☐ EXPEDITE
☒ Hearing is set
Date: September 3, 2021
Time: 9:00 a.m.
Judge/Calendar: Mary Sue Wilson

☐ No hearing is set

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF THURSTON

AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION; PROFESSIONAL INSURANCE AGENTS OF WASHINGTON; INDEPENDENT INSURANCE AGENTS AND BROKERS OF WASHINGTON; and Petitioner Intervenor NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES,

Petitioners,

v.

OFFICE OF THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON and MIKE KREIDLER, in his official capacity as INSURANCE COMMISSIONER FOR THE STATE OF WASHINGTON,

Respondents.

NO. 21-2-00542-34

PETITIONERS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIM FOR DECLARATORY RELIEF, FOR A PERMANENT INJUNCTION, AND TO SUPPLEMENT THE RECORD

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I. INTRODUCTION AND REQUESTED RELIEF

In this action for declaratory and injunctive relief, Petitioners, the American Property Casualty Insurance Association, Professional Insurance Agents of Washington, and Independent Insurance Agents and Brokers of Washington, move for summary judgment on their claim for declaratory relief and for a permanent injunction to enjoin Respondents, the Office of the Insurance Commissioner of the State of Washington ("OIC") and Insurance Commissioner Mike Kreidler, from implementing and enforcing an emergency rule that the Commissioner adopted on March 22, 2021 (the "Emergency Rule").[1]

The Emergency Rule suspends for 120 days insurers' use of consumers' credit histories to determine rates, premiums, or eligibility for coverage (sometimes called "credit scoring") with respect to all private passenger automobile, renters, and homeowners insurance issued in Washington. The Commissioner adopted the Emergency Rule about one year after the federal and state measures which he asserts gave rise to the emergency necessitating the Rule, but less than two weeks after his most recent effort to convince the Washington Legislature to ban the use of credit histories failed.

Summary judgment is appropriate, first, because the Emergency Rule violates the constitutional separation of powers. The Rule, adopted almost immediately after the Legislature declined to ban the use of credit history, was an unconstitutional invasion of the Legislature's exclusive prerogative to amend its own statutes. Second, summary judgment should be granted because the Commissioner lacked the statutory authority to adopt the Emergency Rule. Washington law permits the use of credit history as a factor to determine rates, premiums, and eligibility for coverage, and limits the Commissioner's authority to adopting implementing rules. The Emergency Rule suspends a statutorily authorized use and is invalid as a result. The

[1] This motion and the entire action are limited to the Emergency Rule and do not in any way address the Commissioner's expressed intention to adopt a permanent rule banning use of credit history for at least 3 years. Such a hypothetical challenge would not be ripe in any event.

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Commissioner has no authority to suspend legislative enactments, as he has done here. Third, summary judgment is appropriate because the Commissioner did not have the requisite statutory good cause to adopt the Emergency Rule. Fourth, Petitioners are entitled to summary judgment because the Emergency Rule, which is based on no supporting evidence, is arbitrary and capricious. In addition, because Petitioners have demonstrated their entitlement to relief, pursuant to RCW 34.05.574(1)(b), the Court can and should enter a permanent injunction enjoining Respondents from implementing and enforcing the Emergency Rule.

Petitioners recognize that this motion raises some issues that also were presented by Petitioners' prior motion for a preliminary injunction, which the Court denied. Petitioners respectfully submit that the Court's decision was erroneous and intend to demonstrate as much in the context of this new motion which, in any event, is considered under different standards. Moreover, and more importantly, evidence has come to light which conclusively demonstrates that the motion for summary judgment should be granted.

Senator Mark Mullet has come forward on his own accord to set the record straight regarding Respondents' conduct in connection with their legislative efforts to ban the use of credit history in insurance. Senator Mullet chairs the senate committee that considered the bill that the Commissioner recently sponsored to impose a ban, and he interacted extensively with Respondents in connection with that bill. Senator Mullet makes clear that at no time during their legislative efforts did Respondents suggest that they had the regulatory authority to suspend the use of credit history. Nor did Respondents ever suggest that action was necessary to address an emergency, that any emergency even existed, or that credit scoring was unfairly discriminatory in the manner Respondents assert in this case.

