Superior Court of Washington
County of Thurston

American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, **Appellant,** **vs.** **State of Washington ex. Rel. Washington State Office of the Insurance Commissioner; Mike Kreidler, in his official capacity as Commissioner of Insurance,** **Respondents.**	**No. 22-2-00180-34** **Amicus Curiae Brief of the Consumer Federation of America, Northwest Justice Project, and Northwest Consumer Law Center in Support of Respondent and Washington Regulation R2021-07—Temporary Prohibition of Use of Credit History for Three Years After Conclusion of Public Emergency**

The Consumer Federation of America ("CFA"), Northwest Justice Project ("NJP), and Northwest Consumer Law Center ("NWCLC") submit this brief to the Thurston County Superior Court to assist the Court in resolving the lawsuit filed against the Washington State Office of the Insurance Commissioner regarding Regulation R2021-07—Temporary Prohibition of Use of Credit History for Three Years After Conclusion of Public Emergency. This regulation is a necessary and proper response to the COVID-19 pandemic and its resulting impact on Washington drivers. This temporary prohibition on the use of credit history to determine rates for private passenger automobile coverage, renter's coverage, and homeowner's coverage is

Northwest Justice Project
401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

necessary to address the unfair discrimination caused by the impact of the pandemic and related public policy responses on consumer credit histories, as well as the pandemic's amplification of racial disparities caused by the use of credit history in insurance underwriting, pricing, and other practices.

As will be illustrated through the stories of actual Washington residents below, NJP advocates have noticed a sharp increase in pandemic-related unsecured credit defaults resulting in litigation filed by both original creditors and debt buyers. NJP regularly provides direct representation to clients who become defendants in debt collection lawsuits. Even though many of NJP's clients are collection-proof (meaning they have no income or assets above Washington's exemptions for bank or wage garnishment), preventing entry of a judgment is critical to stave off harm from credit-related barriers to housing and food security and other consequences of tarnished credit. In the months preceding drafting of this brief, NJP has assisted hundreds of consumers being sued or sent to collections for defaulted unsecured debt increasingly traceable to 2020 and pandemic related financial hardships.

In this brief, we will show that disruptions caused by the pandemic and the resulting public policy responses made the use of credit history by insurers unfairly discriminatory both as an actuarial matter and with respect to protected classes. As such, the rule promulgated by Insurance Commissioner Mike Kreidler is within his statutory authority and in the best interest of Washington consumers.

Interest of *Amici Curiae*

CFA is an association of over 250 national, state, and local non-profit consumer organizations founded in 1968 to advance the consumer interest through research, advocacy, and education. We advocate on behalf of consumers throughout the United States, with a special

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

focus on the protection of low- and moderate-income consumers. For decades CFA worked on insurance policy under the direction of J. Robert Hunter, an actuary, former Federal Insurance Administrator, former Texas Insurance Commissioner and now CFA's Insurance Director Emeritus. CFA's current Director of Insurance, Douglas Heller, serves as a member of the United States Department of the Treasury's Federal Advisory Committee on Insurance and as a Public Member of the California Automobile Assigned Risk Plan Advisory Board. CFA's Research and Advocacy Associate Michael DeLong serves as a member of the Nevada Division of Insurance's Property and Casualty Advisory Committee and as a funded Consumer Representative with the National Association of Insurance Commissioners (NAIC). CFA collects, analyzes, and synthesizes data from a wide variety of sources, including public records, vendors of insurance industry data, and insurers themselves. CFA has issued numerous reports on the issues of credit history in insurance, auto insurance affordability, and unfair discrimination in insurance markets.[1]

As a result of our research and analysis, CFA advocates in legislative and regulatory proceedings for consumer protection-oriented reforms and rules such as the protections established by Regulation R2021-07. Finally, CFA has submitted numerous amicus briefs before state and federal courts on insurance and other topics. As we describe herein, if this regulation is not permitted, consumers will be subject to unfair discrimination, which is prohibited by Washington law. Our organization therefore has a direct interest in this regulation and this case, both of which relate directly to and impact our work protecting consumers.

