very same argument when denying USAA's earlier motion to dismiss its motion to certify for interlocutory appeal). It agreed that with those five words the Legislature had authorized USAA to do what no other insurer may do in California: offer and sell otherwise

equivalent Good Driver policies to different customers through different affiliates at different prices.

The district court badly misread § 11628(f)(1). That section allows USAA and its affiliates to limit sales to some or all military members and their families, relieving the insurers of the obligation, otherwise imposed by Prop. 103, to "take all [Good Driver] comers." *And that is all that § 11628(f)(1) does*. It does not exempt USAA and its affiliates from any other requirement of Prop. 103. No evidence nor any plausible reading of § 11628(f)(1) favors reading it, as the district court did, to thwart the Good Driver protections of 1861.02(b) and § 1861.16(b)'s "lowest available rate rule."

But if the district court properly construed the legislative intent, then § 11628(f)(1), or at least the phrase "or segments of categories thereof," is invalid. The court discounted the conflict between § 1861.16(b) and § 11628(f)(1), as construed, because the former was not part of Prop. 103 as originally adopted. But that wrongly elevates form over substance. When § 1861.16(b) amended Prop. 103 to prevent evasions of § 1861.02(b), it became part of Prop. 103. A statute conflicting with § 1861.16(b) is invalid to the

same extent that a statute conflicting with any other part of Prop. 103 would be invalid.

And the district court erred by failing to consider that its construction of § 11628(f)(1) frustrated the purposes, if not the language, of § 1861.02(b), part of the original Prop. 103. Section 1861.16(b) is not divorced from the original Prop. 103. Instead, it effectuated the Commissioner's emergency regulation issued under the authority of § 1861.02(b). The district court's construction of § 11628(f)(1) thus not only undermines § 1861.16(b), it also undermines § 1861.02(b).

Standard of Review

This Court gives *de novo* review to the district court's interpretations of both voter initiatives and California statutes. *See, e.g., Cordero-Garcia v. Garland*, 105 F.4th 1168, 1171 (9th Cir. 2024).

Argument

I. By not selling class members Good Driver Discount policies from its lowest-priced affiliate, USAA violates § 1861.16(b).

The "lowest available rate" rule established by § 1861.16(b) is unambiguous. Any insurance group operating through multiple affiliates under common ownership or control and selling automobile insurance for

vehicles garaged in California "*shall*" offer and sell Good Driver Discount policies to all statutorily eligible drivers from its affiliate with "the lowest rates for that coverage." § 1861.16(b).

As the district court acknowledged, the factual predicates for a violation of § 1861.16(b) are undisputed here:

- USAA operates in California through two affiliates--United Services and GIC---under common management and control, 1-ER-6;
- USAA's placement rules are mutually exclusive: enlisted members and their families, including good drivers, are eligible to purchase only from GIC, while officers are placed exclusively in United Services, 1-ER-5, 14; and,
- At all relevant times, the rates for Good Driver Discount policies at GIC have been higher than at United Services, and class members have paid more in GIC than they would have paid under United Services' contemporaneous rates, 1-ER-6.

The district court did not question that these undisputed facts establish a violation of § 1861.16(b)—*unless* § 11628(f)(1) exempts USAA from § 1861.16(b). The district court held that § 11628(f)(1) does exempt USAA from § 1861.16(b). The conclusion is incorrect.

II. In denying USAA's motion to dismiss, Judge Bencivengo correctly ruled that § 11628(f)(1) does not excuse USAA from complying with § 1861.16(b).

Judge Bencivengo adopted the correct reading of § 11628(f)(1) early in this case when she denied USAA's motion to dismiss and then its § 1292 motion asking for an interlocutory appeal. Both motions invoked § 11628(f)(1) as a Rule 12(b)(6) defense. She rightly recognized that § 11628(f)(1) authorizes USAA to do business as a specialty insurer—that is, to limit its business to active and retired military and their families, thereby partially exempting it from Prop. 103's "Take All Comers" requirement. 3-ER-291. But, as Judge Bencivengo also correctly held, § 11628(f)(1) does not exempt USAA from § 1861.16(b)'s mandate that good drivers be offered a policy from USAA's lowest priced affiliate. 3-ER-291-92. This interpretation makes perfect sense. It also is consistent with the plain language, history, and broader statutory context. Judge Huie's interpretation, by contrast, is not.

III. By contrast, Judge Huie misread the text of § 11628(f)(1) in concluding that it exempts USAA from complying with § 1861.16(b).

Judge Huie disagreed with Judge Bencivengo, grounding his disagreement in what he considered the "clear language" of § 11628(f)(1).