Moreover, on May 26, 2021, Respondents finally transmitted and served what they certify is the emergency rule-making file for the Emergency Rule. This file is devoid of even a superficial analysis by the Commissioner's staff of the third-party documents included in the

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file and also lacks any evidentiary support for the Commissioner's purported finding of good cause that an emergency existed. Nor is there any evidence in the file to support the speculation in the Emergency Rule itself, and by Respondents, that use of credit history is unfairly discriminatory in the manner Respondents have asserted in this case.

This powerful new evidence confirms that Petitioners' motion for summary judgment on their claim for a declaratory judgment, and for entry of a permanent injunction, should be granted. Respect for the rule of law, including respect for the Administrative Procedure Act's strong preference for regular order and public engagement in rulemaking, demands that Respondents' gross regulatory overreach be stopped in its tracks.

II. STATEMENT OF FACTS

A. The Legislature authorized credit scoring for insurance underwriting and rating purposes in 2002, rejecting the Commissioner's request to ban it.

In 2002, over the Commissioner's opposition, the Legislature passed Engrossed Substitute House Bill 2544, which enacted RCW 48.18.545 and RCW 48.19.035—statutes that authorize credit scoring in underwriting and setting rates, subject to certain requirements and restrictions. LAWS OF 2002, ch. 360.[2] Both statutes provide that the Commissioner "may adopt rules to *implement*" the sections. RCW 48.18.545(7) & RCW 48.19.035(5) (emphasis added). And the Commissioner has in fact done so. *See* WAC 284-24A-001, *et seq*. Among his adopted rules are WAC 284-24A-010 and 284-24A-011 (specifying what an insurer must tell a consumer about significant factors that adversely affect the consumer's credit history as well as significant factors that led to a decision to charge a higher premium or to reject coverage) and WAC 284-24A-045, 284-24A-050 and 284-24A-055 (detailing how an insurer using credit history as a factor to determine insurance rates can show that its rating plan results in rates that are not excessive, inadequate, or unfairly discriminatory).

[2] http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2544-S.SL.pdf?q=20210609164555.

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B. The Commissioner again tried unsuccessfully to get the Legislature to ban credit scoring in 2010.

In 2010, the Commissioner supported Senate Bill 6252, which would have banned the use of credit history in insurance for any purposes, including underwriting or rating.[3] The bill failed, never making it out of committee hearings.[4]

C. The Legislature rejected the Commissioner's latest attempt to ban credit scoring earlier this year.

On January 11, 2021, at the behest of the Commissioner and the Governor, two senators introduced Senate Bill 5010 which, if passed, would have prohibited insurers that issue personal lines insurance policies (such as private passenger automobile, renters and homeowners insurance), from refusing to issue or renew a private insurance policy based upon an individual's credit history or credit information. Senate Bill 5010 also would have prohibited insurers from filing rates with the OIC for personal lines that incorporated credit information. *See* Declaration of Jason W. Anderson in Support of Petitioners' Motion for Summary Judgment ("Anderson Dec.") ¶ 2, Ex. 1.

On January 14, 2021, a public hearing was held on Senate Bill 5010 before the Senate Committee on Business, Financial Services & Trade. Anderson Dec. ¶ 3, Ex. 2. Two representatives of the Insurance Commissioner spoke at the hearing—John Noski, the legislative liaison for the OIC, and Eric Slavich, the OIC's lead actuary for property and casualty insurance. Anderson Dec. ¶ 4, Ex. 3 at 8. Mr. Slavich testified that he understood why insurers use credit history and aptly described the choice confronting the Legislature:

> As an actuary, I understand why insurers use credit to help set their premium rates. Actuarially, there is a correlation between credit scores and insurance

[3] SB 6252, 2010 Reg. Sess., http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Bills/6252.pdf?q=20210403132302. *See* Mike Kreidler, "Washington Legislature must ban the insurance industry's use of credit scoring," *The Seattle Times* (January 21, 2010).