Northwest Justice Project is a not-for-profit organization that provides free civil legal services to low-income people throughout the state of Washington to address fundamental

[1] See https://consumerfed.org/cfa-studies-on-the-plight-of-low-and-moderate-income-good-drivers-in-affording-state-required-auto-insurance./ for a list of CFA auto insurance studies.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

human needs such as housing, family safety, income security, health care, education, and more. In 2021 alone, Northwest Justice Project provided legal assistance to thousands of low-income Washingtonians, many of whom were facing consumer and debt collection issues and general economic hardship. NJP's work challenges structural and racial inequities to promote the long-term well-being of low-income individuals, families and communities statewide. Economic discrimination in insurance rates negatively affects NJP's clients by creating an unfair system that forces people with less to pay more, reinforcing the cycle of poverty. NJP endorses and has signed onto the Race, Equity & Justice Initiative ("REJI") and is committed to combatting the effects of systemic racism in the lives of our clients and in their communities. Due to the undeniable link between race and poverty, any policy that discriminates based on credit worthiness correspondingly results in a disparate impact on communities of color.

Northwest Consumer Law Center is a Washington nonprofit organization dedicated to advancing economic justice. Since opening its doors in January 2013, NWCLC has served over 4,000 low-income Washington consumers. NWCLC engages in education and outreach to low-income Washington consumers about credit reporting and also provides legal representation to consumers facing unfair and discriminatory credit reporting practices. As such, NWCLC and its clients have an interest in the fair development and application of Washington laws affecting credit reporting and unfair discrimination stemming from credit reporting.

Summary of Argument

On February 1, 2022, the Washington State Office of the Insurance Commissioner ("OIC") approved Regulation R2021-07, which temporarily prohibits insurance companies from using credit history to determine personal insurance rates, premiums, or eligibility for coverage in the cases of private passenger automobile insurance, renter's insurance, and homeowner's

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

insurance. The Thurston County Superior Court granted a temporary stay of the new rule on February 25, 2022, and scheduled a hearing for July 8, 2022.

This rule is based on the determination by the OIC that the application of a credit-based insurance score in the midst and eventual wake of the COVID-19 pandemic and the resulting economic impact results in unfair discrimination in the personal lines insurance marketplace. R2021-07 will remain in effect for three years after the end of the national emergency concerning the COVID-19 outbreak declared by the President of the United States on March 13, 2020 or three years after the date the Washington Governor's proclamation of a State of Emergency expires, whichever is later.[2]

In order to provide critical context for the public interest in preserving this regulation, our brief begins with important background information describing the use of credit history in insurance markets, with a specific focus on its use in auto insurance pricing, and illustrating how credit-based insurance scores result in drivers with clean driving records paying significantly higher premiums than similarly situated drivers when their credit-based scores are lower than other policyholders. We then show how the pandemic, its resulting economic impacts, and government responses make this practice unfairly discriminatory, and why Regulation R2021-07 not only complies with Washington law and is within the authority of the OIC, but is necessary to prevent insurers from charging insurance premiums that violate the state law governing unfair discrimination.

Background on the Use and Impact of Credit History in Washington's Insurance Market as Context for Understanding the Necessity of Regulation

In order to understand the reasons why the use of credit history can be deemed *unfairly* discriminatory – and the regulation justifiable – due to the current pandemic-influenced

[2] https://www.insurance.wa.gov/sites/default/files/documents/r2021-07-cr-103.pdf.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

conditions, it is important to first describe how credit history is used to discriminate among consumers. While our discussion here focuses on auto insurance prices, the practice is much the same in homeowner's and renter's insurance, as well as in the underwriting practices of insurers. In the underwriting context, the worse one's credit history report is, the more likely they will be labelled ineligible for coverage or shunted to a more expensive affiliate insurer. Furthermore, while insurers argue that they use "credit-based insurance scores" instead of traditional "credit scores," both are derived from the same credit histories compiled by the same credit bureaus and converted to their respective scores using similar statistical techniques. The difference among different types of scores – auto insurance, home insurance, auto loan, mortgage loans – is the application of the product, not the raw material used to develop the scores. For example, one leading scoring firm – FICO – describes the contents of its credit score[3] and insurance score[4] as follows:

Credit Score	**Insurance Score**
• Payment history (35%), • Amounts owed (30%), • Length of credit history (15%), • New credit (10%), and • Credit mix (10%).	• Previous credit performance (40%), • Current level of indebtedness (30%), • Length of credit history (15%), • New credit/Pursuit of new credit (10%), and • Types of credit used (5%).

