IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SPANISH SPEAKING CITIZENS' FOUNDATION, INC. ET AL.,

Petitioners and Respondents,

v.

CHUCK QUACKENBUSH, in his capacity as Insurance Commissioner of the State of California
Respondent and Appellant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, AND TRUCK INSURANCE EXCHANGE,

Intervenors and Appellants.

After a Decision By the Court of Appeal, First Appellate District, Division Four
Consolidated Case Nos. A084024, A085376, A085713

PETITION FOR REVIEW BY

PROPOSITION 103 ENFORCEMENT PROJECT

Harvey Rosenfield (SBN 123082)
Pamela Pressley (SBN 180362)
Proposition 103 Enforcement Project, a Project of
The Foundation for Taxpayer and Consumer Rights
1750 Ocean Park Boulevard, Suite 200
Santa Monica, California 90405-4938
Telephone (310) 392-0522
FAX (310) 392-8874

Attorneys for Respondent and Petitioner
the Proposition 103 Enforcement Project

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases (continued)

Statutes

Regulations

ISSUE(S) PRESENTED

When a voter-enacted initiative statute, (Cal. Ins. Code § 1861.02(a)), expressly requires that automobile insurance premiums shall be based primarily upon a motorist's driving safety record, annual miles driven and years of driving experience, may the Insurance Commissioner contravene this mandate by promulgating regulations which permit insurers to continue to allow optional factors such as ZIP Code to outweigh any of the factors related to how well and how far a motorist drives?

WHY REVIEW SHOULD BE GRANTED

This case presents an issue of enormous importance to every citizen of this state who drives a car and who by law is required to carry automobile insurance. At issue is the application of one of the last remaining provisions of voter-enacted Proposition 103 to be adjudicated by the courts – specifically, the provision requiring that insurance companies, when determining automobile insurance premiums, give greater weight to a motorist's driving safety record, annual miles driven and years of driving experience than where one lives. This provision, Cal. Ins. Code § 1861.02(a), seeks to remedy the long-standing, pernicious practice of "territorial rating."

At least four times in the last thirteen years, this Court has addressed issues raised by the present case:

Once, to direct those challenging the mandatory insurance law and the practice of territorial rating to take their case to the legislative branch. *See King v. Meese* (1987) 43 Cal.3d 1217. And thrice more, to protect the will of the people against encroachment after voters enacted insurance reforms at the ballot box. *See Calfarm Ins. Co. v. Deukmejian* (1989) 48

Cal. 3d 805 (upholding rate rollback provision of Proposition 103 as modified); *20th Century v Garamendi* (1994) 8 Cal. 4th 216 (upholding regulations implementing rate rollbacks); *Amwest v. Wilson* (1995) 11 Cal.4th 1243. (invalidating legislative amendment excluding surety insurance from rate rollback and rate prior- approval provisions of Proposition 103).

The Court of Appeal's decision in this case flouts each of these unanimous decisions of this Court.

The arbitrary disparities caused by territorial rating in automobile insurance were first addressed by this Court in 1987 in the context of a challenge to the constitutionality of mandatory insurance laws. *King v. Meese* (1987) 43 Cal.3d 1217. The Court then noted:

> There is a certain appeal to plaintiffs' complaint that those with good driving records, who could possibly afford insurance if they lived in a more affluent area, are unable to obtain insurance in the area where they actually live.

Id. at 1235.

Justice Broussard, in a concurring opinion, emphasized that residents of certain sections of Los Angeles or Oakland "with a perfect driving record could obtain private [insurance] coverage, if at all, only by paying more than a resident of some other areas with a history of accidents and violations." *Id*. at 1238 (conc. opn., Broussard, J.) Justice Broussard suggested:

> Rates which took affordability into account, and ***weighted driving record more than residence***, would go far to alleviate the problem caused by the financial responsibility law.

Id. at 1242, emphasis added. (conc. opn., Broussard, J.)

Nevertheless, this Court told petitioners there that "their case should be made to the Legislature, not to this court." *Id.* at 1235.

This advice was followed. One year later, after the Legislature failed to enact insurance reforms, California voters passed Proposition 103. That measure was aimed at overhauling insurance industry practices in California and providing greater protections for policyholders. Cal. Ins. Code § 1861.02(a) ("§ 1861.02(a)") was a central focus of the initiative and of the contentious campaign waged against it by the insurance industry. Twelve years later, the mandate of § 1861.02(a) remains unenforced, and one of Proposition 103's express purposes – "to protect consumers from arbitrary insurance rates and practices"—remains unfulfilled.