[4] https://app.leg.wa.gov/billsummary?BillNumber=6252&Year=2009&Initiative=false.

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> claims. But as legislators, you must decide if the rating factor is justified. Does the correlation matter more than its impact on society?

Anderson Dec., Ex. 3 at 11. As Mr. Slavich recognized, this is an archetypal example of the kind of policy judgments that are the province of elected legislatures. Ultimately, the Legislature did not adopt the policy rationale that the Commissioner urged, and the Commissioner's bill failed to pass. Anderson Dec., Ex. 2.

D. Shortly after the 2021 bill failed, and without notice, the Commissioner adopted an emergency rule banning credit scoring.

With no prior notice, and less than two weeks after expiration of the March 9 deadline for the Senate to pass Senate Bill 5010, the Commissioner adopted the Emergency Rule. Anderson Dec. ¶ 5, Ex. 4. The Rule creates two new provisions—WAC 284-24A-088 and 284-24A-089 (Anderson Dec., Ex. 4 at 1).

The first provision, WAC 284-24A-088, contains the Commissioner's "Findings" in support of the Emergency Rule. In the second provision, WAC 284-24A-089, the Commissioner "finds" that, as a result of the broad negative economic impact of the COVID-19 pandemic, the disproportionate negative economic impact of the pandemic on communities of color, and the purported disruption to credit reporting resulting from federal and state consumer protection measures, use of credit-based insurance scores for private passenger automobile coverage, renters coverage and homeowners coverage results in premiums that are excessive, inadequate, or unfairly discriminatory under RCW 48.19.020 and 48.18.480. *See* WAC 284-24A-089(2). On these grounds, for all policies effective or processed for renewal on or after June 20, 2021, the Emergency Rule suspends for 120 days the use of credit history as a factor to determine personal insurance rates or eligibility for coverage for private passenger automobile coverage, renters coverage and homeowners coverage. The Emergency Rule further required each insurer to file, by May 6, 2021, amendments to their rate plans for all insurance policies covered by the Rule. WAC 284-24A-089(3), (7).

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E. Significant developments since the hearing on petitioners' request for a preliminary injunction support the pending motion.

On April 23, 2021, this Court heard argument on Petitioners' motion for a preliminary injunction to enjoin implementation and enforcement of the Emergency Rule. At the conclusion of the hearing, the Court denied the motion. Since then, there have been significant developments that bear directly on the issues presented by this motion for summary judgment.

In particular, Senator Mark Mullet is the Chair of the Senate Committee on Business, Financial Services & Trade, which has jurisdiction over legislation relating to insurance. He has come forward to confirm that, in adopting the Emergency Rule, the Insurance Commissioner abused his regulatory authority. *See* Declaration of Mark Mullet ("Mullet Dec.") ¶¶ 1-3.

Senator Mullet attests to a series of facts that support this conclusion. First, OIC staff contacted him by text message on June 10, 2020 and spoke with him on June 11 about a bill proposal to ban use of credit scoring in pricing and underwriting personal insurance. Neither in the text message nor during the call did OIC staff say that the bill was necessary to address an emergency. Mullet Dec. ¶ 4. Later, on October 7, 2020, OIC staff contacted members of Senator Mullet's committee seeking support for legislation to be introduced in the upcoming legislative session prohibiting the use of credit history in personal insurance in Washington. OIC's explanation in support of the bill related entirely to social justice considerations, and there was no suggestion that the bill was necessary to address any emergency. Mullet Dec. ¶ 5.

On December 10, 2020, SB 5010 was pre-filed for introduction. Senator Mullet had two competing concerns. He wanted to provide relief to those in economic distress but was alarmed about the impact banning the use of credit history could have on the Washington insurance market and the insurance premiums of millions of Washington residents. Seeking a possible alternative to SB 5010 that would help those in need, but with less dramatic consequences for the Washington insurance market, he requested that his committee's staff draft language that

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would provide relief to insureds experiencing "extraordinary life circumstances," such as a lost job. Mullet Dec. ¶ 6.