The following states prohibit the use of credit history for personal lines insurance underwriting and rating: California, Hawaii, and Massachusetts prohibit it in auto insurance transactions and California, Maryland, and Massachusetts prohibit its use in their home insurance markets. These prohibitions predate and are not linked to the pandemic or its effects.

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[3] See https://www.myfico.com/credit-education/whats-in-your-credit-score, retrieved on April 20th, 2022.
[4] See https://insurancescores.fico.com/InScore, retrieved on April 20th, 2022.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

How Credit History Impacts Auto Insurance Premiums in Washington State

Earlier this month NJP represented Jane Doe 1 (JD1) (name withheld for personal privacy) in a debt buyer lawsuit seeking entry of a judgment on pandemic related defaulted credit card debt. JD1 is a 41-year-old Black single mother of three children who lives in Eastern Washington. She has been steadily employed her entire adult life, but like an increasing number of Americans, lives paycheck to paycheck. In March 2020, JD1 lost her job due to pandemic-related closures. Despite the pandemic government assistance, JD1 had to make a difficult choice -- one familiar to the increasing ranks of Washingtonians whose income fails to keep pace with living expenses: she had to assign each bill a degree of urgency. Failure to pay rent would see her evicted. Failure to pay utilities might see her electricity and water cut off. Failure to pay her auto insurance would be unlawful and impose unfair risks on her and other drivers. Failure to budget for food would cause her family to go hungry. Employing this form of poverty triage, she missed the monthly payment on her unsecured credit card. This was the first time JD1 had ever missed a payment on the account, and she had a credit score in the 700’s. Almost immediately, she noticed her score decline by 74 points. Within a month, she got notice from her auto insurance carrier that her monthly rate was increasing by approximately 43% from $70 per month to $130. JD1 has never made a claim against any auto insurance policy and has a clean driving record. She was surprised at the sudden increase, since she had no change in driving record or other circumstance that would be reasonably related to her risk as a driver. She called her insurance carrier, which provided no explanation for the sudden jump (but agreed to a “reduced” increase to $112 per month). For JD1, already budgeting to the penny each month, the increased cost of auto insurance remains a substantial financial hardship.

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Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

In Washington State, insurers use credit history to determine premiums for consumers such that consumers with the best credit-based insurance scores pay lower rates and consumers with worse scores pay increasingly higher rates. In the auto insurance context, this pattern occurs even when consumers have perfect driving records and no history of filing claims and are otherwise similarly situated except for their personal credit history. In fall 2020, CFA acquired from Quadrant Information Services, LLC data on auto insurance premiums charged by ten of the largest auto insurers for every ZIP code in the United States. Quadrant's premium data are sourced directly from auto insurers or from the public filings submitted to insurance departments. CFA analyzed the premium data for Washington State and found that insurers charge consumers dramatically different premiums based solely on their credit history.

To purchase the state-mandated minimum limits, liability-only auto insurance in Washington State, consumers with excellent credit-based insurance scores and a perfect driving record pay an average statewide annual premium of $468.09. But if those exact same consumers have fair credit, their average annual premium increases to $632.96—a 35% or $165 increase. If, instead, those clean-record drivers have poor credit, their average annual premium rises to $838.06—a 79% or $370 increase compared to consumers with excellent credit.[5]

Table 1 below shows the average statewide premiums charged by ten of the largest auto insurers in Washington State based on policyholders' credit history as of August 2020. Table 2 shows the percentage increases by insurer, based on credit history.