It is undisputed that the regulations at issue here, promulgated by Insurance Commissioner Quackenbush in 1996, continue to allow ZIP Code and other factors to outweigh driving safety record in the determination of auto insurance premiums. A lengthy administrative hearing initiated by Petitioner found the regulations in compliance with Proposition 103 and they have since been enforced in their current form. By separate suits subsequently consolidated, Petitioner, and a coalition of city and county agencies, consumer, community and minority organizations filed a challenge to the regulations as inconsistent with the enabling statute. The Alameda County Superior Court agreed with Petitioners. The insurance industry appealed.

The First District Court of Appeal has reversed. Its ruling explicitly acknowledges that the regulations do not comply with § 1861.02(a): "What the regulations do not do is ensure that rates will be determined primarily by driving safety record and mileage driven." Slip Op. at 67. Nevertheless, the Court of Appeal upholds the regulations, because, in the Court's view, the "assumptions" of the voter-enacted statute are wrong (Slip Op. at 66), and "territory is a more important determinant of risk of loss than any other single factor." *Id.*

By what authority does the Court of Appeal substitute its judgment for that of the voters? Incredibly, by seizing on the purpose of Proposition 103 quoted above – "to protect consumers from arbitrary insurance rates and practices." Slip Op. at 53. Because the statute's mandate – that premiums be based principally on driving safety record, annual mileage and years of driving experience – departs from the insurance industry's "actuarial" data, which favors "territory," the Court concludes that the statutory scheme leads to an "arbitrary" rate in violation of the "purpose" of Proposition 103.

In this way, the Court of Appeal's decision stands Proposition 103 on its head. The provision of the initiative which proposed to remedy the "arbitrary practice" of territorial rating is nullified. A clause in the Purposes section of Proposition 103 becomes the perpetrator of the very evil that the proposition sought to diminish. What the voters intended as a shield against an abusive insurance industry practice becomes a sword in the hands of the industry to gut the initiative.

Numerous statements and observations throughout the Court of Appeal's opinion, discussed in further detail below, conflict with this Court's prior decisions in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal. 4th 216 and *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805. Those cases, in construing other Proposition 103 requirements, determined that the initiative's provisions should not "be interpreted in accordance with the insurance industry's or the actuarial profession's understanding of its operative terms." *20th Century Ins. Co. v. Garamendi*, 48 Cal. 3d at 289. In contrast to those cases, the decision of Court of Appeal here concludes that regulators must adhere to actuarial standards advocated by insurance companies. Not just § 1861.02(a), but all of Proposition 103, and many other insurance statutes, are jeopardized by this ruling.

Review is manifestly needed here, for the following reasons:

1. To resolve longstanding and important issues of law when the Court of Appeal has applied an improper construction of a voter-enacted statute by creating conflicts in the law where none exist and replacing its judgment for that of the voters.
2. To secure uniformity of law with this Court's prior rulings so as to properly implement a voter-enacted automobile insurance rating scheme that deviates from traditional insurance "actuarial standards" by carrying out its mandate that driving safety record be prioritized over all other factors.

More is at stake here than automobile insurance rates. The voters, having taken the step to reform automobile insurance rating practices in a manner suggested by this Court thirteen years ago, are now told that the rating system they enacted to ensure that rates are primarily based on driving safety record rather than ZIP code ***simply cannot be implemented***. In so ruling, the Court of Appeal has struck at the very heart of the sanctity of the voters' initiative power, "one of the most precious rights of the democratic process." *See Rossi v. Brown* (1995) 9 Cal.4th 688, 695. (It is "the duty of the courts to jealously guard this right of the people" and "to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled.")

Throughout its examinations of Proposition 103, this Court has emphasized its paramount responsibility: "the duty of the courts to jealously guard this right of the people." *Ibid.* Once again, this Court is called upon to vindicate this principle. Failing to do so now will only postpone, at substantial delay and cost to the taxpayers, the ultimate resolution of this matter.

STATEMENT OF FACTS

A. *King v. Meese*.

In 1987, this Court upheld California's financial responsibility law, (Cal. Veh, Code § 16028,), which requires drivers to provide proof of financial responsibility, upon demand by a peace officer, when they are cited for a moving violation. This law "effectively mak[es] the ability to drive contingent on having insurance." *King v. Meese*, 43 Cal.3d at 1225, 1230; *id*. at 1236 (conc. opn., Brossard, J.). As noted above, the Court considered objections to the practice of "territorial rating," a controversial and much-criticized system long employed by insurance companies, under which premiums are based principally upon a motorist's place of residence. However, this Court determined that the legislative branch was the appropriate forum in which to raise such objections.