1-ER-12, 15, 16. He reasoned that § 11628(f)(1)'s words, "or segments of categories thereof," entitles USAA to "draw[ ] a distinction between officers (whom it insures [through United Services] and enlisted personnel (whom it does not)." 1-ER-12. And because § 11628(f)(1) states that "nothing in this … code precludes" USAA from insuring only "segments of categories" of the military, Judge Huie concluded § 11628(f)(1) controls and there is "no conflict" between it and § 1861.16(b). *Id*.

Those five words are crucial because, without them, § 11628(f)(1) would only authorize USAA to limit insurance, in the statute's words, to "persons who engage in, or have formerly engaged in, governmental or military service." These are the only words that even arguably allow USAA to assign good drivers based on their military rank.

In determining whether "or segments of categories thereof" has a clear meaning, a court should consider "the statutory framework as a whole" and "harmonize the various parts of the enactment.… If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." *Sierra Club v. Superior Ct*., 57 Cal. 4th 157, 165–66 (2013). Under this standard, the five words "or segments of categories thereof"

cannot plausibly bear the weight that USAA and Judge Huie have assigned them. As a matter of plain language, the words "or segments of categories thereof" do not manifest any intent to exempt USAA (or any other insurer) from the lowest rate requirement of § 1861.16(b).

First, nothing in these five words hints at, much less speaks plainly about, excusing USAA from selling Good Driver Discount policies at the same prices to all statutorily eligible good drivers in all "segments" or "categories" of the military that it insures. Moreover, nothing in the record indicates that USAA in 1990 was contemplating selling to any segment of the military other than officers; USAA did not begin doing so in California until 1998, eight years later. 2-ER-22, 48, 144. The meaning of the phrase also cannot be gleaned from use in other statutes: as far as Westlaw reveals, those five words have never been used, before or since, in any other statute, state or federal.

Second, if as Judge Huie implicitly assumed, the Legislature's goal was twofold—both to allow USAA to continue to sell to officers without also selling to enlisted personnel *and* to excuse USAA from complying with § 1861.16(b)—the Legislature could easily have drafted clear language

reflecting that intent. A straightforward revision of the statute would have left no ambiguity. The Legislature could have said:

> … nothing in this section … or in any other provision of this code shall prohibit an insurer from limiting the issuance or renewal of insurance … to persons who engage in, or have formerly engaged in, governmental or military service *or segments of categories thereof*, and their spouses, dependents, and former dependents or spouses, **or from selling good driver discount policies to good drivers insured by an affiliate that does not offer the lowest rates for that coverage.**

The Legislature's failure to word § 11628(f)(1) to clearly cancel 1861.16(b) is dispositive. *See United States v. Cruz*, 50 F.3d 714, 719 (9th Cir. 1995) ("Where, as here, Congress has failed to make clear its intent, and *where it could have written the statute without grammatical ambiguity*, we resolve any doubt in favor of the defendant.") (emphasis added); *see also Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 786–87 (9th Cir. 2010) (rejecting argument that 12-month requirement under FMLA applied only to seasonal and temporary workers because, "[a]lthough some legislative history suggests that Congress aimed the 12–month requirement at least in part to exclude seasonal and temporary workers, … the text of the provision is decidedly broader. Had Congress intended to exclude only seasonal and temporary workers, it easily could have written the statute to

say so, but it did not."); *E. W. Bliss Co. v. Superior Ct.*, 210 Cal. App. 3d 1254, 1258 n.2 (Ct. App. 1989), *as modified* (June 19, 1989) (rejecting argument that statute included concept of indemnification because "the Legislature could have drafted the statute to read 'however, a defendant may seek contribution or indemnity against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.' (Underlined words could have been added.) That the Legislature did not do.").

Third, the language fails California's clear statement rule for statutes purportedly limiting the voters' initiative power. The phrase "or segments of categories thereof," does not plainly and clearly excuse USAA's compliance with §§ 1861.16(b) and 1861.02, and under California's clear statement rule, may not be construed as doing so. *See California Cannabis Coal. v. City of Upland*, 3 Cal. 5th 924, 931, 936, 946, *as modified on denial of reh'g* (Nov. 1, 2017) (explaining that "[w]ithout a direct reference in the text of a provision—or a similarly clear, unambiguous indication that it was within the ambit of a provision's purpose to constrain the people's initiative power—we will not construe a provision as imposing such a limitation" because "we narrowly construe provisions that would burden

or limit the exercise of that power"); *see also People v. Kennedy*, 91 Cal. App. 4th 288, 297 (2001) (noting duty under California law "when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between different statutory provisions").