Senator Mullet presided over the January 14, 2021 hearing held before his committee on SB 5010. He attests that, at no time during this hearing, or to his knowledge at any other time in connection with SB 5010, did anyone from the OIC assert that SB 5010 was necessary to address an emergency. Nor did anyone from the OIC assert that use of credit history in insurance was unfairly discriminatory in the actuarial sense (*i.e.*, that it led to differences in premiums charged that did not correspond to expected losses). Instead, SB 5010 was again touted as a social justice measure. Mullet Dec. ¶ 7. As such, it was not a measure designed to address unfair discrimination as it is defined in Washington's insurance code generally and RCW 48.18.480 specifically.[5]

On January 22, 2021, Representative Steve Kirby, Chair of the Committee on Consumer Protection and Business of the Washington House of Representatives, introduced House Bill 1351, which would have required insurers to provide reasonable relief from insurance rates and underwriting rules to consumers whose credit histories had been negatively impacted by extraordinary life events such as a lost job or the death of a close family member. HB 1351 would have provided meaningful assistance to those in need without causing massive disruption to the Washington insurance market. Nevertheless, the OIC and Commissioner Kreidler opposed the bill. Mullet Dec. ¶¶ 6, 8.

A hearing on HB 1351 was held before Representative Kirby's committee on February 1, 2021. The bill was unanimously approved by the committee on February 4, 2021, and it was

[5] RCW 48.18.480, entitled "Discrimination Prohibited," provides: "No insurer shall make or permit any unfair discrimination between insureds or subjects of insurance *having substantially like insuring risk, and exposure factors, and expense elements*, in the terms or conditions of any insurance contract, or in the rate or amount of premium charged therefor, or in the benefits payable or in any other rights or privileges accruing thereunder. The provision shall not prohibit fair discrimination by a life insurer as between individuals having unequal expectation of life." (Emphasis added).

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Senator Mullet's understanding that the bill had sufficient support to pass on the House floor. However, Commissioner Kreidler successfully urged House leaders to keep the bill from being brought to an up-or-down vote on the floor, even though it would have directly benefited Washington consumers. The Commissioner's actions have left Washington as the only state in the country that does not provide relief to consumers from extraordinary life events. Mullet Dec. ¶ 9.

From late January through mid-February, Senator Mullet had separate informal discussions with his committee staff, OIC staff and industry stakeholders regarding possible amendments to SB 5010. On February 9, 2021, OIC staff proposed a compromise that would have allowed insurers to continue to use credit history but that also would have limited its impact. Later that day, Senator Mullet met with Commissioner Kreidler in the hope of reaching a definitive agreement, but the Commissioner refused to honor the compromise that his own staff had proposed. At no time during this meeting did Commissioner Kreidler claim that use of credit history was unfairly discriminatory in the actuarial sense. Nor did the Commissioner assert that SB 5010 was meant to address any kind of emergency resulting from use of credit history or that any emergency even existed. Mullet Dec. ¶ 10.

Notwithstanding the Commissioner's unwillingness to engage constructively, Senator Mullet continued his efforts to achieve a solution. Those efforts led to introduction of Substituted Senate Bill 5010. SSB 5010 would have allowed insurers to continue to use credit history, but for a period of three years would have permitted such use only when doing so resulted in lower premiums for the insured. In this way, SSB 5010 would have protected Washington insureds whose credit scores were negatively affected by the pandemic. Nevertheless, Commissioner Kreidler adamantly opposed SSB 5010. Mullet Dec. ¶ 11.

Senator Mullet's committee approved SSB 5010. Furthermore, his vote count on the Senate floor made clear to him that the bill had sufficient support to pass on the floor. But just

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as he had requested House leaders not to allow HB 1351 to come to a vote on the House floor, Commissioner Kreidler successfully urged Senate leaders to prevent SSB 5010 from coming to an up-or-down vote on the Senate floor, even though the bill would have directly benefitted consumers. As a result, SSB 5010 was not voted on by the March 9 deadline for bills to receive an up-or-down vote in the legislative session. On March 10, Commissioner Kreidler issued a press release arguing that original SB 5010 could still move forward, but later that day, the Senate and House majority leaders made clear that this would not happen. Mullet Dec. ¶¶ 12-13.