B. Proposition 103 and Insurance Code Section 1861.02(a).

Prior to the enactment of Proposition 103 in 1988, property-casualty insurance rates and rating practices were essentially unregulated. As this Court has described the pre-Proposition 103 era, the so-called "open competition" system of regulation was one in which:

> California ha[d] less regulation than any other state, and in California automobile liability insurance [was] less regulated than most other forms of insurance.

20th Century v. Garamendi (1994) 8 Cal.4th 216, 240. (quoting *King v. Meese* (1987) 43 Cal.3d 1217, 1240 (conc. opn. of Broussard, J.))

Enacted over four competing insurance initiatives, Proposition 103 "made numerous fundamental changes in the regulation of automobile and other forms of insurance in California." *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th at 240.

Among other provisions of Proposition 103 familiar to this Court,[1] Cal. Ins. Code § 1861.02(a) ("§ 1861.02(a)") was enacted to address the territorial rating issues raised by by this Court in *King v. Meese*. It requires that automobile insurance premiums be based primarily upon factors tied to one's actual driving history, rather than on other factors unrelated to driving, such as ZIP code, marital status, gender and years insured by a company. Section 1861.02(a) provides:

> Rates and premiums for an automobile insurance policy, as described in subdivision (a) of Section 660, shall be determined by application of the following factors in decreasing order of importance:
>
> (1) The insured's driving safety record.
>
> (2) The number of miles he or she drives annually.
>
> (3) The number of years of driving experience the insured has had.
>
> (4) Such other factors as the commissioner may adopt by regulation that have a substantial relationship to the risk of loss. The regulations shall set forth the respective weight to be given each factor in determining automobile rates and premiums. Notwithstanding any other provision of law, the use of any criterion without such approval shall constitute unfair discrimination.

Thus, the statute mandates that "other factor[s]" – those permitted by §1861.02(a)(4) – be placed on a level of ***decreased importance***, below the three driving-specific, or "mandatory," factors required to be used by §1861.02(a)(1) through (3). *See Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 813, fn. 4 ("Other provisions of the initiative ... require ... that

[1] Chief among Proposition 103's other provisions are the following reforms: a 20% rollback in automobile, homeowner, business, and all other property-casualty premiums; stringent controls on insurance company profiteering, waste, and inefficiency through a regulatory process subject to public scrutiny and participation; a 20% good driver discount; elected, rather than appointed, Insurance Commissioner; and application of antitrust civil rights laws to insurance companies.

automobile insurance rates ... be based on driving record, number of miles driven, years of driving experience, and other factors approved by the Commissioner"). The "other factors" are referred to herein as "optional factors."

C. The Commissioner's Regulations.

After repeated pressure by Petitioner and others, Commissioner Quackenbush, in 1996, finally promulgated regulations as required by §1861.02(a). It is ***undisputed*** that the regulations permit insurers to weight territory – or any other optional factor they choose – as the principle determinant of premiums, rather than driving safety record, annual mileage and years of driving experience, as required by § 1861.02(a). However, the regulations allow insurers to use an arithmetic trick to give the appearance of compliance with § 1861.02(a).

Title 10 of the California Code of Regulations section 2632.8 ("§ 2632.8"), the key regulation at issue here, is the vehicle for this subterfuge. Subsection (a) provides:

> For each type of coverage, four factor weights shall be calculated, one weight for each of the three mandatory factors listed in Section 2632.5(c)(1) through (3) and one for ***all the optional factors*** (from Section 2632.5(d)) taken together as a single factor weight.

Cal. Code Regs., tit. 10, § 2632.8(a) (Emphasis added).

The regulation thus directs insurers to calculate just "***one***" factor weight for "***all the optional factors***" they choose to use.[2] Rather than requiring that a "respective weight" for "each" optional factor be calculated (as required by § 1861.02(a)(4) and as the regulation does require for "***each***

[2] In §2632.5(d), the Commissioner has permitted sixteen so-called "optional" factors which insurance companies may choose to use. Among the factors permitted are the ZIP Code where the insured car is garaged, number of years with the company (called "persistency"), marital status, academic standing, type of vehicle, gender, and others.

of the three mandatory factors"), § 2632.8(a) instead allows insurers to group together all optional factors to derive a single weight for all.

Section 2632.8(c)(4) sets forth the method by which insurers must calculate the single weight for the optional factors:

> The weight for the [single, optional factor] rating factor being analyzed is the ***summation of the amounts . . . divided by the number of calculations.***

Cal. Code Regs., tit. 10, § 2632.8 (c)(4) (emphasis added.)