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[5] "Insurance Companies Charge 79% More to Safe Drivers in Washington State Due to Low Credit Scores; State Farm Nearly Triples Premium for Good Drivers with Credit Problems." January 12, 2021. Consumer Federation of America. Available at https://consumerfed.org/press_release/insurance-companies-charge-79-more-to-safe-drivers-in-washington-state-due-to-low-credit-scores-state-farm-nearly-triples-premium-for-good-drivers-with-credit-problems/.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
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Table 1: Auto Insurance Premiums Charged by Largest Washington Insurers Based on Credit History

Auto Insurer	**Average Premium Charged For Drivers With Excellent Credit**	**Average Premium Charged for Drivers With Fair Credit**	**Average Premium Charged for Drivers with Poor Credit**
Allstate	$679.22	$956.89	$1,282.17
American Family	$551.89	$644.50	$751.99
Enumclaw	$560.21	$652.06	$873.15
GEICO	$400.42	$512.62	$547.63
Mid Century	$836.87	$1,047.61	$1,293.31
PEMCO	$264.98	$445.53	$748.63
Progressive	$311.87	$519.97	$648.60
Standard	$529.19	$723.67	$981.35
State Farm	$293.01	$495.24	$833.84
USAA	$253.21	$331.52	$419.89
Average Premium	$468.09	$632.96	$838.06

The data are based on rates for state minimum liability coverage—25/50/10—in effect as of August 2020 and are representative of publicly sourced data using the following driver profile. The driver profile for this information is a 35-year-old, unmarried driver with a license for 19 years and a perfect driving record. The driver has a high school diploma, rents their home, and drives a 2011 Honda Civic LX on a 12 mile commute, 5 days per week, for a total of 12,000 miles per year.

Table 2: Auto Insurance Premium Percentage Increases Charged By Largest Washington Insurers Based on Credit History

Auto Insurer	**Percentage Premium Increase from Excellent to Fair**	**Percentage Premium Increase from Fair to Poor**	**Percentage Premium Increase from Excellent to Poor**
Allstate	41%	34%	89%
American Family	17%	17%	36%
Enumclaw	16%	34%	56%
GEICO	28%	7%	37%
Mid Century	25%	23%	55%
PEMCO	68%	68%	183%
Progressive	67%	25%	108%
Standard	37%	36%	85%
State Farm	69%	68%	185%
USAA	31%	27%	66%
Overall Premium Increase	35%	32%	79%

All of the largest auto insurers impose a credit penalty on their drivers. Even the smallest credit penalty, levied by American Family, forces consumers with clean driving records but only fair credit to pay premiums that are 17% higher than those with excellent credit, and drivers with

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

poor credit to pay premiums that are 36% higher compared to those with excellent credit. The other insurers impose larger credit penalties. The most severe penalty among the carriers in our dataset was imposed by State Farm, which required consumers with fair credit to pay premiums that are 68% higher and consumers with poor credit to pay premiums that are 185% higher compared to those with excellent credit.

In many individual ZIP codes, credit history results in staggering impacts on consumers. In the ZIP code 98118, in Seattle, consumers with a perfect driving record and excellent credit pay an average premium of $663.65. Consumers with the same driving record but fair credit pay an average premium of $909.80. And consumers with poor credit pay an average premium of $1,211.55—almost $550 more than consumers with excellent credit, *on average*.

In 2015, Consumer Reports conducted a similar study on auto insurance premiums and credit history. They found that the average premium for full coverage for a Washington driver with a perfect driving record but poor credit was $2,563. This was $1,536 more expensive than the same coverage cost a driver with the same driving record but excellent credit. Shockingly, Consumer Reports found that the average premium for a driver with excellent credit and a drunk driving conviction on their record was $690 less than the premium charged to the customer with poor credit but a clean record.[6]

The Use of Credit History Disproportionately Harms People of Color

Jane Doe 2 "JD2" (name withheld for personal privacy), a 44-year-old Native American and Black single mother living in the Puget Sound area, and another client of NJP, saw her auto insurance rates increase after defaulting on a credit card. At the time the pandemic struck, JD2 was on family medical leave from a job at which she had worked for over five years. Her

[6] "The Secret Score Behind Your Rates." Consumer Reports. July 30, 2015. Available at https://www.consumerreports.org/cro/car-insurance/credit-scores-affect-auto-insurance-rates/index.htm.

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Seattle, Washington 98104
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position became a pandemic casualty, and once her leave ended, she became unemployed. The sudden unexpected loss of income meant she could not meet her regular obligations and could not afford to make her monthly credit card payment. JD2 saw her auto insurance rates increase for no apparent reason. She had not been involved in a collision, cited for any traffic violation, or made any other changes to her policy. The only thing that had changed was a score tied to her credit history.

When auto insurers use credit history in their underwriting and pricing, African-American, Latino, and Native American consumers are disproportionately impacted and pay higher premiums. In a November 2021 hearing on the proposed ban on credit history, representatives of the National Association of Mutual Insurance Companies (NAMIC) claimed that "Opposition to insurance scores is not based in facts, science or in mathematics, but in unfounded claims of unfair discrimination. If anything, insurance scores represent the opposite of discrimination."[7] However, this argument ignores the data; in fact, there is substantial evidence that credit history's use results in unfair discrimination and people of color paying substantially more for auto insurance.

The 2019 study "The Geography of Subprime Credit" found that "[p]laces with lower credit scores show more signs of economic adversity and reflect patterns of segregation." The authors also reported a "disproportionate representation of black households in the most subprime neighborhoods."[8] Another recent study by the Urban Institute found that median credit scores reveal persistent racial disparities and discrimination, and, therefore, median credit scores

[7] Public Hearing – R2021.07. Office of the Insurance Commissioner, Washington State. November 23, 2021. Transcript. Pg. 30.

[8] "Mortgage Market Conditions and Borrower Outcomes: Evidence from the 2012 HMDA Data and Matched HMDA-Credit Record Data." By Neil Bhutta, Shira Stolarsky, and Madura Watanagase. (Table 14a) Federal Reserve Bulletin Vol. 99, No. 4. November 2013. Available at https://www.federalreserve.gov/pubs/bulletin/2013/pdf/2012_hmda.pdf.

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for white Americans are significantly higher than median credit scores for African-Americans, Hispanic Americans, and Native Americans.[9] According to Federal Reserve data published in 2013, the average credit score for white Americans is 734, while the average score for African-Americans is 677, and the average score for Hispanic/Latino Americans is 701. 5.4% of white Americans have a credit score below 620 (meaning a significant penalty), while 21.3% of African-Americans and 11.2% of Hispanic/Latino Americans have a credit score below that level.[10]

These credit disparities are connected to systemic biases encountered by Black, Native American, and Latino consumers, as well as structural obstacles to achieving financial stability for these consumers. When auto insurers use credit history to assemble credit-based insurance scores for underwriting and rating auto insurance, the result is higher auto insurance premiums for Black, Native American, and Latino drivers with perfect safety records. The very 2007 Federal Trade Commission report on credit-based insurance scores that insurers cite in the public hearing on this regulation[11] acknowledges this fact: as illustrated in Figure 12 of that report – "Distribution of Scores by Race and Ethnicity, After Controlling for Age, Gender, and Neighborhood Income" – credit-based insurance scores for African-Americans and Hispanics are not evenly distributed but weighted heavily toward the lower scores that result in higher premiums, while scores for Non-Hispanic Whites and Asians are more evenly distributed though with a higher percentage having the highest scores and lowest premiums than the opposite.[12]

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[9] "Credit Health During the COVID-19 Pandemic." Urban Institute. February 25, 2021. Available at https://apps.urban.org/features/credit-health-during-pandemic/.

[10] Bhutta, N., & Canner, G. B. (2013). Mortgage market conditions and borrower outcomes: Evidence from the 2012 HMDA data and matched HMDA-credit record data. *Federal Reserve Bulletin*, *99*(4).

[11] "Public Hearing—R2021-07." Office of the Insurance Commissioner, Washington State. November 23, 2021. Pg. 30.

[12] "Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance." Federal Trade Commission. 2007. Available at https://www.ftc.gov/sites/default/files/documents/reports/credit-based-insurance-scores-impacts-

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

Argument in Support of Regulation R2021-07

Under Washington law, "Premium rates for insurance shall not be excessive, inadequate, or unfairly discriminatory."[13] It is the duty and obligation of the Commissioner to enforce this provision.

The first two elements of this statute requiring that insurance not be excessive or inadequate are meant to avoid windfall profits (excessive) or insurers being unable to pay claims (inadequate). The third element requires that insurers' practices—underwriting, pricing, claims settlement—are not unfairly discriminatory. Unfair discrimination should be understood in two ways: the first is actuarial—consumers in similar situations must be treated similarly. This means there must be a valid statistical and actuarial basis for treating consumers differently for insurance underwriting, pricing, and claims settlement. The second kind of unfair discrimination is protected class discrimination—for example, discriminating on the basis of race, ethnicity, religion, or national origin, regardless of any actuarial basis.

As the background above indicates, there is substantial evidence that any use of credit history, under any economic circumstances and regardless of a state of emergency, results in unfair discrimination in insurance markets. But it is not necessary to reach that broad conclusion to uphold this regulation, because the rule is not a complete prohibition on the use of credit. Instead, this regulation is a time-limited response to the fact that the pandemic's unusual circumstances have made credit-based insurance scoring unfairly discriminatory for reasons particular to this public health emergency.

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consumers-automobile-insurance-report-congress-federal-trade/p044804facta_report_credit-based_insurance_scores.pdf.

[13] RCW 48.19.020.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

Below we explain why the regulation is needed to combat the way the pandemic has resulted in both types of unfair discrimination stemming from the use of credit history by insurers.

Government Responses to the COVID-19 Pandemic Have Compromised Credit Data and Made Credit-Based Insurance Scores Unfairly Discriminatory

The COVID-19 pandemic has had a dramatic impact on consumers, leading to many businesses closing, workers becoming unemployed, and people curtailing their driving. Many Washington State residents lost their jobs and saw a decline in their earnings, and therefore struggled to pay their bills; failure to make payments is one key factor that will cause declines in credit. At the same time, the number of vehicle miles traveled, auto crashes, and insurance claims filed fell drastically due to stay-at-home orders and closures. Traditionally, auto insurers claim that credit history is an accurate predictor of risk in auto insurance because consumers with better credit histories are, allegedly, more reliable and less risky to insure. Over the past two years, credit history has become completely separated from that theoretical connection to risk—this is both due to the CARES Act passed by Congress and to the pandemic's impact on consumers.

In spring 2020, as the pandemic spread, Congress, Washington State, and local governments swung into action to help consumers, businesses, and communities. Among other protections, these actions gave consumers opportunities to avoid the negative credit impacts that would normally accrue due to certain personal financial actions, such as missing a mortgage payment or failing to pay an auto loan.

While this relief was essential and beneficial, it had the effect of making the use of credit-based insurance scores unfairly discriminatory from a similarly-situated (actuarial) perspective.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

This is because the CARES Act contains a requirement for credit bureaus to report any borrower who has received some form of forbearance by a lender as current on their loan while continuing to report late payments by borrowers who also did not make payment but did not receive formal forbearance.[14]

Forbearance can take a number of different forms, including permitting borrowers to miss required payments without penalty. Millions of borrowers have taken advantage of forbearance, but millions more who were eligible for forbearance did not seek this assistance. The Urban Institute's Housing Finance Policy Center has tracked forbearance activity, which peaked at 6.4% of the tens of millions of loans insured or owned by Fannie Mae and Freddie Mac.[15] The Urban Institute concluded that homeowners in neighborhoods of color were less likely to use or access forbearance protections.[16] The Brookings Institution reported that a survey of low and moderate income homeowners found 40% of respondents were unaware of forbearance programs.[17]

It is straightforward to show how the CARES Act provisions lead to unfair discrimination with credit-based insurance scores. Consider two similarly-situated consumers—identical in all respects, including missing several monthly mortgage payments—but one has sought and obtained forbearance while the other has not. Although similarly situated, the credit report of the consumer who did not get forbearance shows a delinquency while the credit report of the

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[14] "Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act." Bureau of Consumer Financial Protection. April 1, 2020. Pg. 2. Available at https://files.consumerfinance.gov/f/documents/cfpb_credit-reporting-policy-statement_cares-act_2020-04.pdf.

[15] "Housing Finance at a Glance: A Monthly Chartbook." Urban Institute. February 2021. Available at https://www.urban.org/research/publication/housing-finance-glance-monthly-chartbook-february-2021.

[16] "Delinquent Homeowners in Neighborhoods of Color Are Less Likely to Be Protected by Forbearance." Michael Neal and Caitlyn Young. Urban Institute. December 2, 2020. Available at https://www.urban.org/urban-wire/delinquent-homeowners-neighborhoods-color-are-less-likely-be-protected-forbearance.

[17] "Low to Moderate-Income Families are Losing Ground: How to Save Their Homeownership Dreams." Makada Henry-Nickle, Tim Lucas, Radha Seshagiri, and Samantha Elizondo. Brookings Institute. June 24, 2021. Available at https://www.brookings.edu/blog/how-we-rise/2021/06/24/working-class-families-are-losing-ground-how-to-save-their-homeownership-dreams/.

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401 Second Avenue S, Suite 407
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consumer who got forbearance shows no delinquency. Pre-pandemic, both consumers would have suffered higher premiums due to delinquencies lowering the credit-based insurance scores. Post-pandemic insurance credit scoring will cause the first consumer (who got no forbearance) to be charged more because of a lower credit score even though the consumers are similarly situated, a hallmark of unfair discrimination in insurance.

Furthermore, on an actuarial basis, the ability of consumer credit information to predict claims has been severely harmed. Economic conditions changed during and after March 2020. Unemployment skyrocketed as businesses were shuttered and certain industries—such as personal services, travel, and tourism—were especially impacted. Predictive models, including credit-based insurance scoring models, are developed based on historical data—the data are mined to see what factors are most predictive of a particular outcome. If the training data are biased, incorrect, incomplete, or, as with the current situation, unrepresentative of the future experience, the model will reflect and perpetuate the bias in the data. In the case of insurance credit scoring, historical data will not reflect the current and near future credit experience of many consumers who have been laid off, whose businesses have closed, or who have major medical bills or lost family income after a death due to COVID-19, among other reasons.

Stated simply, even if one assumed that insurance credit scoring had a sound actuarial basis prior to March 2020,[18] it is clear that the actuarial basis no longer held after March 2020.

Regulation R2021-07 is necessary to block the actuarial unfair discrimination resulting from pandemic-related laws and practices that undermine the validity of credit-based insurance scoring models.

[18] The authors of this brief do not make that assumption.

Northwest Justice Project
401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

The Unfair Discrimination Based on Protected Class Status Resulting From Credit-Based Insurance Scores Has Increased Due to the Pandemic

While hardships caused by the COVID-19 pandemic have affected almost all Americans, some have been impacted far more than others. Black and Hispanic households have been far more likely to contract COVID-19 and to suffer from lost income or face housing insecurity due to the pandemic; the Joint Center for Housing Studies at Harvard University also reports that "minority homeowners were also less likely to receive a deferment than white homeowners."[19] This means that the credit relief offered either by state or federal laws, or voluntary actions of credit reporting private entities, provided less protection to the credit histories of Black, Latino, and Native Americans during the pandemic. For consumers who did receive protection and avoided some negative reports, phasing out of deferments and credit reporting moratoria will hit credit histories of communities of color harder, as these communities experience higher levels of job loss and face increased likelihood of foreclosure and eviction. Without this regulation, as the impact of COVID-19 on credit histories plays out inequitably in society over the next several years, insurers' use of credit history during that period will worsen the racial disparities already inherent in credit-based insurance scoring.

<u>The regulation is necessary to address the disproportionate financial harm that the pandemic has caused in communities of color that will exacerbate the racial disparities associated with credit-based insurance scores.</u>

The Commissioner Has the Authority and Responsibility to Stop Unfair Discrimination on Credit-Based Insurance Scores Caused by the Pandemic

[19] "A Triple Pandemic? The Economic Impacts of COVID-19 Disproportionately Affect Black and Hispanic Households." Sharon Cornelissen and Alexander Hermann. Joint Center for Housing Studies of Harvard University. July 7, 2020. Available at https://www.jchs.harvard.edu/blog/a-triple-pandemic-the-economic-impacts-of-covid-19-disproportionately-affect-black-and-hispanic-households.

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

The COVID-19 pandemic has caused widespread harm in society and the economy. Workers lost their jobs, businesses closed or reduced hours, and many consumers have fallen behind on payments. In theory, consumer credit history provides insurers with a measurement of customers' relative risk level, but this link has always been tenuous and the pandemic has completely severed any connection. It is neither logical nor just for consumers to be charged higher insurance premiums because of poor credit if their credit has declined due to a once-in-a-century pandemic. Nor should other consumers with similar risk profiles get lower rates simply because the pandemic did not harm their credit, or they were able to obtain certain tools to mask their credit risk.

Additionally, as consumer credit protections enacted during the pandemic expire, the volume of negative credit corrections will continue to increase. A fall 2021 survey conducted by National Public Radio, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health found that:

- 38% of households across America reported facing serious financial problems in the past few months;
- 19% of households reported losing all their savings during the COVID-19 pandemic and not currently having any savings to fall back on;
- At the time the Centers for Disease Control and Prevention's eviction ban expired, 27% of renters reported they had serious problems paying their rent in the past few months;

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401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123

- 24% of employed adults reported they have a worse job situation now compared to before the pandemic.[20]

As previously mentioned, federal, state, and local governments took sweeping action to help people impacted by the pandemic. Despite all these efforts, at the end of 2021, tens of millions of Americans were still experiencing serious financial hardship. According to the Household Pulse Survey, in October 2021 nearly twenty million adults lived in households that did not get enough to eat, twelve million adult were behind on paying their rent, and 29% of all adults reported it was somewhat or very difficult for them to cover usual expenses in the past week.[21] Since then, many consumer protections and pandemic aid efforts have expired, placing further burdens on struggling consumers.

Washington State is not alone in its response to credit history's use in insurance. In response to the current situation, in December 2020 the Nevada Division of Insurance adopted Regulation R087-20-Adverse Credit Based Rescoring, which temporarily prohibits the use of credit information to determine insurance rates.[22] The New York State Department of Finance Services has also issued a data call about the use of credit history in insurance pricing and whether this factor is unfairly discriminatory toward protected classes of consumers.[23]

The Washington State Office of the Insurance Commissioner has both the legal responsibility and the authority to stop the unfair discrimination resulting from credit-based

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[20] "Household Experiences in America During the Delta Variant Outbreak." National Public Radio. October 2021. Available at https://media.npr.org/assets/img/2021/10/08/national-report-101221-final.pdf.

[21] "The COVID-19 Economy's Effects on Food, Housing, and Employment Hardships." Center on Budget and Policy Priorities. October 2021. Available at https://www.cbpp.org/sites/default/files/8-13-20pov.pdf.

[22] "Approved Regulation of the Commissioner of Insurance." LCB File No. R087-20. December 29, 2020. Nevada Division of Insurance. Available at https://www.leg.state.nv.us/Register/2020Register/R087-20AP.pdf.

[23] "NYDFS Examines the Use of Personal Credit Scores in a Changing Regulatory Environment." By Kara Bayslinger, Leah Campbell, Matthew J. Gaul, and Allison J. Tam. Law360. March 24, 2022. Available at https://www.willkie.com/-/media/files/publications/2022/nydfsexaminestheuseofpersonalcreditscoresinachangi.pdf.

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Seattle, Washington 98104
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insurance scores during -- and in the wake of -- the COVID-19 public health emergency. This temporary prohibition of the use of credit history in insurance protects the public interest by preventing unfair discrimination in insurance markets while consumers recover from the financial shocks created by the pandemic. Denying the Commissioner his authority to enforce the prohibition against unfair discrimination would undermine the rule of law in Washington State and leave many Washington State residents paying higher insurance premiums than state law is meant to allow.

DATED this the 16th day of June, 2022.

CONSUMER FEDERATION OF AMERICA
Amicus Curia

DocuSigned by:
Kirk D. Miller
62824AF983464E4...

Kirk D. Miller, WSBA # 40025
Local Counsel for Consumer Federation of America

NORTHWEST JUSTICE PROJECT
Amicus Curia

DocuSigned by:
Scott Kinkley
0A149AF1864749C...

Scott M. Kinkley, WSBA # 42434
Julia C. Kellison, WSBA # 28885

NORTHWEST CONSUMER LAW CENTER
Amicus Curia

DocuSigned by:
Amanda N. Martin
DE9819834B55451...

Amanda N. Martin, WSBA # 49581

Northwest Justice Project
401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: 206.464.1519 / Fax: 206.299.3123