IV. The history and context of § 11628(f)(1) refute any possibility that it was intended to exempt USAA from complying with § 1861.16(b).

Because § 11628(f)(1)'s language is opaque, the district court should have turned under *Sierra Club* to "the statute's purpose, legislative history, and public policy." 57 Cal. 4th at 166.

As the legislative history makes clear, § 11628(f)(1) was adopted in 1989 at USAA's behest. It was designed "to allow [USAA] to continue refusing to offer or sell automobile insurance *to any but active and retired military* …" notwithstanding Prop. 103, which had been adopted the year before and requires insurers to "take all [good driver] comers." 2-ER-060.

USAA was concerned that "absent passage of this measure," the Take All Comers requirement of Prop. 103 would compel the company to sell insurance to *all* good drivers, not just those from military and government backgrounds (and their families). This would have required a significant

shift in USAA's business model, which was focused on serving government and military personnel and their families. *Id.*[6]

The stakes on this issue were made even more apparent when one of USAA's major competitors, State Farm—at the time the largest auto insurer in the nation—objected to A.B. No. 327, the bill that ultimately became § 11628(f)(1), arguing that the bill would unfairly allow USAA to avoid Prop. 103's Take All Comers requirement. 2-ER-65-66. Despite State Farm's opposition, USAA prevailed. The following language was adopted, carving out an exception to the Take All Comers requirement for USAA:

> (e) Except as provided in article 4 [of the Insurance Code] (commencing with section 11620), *nothing in this section or in article 10* [of the Insurance Code] (*commencing with section 1861.01*) of chapter 9 of part 2 of division 1 *precludes an insurer from limiting the issuance of its insurance to persons who engage in, or have formerly engaged in, governmental or military service* and their spouses, dependents, and former dependents. (Emphasis added)

A.B. No. 327 (1989 Laws) (codified as CA Ins. Code § 11628(e)). With the words in italics above, this 1989 law enabled USAA to continue to limit its sales to active and retired government and military personnel and their

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[6] At that time, USAA also sold insurance to "specified employees of the FBI, Public Health Service, Secret Service and Foreign Service." 2-ER-55, 58.

families. There is no evidence that lawmakers were informed or understood that the legislation would allow it to ignore the Good Driver Discount requirements. To the contrary, the Senate sponsor stated that USAA intended to comply with those requirements. 2-ER-63.

Belatedly, however, USAA realized that the 1989 statute was insufficiently precise in several ways, one of which applies to this case. While the statute permitted USAA to limit sales to current and former "government or military services" personnel and their families, it did not, on its face, authorize what USAA was actually doing: selling to officers (and their families) but not to enlisted personnel (and their families) and selling to certain federal government employees but not to state and local government employees. USAA did not begin to insure enlisted personnel in California until 1998. 2-ER-22, 48, 144. Without more precise statutory language, USAA had reason to fear that Prop. 103's Take All Comers requirement obligated it to extend coverage to *all* statutorily eligible good drivers who were current or former military or government employees, including enlisted personnel and state and local government employees whom it was not covering.

To address USAA's concerns, in 1990 the Legislature added what it characterized as "clarif[ying]" language to § 11628(e), now (f)(1). No legislative report characterized the changes as substantive or indicated that they would alter USAA's obligations. 2-ER-70-74. The amended language added the words in bolded italics below:

> (e) *(1)* Except as provided in Article 4 (commencing with Section 11620), nothing in this section or in Article 10 (commencing with Section 1861.01) of Chapter 9 of Part 2 of Division 1 ***or in any other provision of this code, shall prohibit*** an insurer from limiting the issuance ***or renewal of*** insurance ***as defined in subdivision (a) of Section 660*** to persons who engage in, or have formerly engaged in, governmental or military service ***or segments of categories thereof***, and their spouses, dependents, and former dependents ***or spouses.***

A.B. No. 3683 (1990 Laws) (emphasis added).

The context strongly supports the proper construction of the statutory language. The 1990 amendment was adopted to allow USAA to continue its then-existing practice of selling to officers and to certain federal government employees, without opening the door to enlisted personnel and state and local government employees who qualified as good drivers. Without such language, USAA could not refuse to insure enlisted good drivers. The 1990 amendment was intended to allow USAA to continue to sell exclusively within its chosen market.