Thus the regulation requires insurers to ***average*** all optional factors to obtain a single weight. Under the regulation, it is only that the ***average*** weight of the optional factors that must weigh less than the mandatory factors. However, that ***average does not reflect the actual impact of each optional factor in determining premiums***. As illustrated below, the regulations permit insurers to utilize the individual optional factors with weights greater than any of the mandatory factors in the determination of premiums. Slip Op. at 8, 10, 25, 62-63.

D. The Class Plans.

On September 20, 1996, the Commissioner issued a notice to all private passenger automobile insurers, requiring them to file class plans[3] in accordance with his regulations by February 18, 1997. CT at 77. Pursuant to this notice, insurers, including Appellant-Intervenors State Farm and Farmers, filed class plans. It is undisputed that these class plans revealed that several of the individual optional factors carry more weight – meaning, they continue to have a greater impact on premium – than any of the three

[3] A "class plan" is a "schedule of rating factors and discounts" used by insurers that simply indicates whether a factor increases or decreases the premium. Cal. Code Regs., tit. 10, §2632.3(a). Class plans are required to be approved by the Insurance Commissioner under §2632.10. Class plans are "revenue neutral." CT 1721. Thus, an insurer's class plan simply tells insurers how to distribute a rate over their entire population of insureds.

mandatory factors. Petitioner refers the court to Appendix A of the Court of Appeal decision attached hereto as Exhibit A to illustrate the following discussion.

In State Farm's class plan as approved by Appellant-Commissioner pursuant to his regulation, for example, ***almost half*** (four of ten) of the optional factors used by State Farm have weights in excess of a mandatory factor:

- ZIP Code ("Cost/Frequency Bands") has a factor weight of **$34.60**, a figure much higher than the **$20.65** assigned to Driving Safety Record. (mandatory factor #1). CT at 1119; Appendix A of Slip Op. attached hereto as Exhibit A.
- Gender and Marital Status were also weighted higher than driving safety record with a weight of **$25.10**. *Id.*
- The number of years a driver has had State Farm automobile insurance, ("Persistency"), counts more toward an insured's automobile insurance rates than the Number of Miles Driven Annually (mandatory factor #2) or Years of Driving Experience (mandatory #3). Persistency has a weight of **$15.51**, while years of driving experience and annual mileage are assigned weights of **$13.64** and **$10.51**, respectively. *Id.*

State Farm uses six additional optional factors, each with nominal weight, thus ***allowing the average weight of all optional factors to be substantially diluted to $9.82***. *Id.*

E. The Administrative Hearing.

On May 15, 1997, Petitioner Proposition 103 Enforcement Project petitioned the Department of Insurance for a hearing to challenge several of the class plans filed by insurers and subsequently by the Commissioner

under his regulations.[4] In challenging the class plans, Petitioner sought a determination as to whether the class plans were in compliance with § 2632.8 and a determination as to the regulation's intended application.[5]

On July 2, 1999, Commissioner Quackenbush granted a hearing. Petitioners Southern Christian Leadership Conference and Consumers Union intervened.

The Hearing Officer's proposed decision firmly concluded "that the method the Insurers used to calculate the 'Fourth Weight' in their filed Class Plans [i.e., averaging] complied with the statutory and regulatory requirements of Proposition 103." CT at 1031. Insurance Commissioner Quackenbush adopted the proposed decision without change on January 29, 1998. CT at 1131.

F. The Superior Court Proceeding.

Following the Commissioner's final decision interpreting § 2632.8, the Project filed a petition for writ of mandate in Alameda County Superior Court on March 26, 1998 against Insurance Commissioner Chuck Quackenbush challenging § 2632.8 as violating voter-enacted Cal. Ins. Code § 1861.02(a) (Case No. 796082-2).

The Spanish Speaking Citizens' Foundation, Consumers Union of U.S., Inc., Southern Christian Leadership Conference of Greater Los Angeles, the City of Los Angeles, the City of Oakland, and the City and

---

[4] The insurers in the administrative proceeding were State Farm Mutual Automobile Insurance Company and State Farm General Insurance Company (collectively "State Farm"), Allstate Insurance Company, Allstate Property and Casualty Insurance, and Allstate Indemnity Company (collectively "Allstate"), and Farmers Insurance Exchange ("Farmers"), Mid-Century Insurance Company, and Truck Insurance Exchange. CT 1012.

[5] The Proposition 103 Project had offered an alternative interpretation of regulation 2632.8 that would have, at least in part, saved it from violating the enabling authority of Cal. Ins. Code §1861.02.

County of San Francisco filed a similar petition (Case No. 796071-6) and the two cases were consolidated. State Farm and Farmers sought and were granted leave to intervene. CT at 772-775.