Senator Mullet found Commissioner Kreidler's adoption of the Emergency Rule less than two weeks later to be shocking and in blatant defiance of the legislative will. At no time during their efforts to obtain a legislative ban on the use of credit history did the Commissioner or the OIC ever state or suggest to Senator Mullet that they had the authority through regulatory action to suspend the use of credit history in insurance. Mullet Dec. ¶ 14. Equally shocking to Senator Mullet is any conclusion that there was any emergency which justified proceeding by emergency rule rather than the normal rule-making process. At no time since the OIC first approached Senator Mullet in June 2020 through to the day that SB 5010 died in March 2021, did the Commissioner or any representative of OIC claim to Senator Mullet that immediate action on use of credit history was necessary to avoid some kind of imminent emergency or that credit scoring was unfairly discriminatory in the manner Respondents claim in this litigation. Mullet Dec. ¶¶ 7, 10. Senator Mullet concludes by stating what by now must be obvious to any fair-minded observer—it was only because of Commissioner Kreidler's failure to pass SB 5010 that the Commissioner adopted the Emergency Rule when he did. Mullet Dec. ¶¶ 15-16.

Senator Mullet's declaration confirms that everything about the Emergency Rule is a sham. Respondents were never concerned about whether use of credit history was unfairly discriminatory in the way Respondents now assert and never claimed that an emergency existed

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that necessitated immediate action. All of these concerns and considerations simply did not exist until Respondents fabricated them, less than two weeks after their legislative efforts had failed, to justify the Emergency Rule.

The emergency rule-making file, which Respondents cryptically describe as the "record of the administrative injunction proceeding," confirms this. The file contains 1,019 pages, over half of which are unannotated copies of the text of the CARES Act and another federal pandemic-relief law. *See* Anderson Dec., Ex. 5 at 2-4. Most of the rest are various articles and reports contained in a "Background File." The "Rule Text File" and the "CR 103 E File" are composed primarily of identical versions of the Emergency Rule as adopted. *Id.* The file contains not a scintilla of evidence supporting the Commissioner's "good cause" determination and not a scintilla of evidence that insurers' use of credit history is unfairly discriminatory in the manner claimed in this litigation.

III. AUTHORITY AND ARGUMENT

A. The Summary Judgment Standards.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* CR 56(c); *Ehrhart v. King County*, 195 Wn.2d 388, 409, 460 P.3d 612 (2020); *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App. 2d 765, 776, 425 P.3d 560 (2018). A material fact is one that affects the outcome of the litigation. *Elon Construction, Inc. v. Eastern Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). A genuine issue of material fact exists when reasonable minds could differ on such facts. *Ehrhart*, 195 Wn.2d at 409.

The moving party in a summary judgment motion bears the initial burden of showing the absence of an issue of material fact. If the moving party makes this initial showing, the inquiry shifts to the opposing party to show the existence of a genuine issue of material fact. If

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the opposing party fails to make a showing sufficient to establish a genuine issue of material fact, then summary judgment is appropriate. *Johnson*, 5 Wn. App. 2d at 777-78.

Petitioners seek summary judgment on four grounds, each of which requires that the motion be granted. The first ground is that the Emergency Rule violated the constitutional separation of powers. This ground presents an issue of law. *See In re Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (Div. 2 2013). The second ground is that the Commissioner lacked the statutory authority to adopt the Emergency Rule. This ground also presents only an issue of law (*see id*. at 116), although certain facts recently have come to light which reinforce the legal conclusion that the Commissioner lacked authority to promulgate the Emergency Rule. The third ground is that the Commissioner lacked the good cause necessary to adopt the Emergency Rule. This ground involves a limited number of material facts but no genuine issue as to any of them. The fourth ground is that the emergency rule is arbitrary and capricious. It, too, involves a discrete number of material facts but no genuine issue regarding any of them. Accordingly, as demonstrated below, Petitioners' motion for summary judgment on its claim for declaratory judgment should be granted. *See Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015) (granting summary judgment to plaintiff in declaratory judgment action); *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 794 P.2d 521 (1990) (same).

B. