

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set
4 Date: April 16, 2021
Time: 9:00 A.M.
Judge: Mary Sue Wilson

5
6 **STATE OF WASHINGTON**
7 **THURSTON COUNTY SUPERIOR COURT**

8 In the Matter of:

Case No. 21-2-00542-34

9 AMERICAN PROPERTY
10 CASUALTY INSURANCE
11 ASSOCIATION,

THE INSURANCE
COMMISSIONER'S RESPONSE
OPPOSING PETITIONER'S MOTION
FOR A PRELIMINARY
INJUNCTION

12 Petitioners,

v.

13 STATE OF WASHINGTON, OFFICE
14 OF THE INSURANCE
COMMISSIONER

Respondent.

15 **I. INTRODUCTION**

16 The current pandemic has upended many assumptions and expectations. However, the
17 way the pandemic has affected our state has not been uniform. Many property and casualty
18 insurers are enjoying unprecedented profits as many of the activities and risks they insure have
19 been dramatically reduced and restricted. Meanwhile, industries like tourism have been
20 devastated. Some individuals have found their financial situation improved through the
21 pandemic while others have been financially devastated. To protect those hardest hit by the
22 changes wrought by the pandemic, federal and state measures were adopted to prevent the
23 reporting of certain information in individual credit histories. Unfortunately, this means that the
24 reported credit histories can no longer be relied upon to prevent unfair discrimination between
25 similarly situated policyholders or applicants. Further, the assumptions insurers have relied
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1 upon about the correlation between insurance credit scores and risk are no longer valid.
2 Moreover, with the end of the pandemic on the horizon, a mass reporting of negative financial
3 history is looming for those least able to afford the increased insurance rates that reporting will
4 cause.

5 The Commissioner's emergency rules are necessary to protect the general welfare of
6 Washingtonians, and are within the Commissioner's broad rule making authority. Therefore,
7 Petitioners cannot demonstrate an equitable right that will be impaired by the Commissioner's
8 emergency rule. When balancing the public harm that will accrue to Washingtonians if the
9 emergency rule is not kept in place, there is no basis for the extraordinary remedy of a
10 preliminary injunction. Therefore, Respondent, Insurance Commissioner Mike Kreidler,
11 (Commissioner), and the Office of the Insurance Commissioner (OIC), through their attorneys
12 of record, ROBERT W. FERGUSON, Attorney General, MARTA U. DELEON, Assistant
13 Attorney General, and SUZANNE BECKER, Assistant Attorney General, respectfully request
14 that the motion for preliminary injunction be denied.

15 II. PROCEDURAL DEFICIENCIES

16 The Petitioner's briefing in this case failed to comply with the court rules on filing
17 deadlines and page limits. LCR 5(1)(C); LCR 10(d)(2). Petitioner's opening brief was 22 pages.
18 In an attempt to cure this failure, Petitioners filed a "corrected" brief on Monday, April 12,
19 2021, one day before the Commissioner's response was due. Petitioners offer no explanation as
20 to why the parties should be excused from the failure to comply with the Court's rules. The
21 timing of Petitioners' noted injunction hearing does not permit a separate motion to object to
22 Petitioners' overlength brief, or untimely brief. However, striking and disregarding any pages
23 over the allotted limit is an appropriate sanction for submitting an overlength brief. LCR
24 11(a)(3). *Humphrey Indus., Ltd. v. Clay St. Assocs. LLC*, 147 Wn. App. 1045 (2008), *rev'd*, 170
25 Wn. 2d 495, 242 P.3d 846 (2010) (Reversed on other grounds). Accordingly, the Commissioner
26

1 asks that the court strike and disregard all pages after page 15 in the original brief, and ignore
2 the late filed “corrected” brief.

3 Realizing the Court will likely have no opportunity to properly consider these
4 deficiencies prior to the date Petitioners have noted their improper briefing, the Insurance
5 Commissioner offers the following response.

6 **III. STATEMENT OF FACTS**

7 **A. The Insurance Commissioner’s Rule Making Authority**

8 The Legislature has long determined that “[t]he business of insurance is one affected by
9 the public interest” RCW 48.01.030. The Legislature delegated the enforcement of the
10 Washington State Insurance Code, Title 48 RCW, to the Washington State Insurance
11 Commissioner. The Commissioner is vested with “authority expressly conferred upon him or
12 her by or reasonably implied from the provisions of this code.” RCW 48.02.060(1). This includes
13 general rulemaking authority to enforce the provisions of the Insurance Code.
14 RCW 48.02.060(3)(a). More specifically, the Legislature has delegated to the Commissioner the
15 authority to review rates and rating methodologies to ensure that rates are not “excessive,
16 inadequate, or unfairly discriminatory,” and to promulgate rules to ensure that is the case.
17 RCW 48.19.020. *See also* RCW 48.18.480, RCW 48.19.080, RCW 48.02.060(3)(a). Further, the
18 Commissioner has express authority to adopt rules affecting the use of insurance credit scoring.
19 RCW 48.19.035. Under the Administrative Procedure Act (APA), Chapter 34.05 RCW, the
20 Commissioner has the authority to adopt emergency rules. RCW 34.05.350(1)(a).

21 **B. Insurance Credit Scoring**

22 Insurance credit scoring is the use of personal credit history information to set insurance
23 eligibility or rates. *See* RCW 48.19.035(2)(a). Each insurer uses different components of a
24 consumer’s credit history, and uses them in different ways. Declaration of Erich Slavich in
25 Support of Respondent’s Response to Petitioner’s Motion for Preliminary Injunction, (Slavich
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1 Decl.) 2. An insurance carrier's methodology for using various pieces of a consumer's credit
2 history must be documented and submitted as an insurance credit scoring model. RCW
3 48.19.035(2)(a). Insurance credit scoring models are deemed proprietary trade secrets. *Id.*
4 Common, but not exclusive or universal, factors insurers use in credit scoring models include:
5 months since recent delinquency; types of credit; age of oldest line of credit; balances on
6 revolving credit accounts; number of credit accounts with an outstanding balance; months since
7 recent collection action; number of accounts that are delinquent. Declaration of Birny Birnbaum
8 in support of Respondent's Response opposing Petitioner's Motion for Preliminary Injunction
9 (Birnbaum Decl.) at 4. Credit history is not the only information insurers use in determining
10 premiums. Slavich Decl. at 4.

11 The Legislature has limited insurers ability to use individual credit history information.
12 Carriers must comply with the requirements of RCW 48.19.035, and any rules promulgated by
13 the Commissioner. RCW 48.19.035(5). Prior to the current pandemic, the Commissioner
14 determined that insurers could demonstrate that a credit scoring model complies with
15 RCW 48.19.020 by providing a multivariate analysis with their insurance credit scoring model,
16 and any subsequent modifications. WAC 284-24A-045. However, current insurance credit
17 scoring models presume the relative accuracy of the available consumer credit histories. Slavich
18 Decl. 5.

19 **C. The Impact of the Pandemic on Credit Histories and Credit Scoring Models**

20 When the Congress adopted the Coronavirus Aid, Relief, and Economic Security Act
21 (CARES Act), (P.L. 116-136, 116th Congress, Mar. 27, 2020), it included several provisions
22 designed to protect consumers from the most difficult financial impacts of the pandemic. Fort
23 Decl, Exhibit A, at 2. Section 4021 of the CARES Act requires that financial institutions report
24 consumers as current if consumers obtain an accommodation that constitutes less than the full
25 payment. *Id.* Section 4022 of the CARES Act requires certain lenders to offer forbearance
26 options to borrowers, and imposed a moratorium on foreclosures for certain home loans. *Id.*

1 Section 3513 of the CARES Act results in all non-defaulted federally-held student loans being
2 reported as current, even if payments are late. *Id.* In addition, several provisions of various state
3 emergency orders have placed a moratorium on garnishment actions (Emergency Proclamation
4 of the Governor 20-49, April 14, 2020, and subsequent amendments) and evictions (Emergency
5 Proclamation by the Governor 20-19, July 24, 2020, and subsequent amendments). *Id.*

6 The impact of these various federal and state requirements is that for some consumers,
7 negative credit history information is no longer being reported. Declaration of David Forte in
8 Support of Respondent's Response to Petitioner's Motion for Preliminary Injunction (Forte
9 Decl.) at 3. Therefore, for many consumers who were the most negatively impacted financially
10 by the pandemic, their credit history information is likely to be inaccurate. Declaration of
11 Candice Myrum in Support of Respondent's Response to Petitioner's Motion for Preliminary
12 Injunction (Myrum Decl.) at 3. While this inaccurate credit history may benefit consumers in
13 some ways, the use of inaccurate credit history results in consumers who are similarly situated
14 in terms of their negative credit histories no longer being treated the same. Consumers whose
15 negative credit history was generated before the pandemic have all of their negative credit history
16 reported. But consumers with similar negative credit histories that developed after the pandemic
17 have some components of their credit history shielded. Forte Decl. at 3; Birnbaum Decl. at 8-10.

18 In addition, the insurance credit scoring models and the analysis submitted by insurers to
19 support their models rest on the assumption that the relationship between a consumer's credit
20 information and expected claim costs does not vary unpredictably over time. Slavich Decl. at 3.
21 When sudden, large, unexpected changes to consumers' credit histories occur, as has been the
22 case during the pandemic, the relationship between credit and claim costs observed in an
23 insurer's historical data would no longer be a reliable indicator of present risk. *Id.* The bigger
24 the disruption to the consumer credit environment, the less reliable an analysis based on
25 historical data prior to the disruption would be. Slavich 3. The pandemic has been a significant
26 change that severs the ability of credit histories to predict claims data. Birnbaum Decl. at 6-8.

1 One example of this unreliability is seen in the auto insurance context. As noted by
2 LexisNexis, average credit scores have remained “stable” with some slight overall improvement.
3 Myrum Decl. Exhibit A. However, claims for some property and casualty lines, particularly auto
4 insurance, have dropped dramatically. Myrum Decl. at 4, Exhibit C. This is one example of how
5 the correlation between insurance credit scoring models and claims has been disrupted by the
6 pandemic.

7 **D. The Commissioner’s Emergency Rule**

8 There is no question that the Commissioner has long been an opponent to the use of credit
9 scoring in setting insurance premiums, a practice he considers racially discriminatory. However,
10 this emergency rule is to target unfair discrimination in the actuarial sense caused by the use of
11 inaccurate credit histories on current credit rating methodologies.

12 The rule prohibits the use credit of history “to determine personal insurance rates,
13 premiums, or eligibility for coverage.” Forte Decl., Exhibit B, at 2. The rule allows, but does not
14 require carriers to use a “neutral factor” to implement this change. Fort Decl. Exhibit D, at 3.
15 Slavich Decl. at 6. This rule is immediately necessary because the use of inaccurate data is
16 currently resulting in unfair discrimination in the three property and casualty lines consumers
17 are most likely to need either because it is required by law, as is the case with auto insurance, or
18 is required by contract, as is often the case with homeowner’s insurance and renter’s insurance.
19 Myrum Decl. at 2. As a result, this actuarially unfair discrimination affects the general welfare.

20 Further, waiting for standard rule-making to address this discrimination is contrary to the
21 public interest. The state and federal credit history protections are tied to the state of emergency
22 caused by the pandemic. Although the OIC cannot know precisely when the state of emergency
23 will end, various indicators support the Commissioner’s belief that the end of the pandemic could
24 be soon. Myrum Decl. at 5.

25 Further, as several of Petitioners’ members have noted, carriers will need a significant
26 amount of time to update and adjust their IT systems in order to fully implement these provisions.

1 This lead-up time is part of the reason the timelines in this rule were established the way they
2 were. Slavich Decl. at 6-7. The deadlines in this rule sought to balance the need for carriers to
3 take time to make changes with immediate need to end the discriminatory credit rating practices.

4 In addition, the end of the state and federal protections imposed by the pandemic will
5 result in the currently shielded credit information hitting consumer credit histories immediately.
6 Myrum Decl. at 5. For the consumers who have been the hit the hardest financially, this will
7 result in significantly higher premiums. Organizations like LexisNexis that offer insurance credit
8 scoring models to insurers have acknowledged that the CARES Act restrictions on credit history
9 reporting are a significant reason why reported consumer delinquencies are low during the
10 pandemic. Myrum Decl. Exhibit A at 20. Numerous articles have indicated the diverging, or “K
11 shaped” recovery of the pandemic. Myrum Decl. at 4, Birnbaum Decl. at 11-12. Without the
12 protections of this rule in place, those most devastated by the pandemic will be subsidizing the
13 insurance policies of those whose financial outlook has improved as a result of the pandemic.

14 IV. STANDARD OF REVIEW

15 Petitioners must establish three requirements to obtain a preliminary injunction: (1) that
16 they have a clear legal or equitable right, (2) that they have a well-grounded fear of immediate
17 invasion of that right, and (3) that the acts complained of are either resulting in or will result in
18 actual and substantial harm to the Petitioners. The criteria to establish a preliminary injunction
19 must be “examined in light of equity including balancing the relative interests of the parties and, if
20 appropriate, the interests of the public.” If Petitioners fail to establish any one of the above
21 requirements, the preliminary injunction must be denied. To establish a clear legal or equitable
22 right, the court examines the likelihood that the moving party will prevail on the merits. *Huff v.*
23 *Wyman*, 184 Wn.2d 643, 652, 361 P.3d 727 (2015); *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200,
24 216, 995 P.2d 63 (2000). “A doubtful case will not warrant an injunction.” *Huff*, 184 Wn.2d at 652.

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V. ARGUMENT

Petitioners are unlikely to prevail on the merits of their petition under RCW 34.05.570(2)(c), therefore they have failed to demonstrate clear legal or equitable right to have the rules overturned. Under the APA, the court may declare a rule invalid only if it finds that “[t]he rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.” RCW 34.05.570(2)(c). Petitioners do not argue the Commissioner’s emergency rule violates any provision of the Constitution. The Commissioner’s emergency rule is well within his authority concerning rate-making generally, and rule-making related to credit scoring. The emergency rule was adopted in compliance with the statutory requirements of the emergency rule process provided in RCW 34.05.350. Because the rule is necessary to protect the general welfare, particularly for those most financially devastated by the pandemic, the rule is not arbitrary or capricious.

A. The Emergency Rule is Well Within the Scope of the Commissioner’s Statutory Authority

The Court presumes that administrative rules adopted pursuant to a legislative grant of authority are valid, and will uphold such rules if they are reasonably consistent with the controlling statute. *Washington Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn. 2d 637, 646, 62 P.3d 462 (2003), *Campbell v. Dep’t of Soc. and Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). The burden is on the party challenging the validity of the rule. *Washington Public Ports Ass’n v. Dep’t. of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003); RCW 34.05.570(1)(a). An administrative rule is only invalid if “the rule exceeds the statutory authority of the agency” RCW 34.05.570(2)(c). *See also Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn. 2d 571, 580, 311 P.3d 6 (2013). Administrative rules must be written within the framework and policy of the applicable statutes. *Id.* So long as the rule is “ ‘reasonably consistent with the controlling statute[s]’ an agency does not exceed its statutory authority”. *Id.*

1 at 580 (internal citations omitted). This includes the interpretation of the agency’s statutes as a
2 whole. *Washington State Hosp. Ass’n v. Dep’t of Health*, 183 Wn. 2d 590, 596, 353 P.3d 1285
3 (2015); *Swinomish Indian Tribal Cmty.*, 178 Wn. 2d at 580-81. “This court assumes the
4 legislature does not intend to create inconsistent statutes. ‘Statutes are to be read together,
5 whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the
6 integrity of the respective statutes.’” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d
7 570, 588, 192 P.3d 306 (2008) (internal citations omitted).

8 The Insurance Code, when read as a whole, gives broad authority to the Commissioner
9 to regulate insurance, and to enforce the provisions of the Insurance Code, and to adopt rules
10 enforcing the provision of the Insurance Code. RCW 48.02.060(1), (3)(a). The Commissioner
11 has the authority to review rates and rating methodologies to ensure that rates are not “excessive,
12 inadequate, or unfairly discriminatory,” and to promulgate rules to ensure that is the case.
13 RCW 48.19.020. *See also* RCW 48.18.480, RCW 48.19.080. This authority is consistent with
14 his authority to establish rules to implement the limited authority insurers have to use credit
15 scoring. RCW 48.19.035. Petitioners ask this court to rewrite RCW 48.19.035 as an expansive
16 grant that eliminates that application of any other rulemaking authority of the Commissioner.
17 But RCW 48.19.035 cannot be read in a vacuum to restrict the ability of the Commissioner to
18 adopt rules prohibiting actuarially unfair discrimination in setting insurance rates. Nowhere does
19 the language of RCW 48.10.035 exempt carriers that adopt credit scoring models from the
20 obligation to ensure their rates are not excessive, inadequate, or unfairly discriminatory. *See*
21 *Birnbaum Decl.* at 5. Nor does RCW 48.19.035(5) prevent the Commissioner from effectuating
22 the requirements of RCW 48.19.020.

23 Petitioners also claim that the fact that the Legislature failed to pass a complete ban on
24 credit scoring necessarily means the Commissioner has exceeded his authority in this emergency
25 rule. However, as a general principle, the court is loath to ascribe any meaning to the
26 Legislature’s failure to pass a bill into law. *State v. Cronin*, 130 Wn. 2d 392, 399-400, 923 P.2d

1 694 (1996) citing *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992).
2 The reason that the court refuses to speculate is because there are numerous other aspects of the
3 proposed draft that legislators might have found objectionable. *In re Personal Restraint of*
4 *Andress*, 147 Wn. 2d 602, 611, 56 P.3d 981 (2002). *E.g.*, *Spokane County Health Dist. v.*
5 *Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992).

6 Petitioners do not cite any statement by the Legislature that the Commissioner's authority
7 under RCW 48.19.020, RCW 48.19.080, or RCW 48.02.060 are limited, or inapplicable to
8 RCW 48.19.035. The OIC has no record of such conversations. Declaration of Jon Noski in
9 Support of Respondent's Response to Petitioner's Motion for Preliminary Injunction at 1.
10 Carriers do point to testimony by OIC Actuary Eric Slavich to support their argument that
11 insurance credit scoring is not actuarially discriminatory. However, Mr. Slavich was not opining
12 that current insurance scoring models were actuarially sound given the credit reporting
13 restrictions in place due to state and federal laws. Further, testimony before a legislative
14 committee is given little weight in determining the legislative intent of a statute. *See Wilmot v.*
15 *Kaiser Aluminum & Chem. Co.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991).

16 Because the emergency rule is well within the Commissioner's statutory authority to
17 promulgate rules, Petitioners are not likely to prevail on the merits of their claim that the rule
18 exceeded the Commissioner's authority. Therefore, this motion for preliminary injunction
19 should be dismissed.

20 **B. The Emergency Rule Complied With the Requirements of the APA**

21 In addition to being well within the Commissioner's authority within the Insurance Code,
22 the rule was adopted consistent with the emergency rule provisions of the APA. RCW 34.05.350.
23 The APA plainly allows state agencies to adopt rules on an emergency basis with, for good cause,
24 an agency finds that immediate adoption of a rule is necessary to preserve the general welfare.
25 RCW 34.05.350(1). While Petitioners cite to the federal APA to argue that good cause does not
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1 exist for emergency rulemaking, the federal APA and case law interpreting it is inapplicable
2 here. The case cited by Petitioners, *California v. Azar*, limits the term “good cause” to apply
3 only to situations where an emergency is adopted to preserve “life, property, or public safety,”
4 *California v. Azar*, 911 F. 3d 558, 576 (2018). The Washington APA also permits emergency
5 rules to protect public health and safety. RCW 34.05.530(1)(a). However, the Washington APA
6 permits emergency orders also to protect the “general welfare.” *Id.* Petitioners have not cited any
7 authority defining “general welfare” to be only applicable to prevent harm to life, property, or
8 public safety. Therefore the case cited by Petitioners has little persuasive authority here.

9 Further, the Legislature has determined that insurance affects the public interest.
10 RCW 48.01.030. Therefore, it is not unreasonable, where violations of insurance provisions are
11 apparent, and uniquely caused by unique and extraordinary circumstances, that an emergency
12 rule be permitted to protect the public’s interest and the general welfare by ensuring insurance
13 products are not unfairly discriminatory. As discussed below, immediate adoption of this rule is
14 necessary to protect that public interest, and the general welfare that depends on insurance
15 products that are not unfairly discriminatory.

16 Petitioners have also alleged that RCW 48.02.060(4) limits the Commissioner’s authority
17 to issue emergency rules to only the four categories listed there. However RCW 48.02.060(4)
18 only speaks to the Insurance Commissioner’s emergency *order* authority. But the
19 Commissioner’s emergency *rule* was not promulgated under RCW 48.02.040. The emergency
20 *rule* Petitioners are contesting was promulgated under RCW 48.02.060(3)(a) and
21 RCW 34.05.350. The Commissioner’s emergency rules are not limited to the topics listed in
22 RCW 48.02.060(4). The Commissioner has the statutory authority to issue an emergency rule
23 regardless of the existence of a state of emergency in the State of Washington, and has authority
24 to issue an emergency rule on any topic for which he can issue a standard rule, if the requirements
25 of RCW 34.05.350 are satisfied.
26

1 For emergency rules, there is relatively little procedure to follow. Petitioners have not
2 identified any procedural requirement in RCW 34.05.350 that the Commissioner failed to
3 comply with. Therefore, Petitioners are unlikely to prevail on the basis that the Commissioner’s
4 emergency rule was inconsistent with the procedural requirements of the APA.

5 **C. The Rules are Not Arbitrary and Capricious as the Emergency is Not Fabricated**

6 An emergency rule will be upheld if the health, safety, or general welfare justification
7 stated by the agency in its CR 103e filing is not arbitrary or capricious, that is, if the emergency
8 is “not artificial or fabricated.” *State v. MacKenzie*, 114 Wn. App. 687, 698, 60 P.3d 607 (2002).
9 If the emergency is present, the trial court should not substitute its judgment for the wisdom of
10 the regulation for that of the agency. *Id.* (citing *Brannan v. Dep’t of Labor & Indus.*, 104 Wn.2d
11 55, 60, 700 P.2d 1139 (1985)). A rule is arbitrary and capricious if it is “willful and unreasoning
12 and taken without regard to the attending facts or circumstances.” *Washington Indep. Tel. Ass’n*
13 *v. Washington Utils. & Transp. Comm’n*, 148 Wn. 2d 887, 905-06, 64 P.3d 606 (2003) “ ‘Where
14 there is room for two opinions, an action taken after due consideration is not arbitrary and
15 capricious even though a reviewing court may believe it to be erroneous.’” *Id.* Further, it is within
16 the discretion of the agency what specific procedures of the APA the agency chooses to use.
17 *Hillis v. Dep’t of Ecology*, 131 Wn. 2d 373, 400, 932 P.2d 139 (1997). Emergency rulemaking
18 is permitted at any point an emergency exists, it does not have to be the first approach tried by
19 an agency. *Id.*

20 Petitioners cite no authority that holds that agencies are required to adopt an emergency
21 rule as a first option, or at the first moment an emergency exists. Considering the incredible
22 uncertainty over the last year caused by the pandemic, the timing of the emergency rule is not
23 remarkable or unreasonable. This has been a year of firsts as agencies recognize and react to
24 myriad impacts from the pandemic, many agencies have had to triage their efforts. As Petitioners
25 note, the Commissioner initially focused his efforts on permanently eliminating the use of
26 insurance credit scoring in Washington state. When that was unsuccessful, he resorted to a

1 different, temporary, and narrower approach to address the discriminatory rating caused in part
2 by the protections of the CARES Act. There is no reasonable dispute that the state and federal
3 consumer protections, including the CARES Act, have altered what is reported to consumer
4 credit histories, making some consumer credit histories inaccurate. Further, there is no question
5 that current rating models assume the reliability of credit history information.

6 But even more urgent is the need to put a replacement for credit scoring in place before
7 the consumer protections expire. There are potentially thousands of consumers waiting on the
8 downward slope of our “K” shaped recovery. When the CARES Act expires, the credit history
9 reporting protections they currently enjoy will eventually disappear. When that happens, if this
10 rule is not in place, consumers in the most financially vulnerable position will be forced to pay
11 more for vital, and in some cases mandatory, insurance policies that protect not only insureds,
12 but also the fellow drivers, banks, and landlords that rely on auto, homeowners, and rental
13 insurance being in place. If financially vulnerable consumers are priced out of the market by
14 drastically reduced credit scores, this will impact the public, not just the policyholders. Further,
15 although there is no way to know when the end of the pandemic will arrive, in Washington there
16 are signs that the end is approaching. If new models are not in place before these protections
17 expire, the consumers who can least afford rate increases will be forced to bear the brunt of them.

18 **D. Conclusory and Unsupported Declarations Cannot Establish Actual and**
19 **Sustainable Injury**

20 Petitioners’ arguments of harm do not allege an irreparable injury sufficient for a grant
21 of a preliminary injunction. For a preliminary injunction, petitioners must provide factual
22 evidence that they will suffer an “actual and sustainable injury”. *Tyler Pipe Indus., Inc. v. Dep’t*
23 *of Revenue*, 96 Wn. 2d 785, 794-796, 638 P.2d 1213 (1982). This is a higher showing than “mere
24 inconveniences or speculative and insubstantial injury.” *Tyler Pipe*, 96 Wn. 2d at 796. Further,
25 the harm must be more than a general dissatisfaction with the statute, it must be “actual damage
26 or injury”. *Kadoranian by Peach v. Bellingham Police Dep’t, a Div. of City of Bellingham*, 119

1 Wn. 2d 178, 191, 829 P.2d 1061 (1992). Mere assertions are not enough to establish that an
2 actual and sustainable injury will accrue. *Tyler Pipe*, 96 Wn. 2d at 794. For example in *Tyler*
3 *Pipe*, the plaintiffs only asserted they would have to pay the tax, not that they were “unable to
4 pay the tax, that payment would somehow irreparably damage Tyler Pipe’s business or drive it
5 into bankruptcy, or that [plaintiffs] would be required to borrow money.” *Id.*

6 Petitioners raise the specter that this rule will somehow cause discriminatory rating. But
7 this is based on a false understanding of how discrimination in actuarial terms works. Removing
8 a factor that is used as the basis for distinguishing groups cannot create more discrimination.
9 Slavich Decl. at 4-5; Birnbaum Decl. at 15. Several states do not even allow the use of credit
10 history in some lines of insurance. Forte Decl. at 2. California, one state that broadly prohibits
11 insurance credit scoring, is ranked as 22 out of 50 in terms of the average cost of insurance. Forte
12 Decl. at 2. Petitioners have not provided any evidence eliminating credit scoring will result in
13 higher than average premiums for consumers.

14 Petitioners have failed to demonstrate any harm other than the cost of compliance, and
15 speculation about the impact of the rule. However, insurance is a highly regulated industry.
16 Neither producers nor insurers have any right to be free of the cost of compliance with properly
17 adopted regulations. Further, the cost claims are based on unsupported, and unverifiable,
18 assumptions. Birnbaum Decl at 13-16. In addition, the OIC has developed several sets of FAQs
19 designed to help carriers implement this rule as painlessly as possible. Slavich Decl. at 6. And
20 to date, 4 amended rate filings addressing the Commissioner’s rule have already been submitted
21 and approved. Slavich Decl. at 2 The claims of harm raised by the insurance producers are based
22 on speculative assumptions that all the insurers they work with will comply with this rule in a
23 way that drives their most favored policy holders out. This is not a rational assumption.

24 Because Petitioners have failed to offer anything other than speculation as to their harm,
25 they have failed to establish the requisite harm to warrant a preliminary injunction.
26

1 **E. Granting Relief to the Petitioners Endanger the General Welfare and Will**
2 **Substantially Harm the Public**

3 All of the criteria for a preliminary injunction “must be examined in light of equity
4 including balancing the relative interests of the parties and, if appropriate, the interests of the
5 public.” *Tyler Pipe*, 96 Wn. 2d at 792. The “general principle is that it is not for the courts to
6 stop officers of this kind from performing their statutory duty for fear that they should perform
7 it wrongly” *Id* at 797. Here, the interest of the public, especially those consumers who
8 have been the most severely impacted by the pandemic, and who will be the most impacted by
9 the loss of the credit history protections weigh in favor of rejecting the motion for preliminary
10 injunction. Further, the interests of the public in having similarly situated policyholders treated
11 similarly all weigh against the grant of a preliminary injunction.

12 **VI. CONCLUSION**

13 For the forgoing reasons, the motion for preliminary injunction should be denied.

14 DATED this 13th day of April, 2021.

15 ROBERT W. FERGUSON
16 Attorney General

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MARTA U. DELEON, WSBA #35779
22 Assistant Attorney General
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24 Attorneys for the Washington State Office of the
25 Insurance Commissioner
26

1 **DECLARATION OF SERVICE**

2 I declare that I sent for service a true and correct copy of this document on all parties or
3 their counsel of record on the date below as follows:

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13
14 I declare under penalty of perjury under the laws of the state of Washington that the
15 foregoing is true and correct.

16 DATED this 13th day of April, 2021 at Olympia, Washington.

17
18 

19 _____
20 LAURA YAEL CHADWICK
21 Legal Assistant