On June 23, 1998, the superior court held that §2632.8 violates Cal. Ins. Code § 1861.02(a) by

> 1) permitting insurers to use individual optional factors that have a greater impact in the determination of rates and premiums than one or more of the three mandatory factors (i.e. the insured's driving safety record, the number of miles he or she drives annually, and the number of years of driving experience the insured has had).
>
> 2) not setting forth the respective weight to be given each optional rating factor in determining automobile rates and premiums, but instead requiring the averaging of all optional rating factors to arrive at a single weight for the optional factors and delegating the task of assigning "weight" to insurers.

CT at 3064.

The superior court directed that the Commissioner neither use nor enforce §2632.8(a) to the extent that it allowed insurers to calculate one average weight for all optional factors taken together as a single factor weight. *Ibid*. Insurance Commissioner Quackenbush, State Farm and Farmers filed notices of appeal.

G. The Court of Appeal's Decision.

By its opinion dated December 29, 2000, certified for publication, the Court of Appeal reversed the lower court. The ruling is not a model of clarity and consistency.

The Court recognizes that § 1861.02 requires that "optional factors are to have less weight than any mandatory factor" related to one's driving history, (Slip Op. at 46). It explicitly acknowledges, however, that "***what the regulations do not do is ensure that rates will be determined primarily by driving safety record and mileage driven***." Slip Op. at 67, emphasis added.

Nevertheless, the Court of Appeal held that:

- The weights of individual optional factors do not have to be less than that of any mandatory factor (Slip Op. at 68); and
- Individual optional factor weights do not have to be calculated in lieu of a single optional factor weight which reflects the average weight of all the optional factors. Slip Op. at 68-69.

Ignoring the acknowledged requirement of the statute, the Court concludes: "the current regulations constitute a lawful choice among imperfect options." Slip Op. at 67.

Petitioners (Respondents below) jointly filed a petition for rehearing with the Court of Appeal in order to preserve on review in this Court several misstatements and omissions of material fact made in the Court of Appeal's decision. On January 25, 2001, the Court of Appeal denied the petition for rehearing, but did modify its decision by excluding references to excerpts of testimony by State Farm's actuary that had been stricken from the administrative hearing record.

DISCUSSION

I. Review is Necessary to Settle Longstanding and Important Issues of Law in a Manner that Will Effectuate the Will of the Voters.

This Court should grant review to settle the long-standing issue of how automobile insurance premiums may lawfully be calculated for millions of drivers to comply with the 1988 voter-enacted legislation requiring that how well and often one drives must be given greater weight than any other factors, including where one lives or one's marital status.

A. The Issue of Effectuating a Rating Scheme that Places More Importance on Driving Safety Record than Where One Lives Requires Definitive Resolution.

As discussed above, it has been over thirteen years since this Court first recognized the problems created by discriminatory territorial rating practices employed by insurance companies to calculate automobile insurance premiums in *King v. Meese* (1987) 48 Cal. 3d 1217. *See* particularly *King v. Meese*, 48 Cal.3d at 1235 and 1240-43 (conc. opn., Broussard, J.) (commenting on the widespread use of territorial rating practices whereby "insurers can draw lines which have the practical effect of discriminating between applicants on the basis of race.") While recognizing the serious disparities created by territorial rating practices, this Court said at that time that it was a case which "should be made to the Legislature." *King v.Meese*, 43 Cal.3d at 1235; *id*. at 1243. (conc. opn. of Broussard, J.)

A year later, after the Legislature failed to take action, California voters took matters into their own hands through the initiative process and enacted Proposition 103, aimed at "fundamentally changing" the way automobile insurance premiums were to be determined. *See 20th Century Insurance v. Garamendi* (1994) 8 Cal.4th 216, 240; CT at 1135. One of the main provisions of that initiative, § 1861.02, requiring, as the courts below agree, that auto insurance rates weight driving record more than residence (Slip Op. at 46), has never been implemented. The permanent regulations enacted by Insurance Commissioner Quackenbush in 1996 still allow insurers to attribute more weight to factors such as age, gender, marital status, and ZIP Code than to factors directly related to how well someone drives. Slip Op. at 8, 10, 25, 62-63.

The stark disparities in annual premiums for the same coverage paid by drivers with the same driving record and number of miles driven annually who happen to live in different ZIP Codes have been amply demonstrated in the record. CT at 140-141, 174-175, 326. These examples profoundly illustrate that the problems faced by drivers in many urban areas who cannot afford automobile insurance which they are required by law to carry, first addressed by the *King v. Meese* court thirteen years ago, continue today.

Indeed, the burdens facing motorists are significantly greater now than they were when this Court decided *King v. Meese*. Mandatory insurance laws have been dramatically tightened to require proof of insurance upon registration (Cal. Veh. Code § 4000.37), with greatly increased punishment for violation, including heavy fines and impoundment of the vehicle. Cal. Veh. Code § 16029. Moreover, a ballot measure sponsored by Commissioner Quackenbush and approved by voters in 1996, Proposition 213, levies a severe sanction on motorists who are injured in an automobile accident in which they are not at fault, but who are uninsured. Such individuals are precluded from recovering non-economic losses for their injuries. Cal. Civ. Code § 3333.4.

This Court should therefore grant review to finally resolve this longstanding issue which will significantly impact drivers throughout the state.

B. In Upholding the Regulations, the Court of Appeal has Created Conflicts in the Law Where None Exist, Substituting Its Judgment for the Voters'.

The Quackenbush regulations were upheld by the Court of Appeal even though they "do not . . . ensure that rates will be determined primarily by driving safety record and mileage driven." Slip Op. at 67. *See also,* Slip Op. at 8, 10, 25, 62-63. Cal. Ins. Code § 1861.02(a) is clear and

unambiguous on its requirements: the Commissioner must set forth the respective weights for each optional factor, and those factor weights must be less than driving safety record, number of miles driven, and years driving experience. Yet, the Court of Appeal's decision finds conflicts within the law where none exist and substitutes its judgment for that of the voters. The Court of Appeal's decision thus endorses the one interpretation of the voters' initiative that continues the very ills the voters sought to end. In so doing, the ruling gives wide latitude for future Commissioners to enact regulations even further afield of the current regulations.

1. The Court of Appeal Finds Conflicts in the Law Where None Exist.

The Court of Appeal finds that "there is a conflict in the law which any set of implementing regulations must attempt to reconcile," and ultimately concludes that "the current regulations manage to implement most of the law's conflicting demands." However, the "conflict" that the Court of Appeal refers to is one of its own creation.

The decision cites a clause contained within the Purposes section of Proposition 103 stating that the measure is aimed at "protecting consumers from arbitrary insurance rates and practices." Slip Op. at 53. The Court of Appeal equates "arbitrary insurance rates" with "rates which do not reflect the cost of providing insurance":

> We can conceive of no interpretation of 'arbitrary insurance rates,' and Petitioners offer none, as anything other than ***rates which do not reflect the cost of providing insurance***.

Slip Op. at 53, emphasis added..

Accepting the insurance industry's contention that "territory is a more important determinant of risk of loss than any other single factor," the Court concludes that weighting rating factors as required by § 1861.02(a) would "produce[] premiums that are individually and collectively arbitrary"

(Slip Op. at 67), and thus a proper application of § 1861.02(a) conflicts with Proposition 103's purpose of preventing "arbitrary" rates.

There is no such conflict within the provisions of Proposition 103. Therefore, under established principles that have guided California courts for many years, the court's inquiry is at end. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799 (internal quotations and citations omitted); *In re Lance W.* (1985) 37 Cal.3d 873, 886, (where statute is clear, "courts should not indulge in [further construction]."); *Wilshire Ins. Co. v. Garamendi* (1992) 5 Cal.App. 4th 1573, 1579 (following above rule in interpreting Proposition 103). The Court certainly has no right to rewrite the statute.[6] *See id.*

Nevertheless, having invented a conflict within Proposition103, the Court of Appeal fails to follow the fundamental rules of statutory construction that require it to harmonize these words in a manner consistent with the mandate of § 1861.02. *See Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065. (stating that statutes are not to be construed "in isolation," but rather "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.")

Instead, the Court turns Proposition 103 on its head by ignoring that when the voters stated one purpose of the proposition as being "to protect

---

[6] To the extent that there is any ambiguity at all about the intended impact of §1861.02(a), proper legislative interpretation of an initiative requires that the Court consult the Ballot Pamphlet and other materials provided to voters to discover what the voters were told about the initiative's intended impact and, thus, what the electorate's intent was in enacting it. *Gilroy v. State Bd. of Equalization* (1989) 212 Cal. App. 3d 589, 592. As exhaustively documented in the record, voters were well aware that 103 required insurers to base premiums on driving record, rather than territory; that fact was featured by both sides in the ballot arguments, in the Legislative Analyst's analysis, and in the massive campaign advertising of the industry itself. CT at 1133, 1135, 1136.

consumers from arbitrary insurance rates and practices," territorial rating was the very arbitrary practice they sought to end**.** In the process of resolving a conflict of its own creation by rewriting the law, the Court of Appeal has sacrificed the very mandate of the statute under consideration in this case: "What the regulations do not do is ensure that rates will be determined primarily by driving safety record and mileage driven." Slip Op. at 67.

2. Rather than "Jealously Guarding" the Right of the Voters to Enact a New Scheme of Calculating Insurance Rates, the Court of Appeal Substitutes its Judgment for that of the Voters.

With its admission that the regulations do not accomplish what § 1861.02 requires, the Court of Appeal's decision flies in the face of the longstanding judicial cannon that the voters' initiative is a "precious" right of the electorate to be "jealously" guarded against all efforts to thwart it. *Rossi v. Brown* (1995) 9 Cal 4th 688, 695. ("[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." [citation omitted])

Rather than "jealously guarding" the right of the voters to enact a new scheme for determining insurance premiums, the Court of Appeal has gone to the opposite extreme by calling the voters' assumptions into question and ultimately substituting its views for those of the voters.' In justifying its conclusion that the current regulations can be upheld even though they do not prioritize driving safety record over ZIP Code and other factors, the Court of Appeal states flatly that ***the voters were wrong*** when they adopted the law. Reviewing the express declarations in the preamble to Proposition 103, the provisions of § 1861.02(a) itself, and

"representations" in the ballot pamphlet, the Court of Appeal reaches a startling conclusion:

> The shared assumption underlying all of these declarations, provisions and representations is that safety record and other mandatory factors are more indicative of the insurance risk drivers pose than where they live. The line between these declarations, provisions and representations marks a conflict because that assumption is false.

Slip Op. at 66.

The Court of Appeal states that contrary to what the voters must have assumed, "unrefuted evidence establishes that territory is a more important determinant of the risk of loss than other single factor."

By calling the voters' assumptions into question in this manner, the Court of Appeal's decision contravenes this Court's analysis in *Amwest v. Wilson* (1995) 11 Cal.4th 1243. There, this Court rejected the argument by insurers that citizens who voted for Proposition 103 did not know what they were voting for. As this court reasoned, when a measure "has been adopted by a majority vote of the people," the voters:

> must be assumed to have voted intelligently upon a [ballot measure], the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure.

Amwest v. Wilson (1995) 11 Cal.4th 1243, 1260-1261.

Furthermore, the substitution by the court of its own fact-finding for that of the voters violates its duty under the separation of powers doctrine to refrain from reviewing legislative determinations. *See Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 999 ("Courts have nothing to do with the wisdom of laws or regulations" and "under the doctrine of

separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations." [quoting *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.]); *see also King v. Meese*, *supra*, 43 Cal.3d at 1235. (Courts "cannot look behind the enacted framework to replace the Legislature's social judgment with their own.")

So too, *every* California Supreme Court authority interpreting initiative statutes has proclaimed that when a dispute arises about the scope or meaning of an initiative, a court's task is not to "weigh the economic or social wisdom or general propriety of the initiative" (*Legislature of the State of California v. Eu* (1991) 54 Cal.3d 492, 514 [citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Education* (1978) 22 Cal.3d 208, 219]), but simply to discover, and defer to, the legislative policy choices made by the people and enforce those policies. *Accord*: *Quackenbush v. Superior Court* (1997) 60 Cal.App.4th 454, 462, *review denied* March 25, 1998 (stating that it is not the role of the courts to "second-guess the electorate's decision" that certain benefits outweigh possible adverse effects of a voter-enacted measure.).

For these reasons, this Court should grant review to ensure that regulations which eviscerate the voter-enacted mandates of § 1861.02(a) do not continue to carry a court's stamp of approval as "a lawful choice."

II. Review is Necessary to Secure Uniformity of Law with this Court's Prior Rulings.

Contrary to prior rulings by this Court, the Court of Appeal's decision ***embraces*** insurers' actuarial interpretations over the intent of the voters, stating, for example:

> We can conceive of no interpretation of 'arbitrary insurance rates,' and Petitioners offer none, as anything other than ***rates which do not reflect the cost of providing insurance***.

(Slip Op. at 53, emphasis added.).

From this assumption, the Court of Appeal reasons that the optional rating factors must be weighted in a way that preserves a "substantial relationship to risk of loss," as insurers have defined that relationship. Slip Op. at 53-54. Thus, according to the Court, any other method that deviates from the insurers' methods, including ordering of the factor weights in the manner required by § 1861.02(a), must necessarily constitute "unfair discrimination." *Id*.

Contrary to the Court of Appeal's conclusions, this Court has previously clearly rejected the argument that regulation of rates under Proposition 103 is subject to any purely "actuarial" interpretation. In *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal. 4th 216, this Court dismissed arguments urged there by insurers that Cal. Ins. Code § 1861.05, which establishes the "prior approval" system of insurance rate regulation, must be interpreted in such a way as to conform to the preferences expressed by actuaries in the employ of insurance companies:

> The insurers argue in substance that the 'excessive' / 'inadequate' standards as defined in the initiative should be interpreted in accordance with the insurance industry's ***or the actuarial profession's understanding*** of its operative terms. ***We believe that subdivision (a) of Insurance Code § 1861.05 . . . stands in the way.***

20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 289. (Emphasis added.)

In holding that §1861.05(a) cannot be interpreted according either to an actuarial definition or in light of "similar statutes" from other jurisdictions (*id.* at 289), this Court stated:

> we must observe that the "excessive/inadequate" standard as defined in Proposition 103 is itself apparently "unique" and without "precedent" among "similar statutes."

Ibid.[7]

As well, the California Supreme Court's decision in *Calfarm* interpreted the "inadequacy" standard in §1861.05(a) to encompass constitutional, not just actuarial precepts. *Calfarm v. Deukmejian* (1989) 48 Cal.3d 805, 823 n.15. Justice Broussard, in his concurrence in *King v. Meese*, *supra*, 43 Cal.3d 1217 also noted:

> The Commissioner's assumption that an actuarially sound rate is necessarily a fair and reasonable rate is open to challenge. One can argue that it is unfairly discriminatory to use classifications which result in charging good drivers in some areas much more than bad drivers in other parts of the state.

King v. Meese, 43 Cal.3d at 1241-42 (conc. opn., Broussard, J.)

These California Supreme Court opinions "stand in the way" of the Court of Appeal's ruling which forces an interpretation of Proposition 103 placing insurers' notions of "cost-based" insurance premiums above all else.

The Court of Appeal attempts to distinguish *20th Century* by stating that that case addressed standards which "appear to be aimed more at the base rates insurers can charge than at the distribution of premiums among policyholders." Slip Op. at 51. There is no explanation given, however, as to why actuarial standards deemed by this Court not to apply to one provision of Proposition 103 should nonetheless be strictly applied to another provision of the measure. Indeed, there is no logical or legal basis

---

[7] What is "unique," according to *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal. 4th 216, is that § 1861.05 includes standards that are seen in no actuarial manual or in other statute in the nation:

> In considering whether a rate is excessive, inadequate or unfairly discriminatory, ***no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income***.

for that distinction. The Court of Appeal's decision in this case effectively reverses this Court's rulings in *Calfarm*, and *20th Century*. Clearly, the entire regulatory structure authorized by Proposition 103 is threatened, for under the Court of Appeal's reasoning, insurance companies can only be regulated by insurance actuaries. This Court should therefore grant review to resolve this apparent conflict.

Moreover, if the Court of Appeal's interpretation of what constitutes "arbitrary rates and practices" and "unfair discrimination" in voter-enacted Proposition 103 is correct, then a large number of other insurance code sections are subject to judicial invalidation as well.

For example, Insurance Code § 11628 (which, among other things, prohibits race discrimination) would be of doubtful validity. According to the Court of Appeal's reasoning, if the use of race is "actuarially sound," then it would be unlawful – "arbitrary" or "unfairly discriminatory" – under Proposition 103 ***not*** to permit insurers to discriminate between races in rate-setting.

Similarly, Insurance Code § 10140(a) outlaws the same kind of "actuarial" discrimination in the context of life and disability insurance. Are these provisions also "arbitrary" and "unfairly discriminatory?" There is no reason why a statutorily-mandated departure from so-called "cost-based" pricing is "unfairly discriminatory" when it comes to favoring driving safety over address (often a surrogate for race), but somehow "fair" when banning pricing based explicitly on race.

CONCLUSION

It is imperative that the will of the voters in enacting an insurance rating scheme that prioritizes driving safety record and experience over ZIP

(Insurance Code §1861.05. Emphasis added.)

Code, an issue which has remained unresolved for over thirteen years, be finally enforced in a way that secures uniformity with prior decisions of this Court. These are matters that only this Court can definitively resolve. This Court has accepted the responsibility on several occasions in the past to protect the will of the voters and, by extension, maintain public confidence in our institutions. For all the foregoing reasons, Petitioner Proposition 103 Enforcement Project respectfully requests that this Court grant review.

Dated: February 7, 2001

Respectfully submitted:
PROPOSITION 103 ENFORCEMENT PROJECT, a project of the FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS
Harvey Rosenfield
Pamela M. Pressley

By: _____
Pamela M. Pressley
Attorneys for Petitioner and Respondent Proposition 103 Enforcement Project