Moreover, A.B. 3683 (adding "segments of categories thereof" to § 11628) and AB 2737 (which added § 1861.16(b)) moved through the Legislature and became law on nearly identical schedules. The relevant language for each bill was added by the Senate Committee of Insurance, Claims, and Corporations. The reports of that committee reflect that it amended A.B. 3683 on July 27, 1990, and amended A.B. 2737 on August 6, 1990, ten days later. 2-ER-31, 73. The Senate Rules Committee issued its floor analysis of AB 3683 on August 10. 2-ER-70. The record does not contain a similar report for A.B. 2737 but it passed the Senate on August 31. 2-ER-43. The Governor approved A.B. 3683 on September 16, 1990, and A.B. 2737 on September 21. 1990.

The concurrent consideration of both bills is significant. If A.B. 3683 had been intended to exempt USAA from the soon-to-be-adopted § 1861.16(b), one would expect some record of that intent. *There is none*. Nothing in the legislative history suggests that the 1990 amendment to § 11628 (via A.B. 3683) was intended to do any more than "clarify" the legislation from the year before (A.B. 327)—by confirming that, as applied to USAA, the Take All Comers requirements of Prop. 103 did not mandate coverage for "all" current and former government and military employees

(and their families) who qualified as good drivers. And likewise, nothing indicates that the added phrase "or segments of categories thereof" was intended to excuse USAA (or any other insurer) from complying with § 1861.16(b). The notion that § 11628(f)(1) was intended to exempt USAA from § 1861.16(b) or § 1861.02(b) was invented by USAA's lawyers *for purposes of this litigation*.[7]

V. Judge Huie's reading of § 11628(f)(1) is not only textually and historically flawed, it also renders that provision unconstitutional.

Beyond misreading the text of § 11628(f)(1) and disregarding its history and context, Judge Huie compounded the errors by construing § 11628(f)(1) in a way that conflicts with, or at minimum frustrates rather than furthers, the purposes of Prop. 103. His version of § 11628(f)(1) runs afoul of Prop. 103.

Judge Huie acknowledged the constitutional rule that the Legislature may not amend Prop. 103 except to further its purposes. 1-ER-15. He did

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[7] Judge Huie wrongly discounted this history, stating that it does not "conclusively address the interplay between [§ 11628(f)(1)] and Section 1861.16(b)." 1-ER-14-15. But this also means that the contrasting rulings by Judge Bencivengo (at the motion to dismiss stage) and Judge Huie (on summary judgment) cannot be explained by the legislative history that the parties added to the record after USAA's motion to dismiss. The judges reached contrary conclusions based on the words of the statutes.

not dispute that a provision exempting USAA from § 1861.16(b) would be invalid—if § 1861.16(b) were part of Prop. 103. But he concluded that § 1861.16(b) "is *not* part of Proposition 103." 1-ER-16 (emphasis in original). That conclusion elevates form over substance and gets both the form and the substance wrong.

In fact, § 1861.16(b) was a vital *amendment to* Prop. 103. An amendment is "'a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.'" *People v. Superior Ct. (Pearson)*, 48 Cal. 4th 564, 571 (2010) (quoting *People v. Cooper*, 27 Cal. 4th 38, 44 (2002)). Section 1861.16(b) adds to Prop. 103 by expressly preventing insurance companies from evading their Good Driver protections, making it an amendment. When California voters adopted Prop. 103 in 1988, they mandated that insurers offer at least 20% reductions to all good drivers who sought Good Driver Discount policies. § 1861.02(b)(1), (2). But within a year, some major insurers were circumventing this requirement by relegating certain statutorily eligible good drivers into high-priced affiliates while channeling others into preferred affiliates with better pricing. This undermined the initiative's

mandate that all insurance companies sell good drivers policies with at least a 20% discount.

To prohibit this tactic, the Legislature amended Prop. 103 in 1990 by passing A.B. 2737, which was codified in relevant part as Cal. Ins. Code § 1861.16(b).[8] It clarified that an insurance group must offer *all* statutorily eligible good drivers Good Driver Discount policies from its affiliate with the lowest rates. § 1861.16(b). A.B. 2737 furthered Prop. 103's purposes and hence was a valid amendment.

Once a valid amendment is adopted, it becomes part of an initiative, just as a valid amendment to a constitution or a statute becomes part of that constitution or statute. *See Strauss v. Horton*, 46 Cal. 4th 364, 386 (2009), *as modified* (June 17, 2009), *abrogated on other grounds by Obergefell v. Hodges*, 576 U.S. 644 (2015) (explaining that an amendment to the California Constitution "*becomes part of the state Constitution* if it is approved by a simple majority of the voters who cast votes on the measure at a statewide election") (citing Cal. Const., art. XVIII, § 4) (emphasis added; emphasis in original omitted); *Steffler v. Johnston*, 121 F.2d 447, 448 (9th Cir. 1941) ("'A

[8] A.B. 2737's other measures to shut down loopholes are codified at §§ 1861.15 and 1861.16(a).

statute which is amended is thereafter, and as to all acts subsequently done, *to be construed as if the amendment had always been there*'") (citation omitted) (emphasis added).

In addition, as interpreted by Judge Huie, § 11628(f)(1) frustrates the purposes of the original version of Prop. 103, not just § 1861.16(b). We know that to be the case in three ways.

First, when the Commissioner promulgated an emergency rule requiring insurers to sell a good driver discount policy from their lowest priced affiliate to all good drivers in their higher priced affiliates *before § 1816.16(b) became law*, the Commissioner cited § 1861.02 as his authority for that regulation. 10 CCR § 2632.14.2 (repealed).

Second, the Commissioner correctly looked to § 1861.02(b) as authority for the regulation. Section 1861.02(b) required an insurance company, such as United Services, to sell a policy at a 20% discount to any good driver who requested it. Any rational good driver knowing that two affiliates sold identical policies at different prices would select the policy from the lower priced affiliate. Thus, § 1861.02(b)'s logic required an insurance group to sell Good Driver Discount policies from its lowest

priced affiliate. Section 1861.16(b) effectuated that logic. And Judge Huie's interpretation pits § 11628(f)(1) against § 1861.02(b) as well as § 1861.16(b).

Third, construing § 11628(f)(1) to create an exemption for USAA, and only USAA, from the obligation to sell a large group of good drivers its lowest-priced Good Driver Discount policies violates two of the purposes of Prop. 103 as a whole. First, the initiative was intended to "protect consumers from arbitrary insurance rates and practices." Prop. 103, § 2. It is arbitrary to exempt one insurance group from the Good Driver Discount mandate, harming almost 200,000 motorists whom it chooses to insure through its high-priced affiliate. 2-ER-74-75. Second, Prop. 103 was intended to "ensure that insurance is fair, available, and affordable for all Californians." Prop. 103, § 2. Here, over four years, USAA has charged enlisted good drivers almost 18% more than they would have paid under United Services' contemporaneous rates. 2-ER-164. That is inconsistent with the goal of insurance being "fair" or "affordable" to 200,000 Californians.

Section 11628(f)(1), as interpreted by Judge Huie, thus unconstitutionally frustrates the language and purposes of § 1861.16(b) and the purposes of § 1861.02(b) in particular and Prop. 103 as a whole.

Correcting his ruling is critical. His minimization of its impact—by commenting that it "may only apply to USAA" (1-ER-14)—belittles the harm to this large class of Californians.

VI. Two wrongs don't make a right: even if § 11628(f)(1) violated Prop. 103 by allowing USAA to limit sales to "segments" of the military, that does not excuse a second violation of Prop. 103.

Judge Huie concluded his memorandum opinion by offering a further rationale for his interpretation. He reasoned that if § 11628(f)(1) "does not run afoul of Proposition 103" by allowing [USAA] to issue policies to segments of the military only—thereby creating an exception to Prop. 103's 'take all comers' requirement as contained in Section 1861.02(b)(1)"—then it must be "no less valid" in "limiting the 'lowest driver discount' requirement," which he asserted is "*not* part of Proposition 103." 1-ER-16. But his reasoning is too facile.

The Legislature's decision to exempt USAA from having to take good drivers who were not current or former governmental or military personnel (or their families) may itself have been an unconstitutional amendment to Prop. 103. The legislative history clearly shows a legislative intent to create that carveout, but that does not make it constitutionally valid. Whether that amendment was permissible without voter approval is

not a question before this Court in this case. The issue here is different: whether the Legislature intended to excuse USAA from Prop. 103's requirement that an insurance group offer all statutorily eligible drivers a Good Driver Discount policy at its lowest rates. And that question cannot be answered by alluding to how the Legislature may have thwarted Prop. 103 once before. In insurance law, as elsewhere, it's trite but true: two wrongs do not make a right. They simply make two wrongs. Invoking one error does not bolster the case for another.

Conclusion

The important and unresolved questions of state law raised in this appeal should be certified to the California Supreme Court for determination. However, if this Court elects to decide those questions itself, it should reverse the district court's judgment in its entirety and remand with instructions to the district court to enter partial summary judgment on liability in favor of the Plaintiff Class.

April 29, 2025

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ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, this addendum includes pertinent Constitutional sections, initiatives, statutes, and similar documents, reproduced verbatim:

Statute **Page**

California Constitution

Initiatives

California Code Sections

Insurance Code

Other Codes

Federal Code

California Statutes (as enacted)

California Regulations

Legislative and Regulatory History

Court Rules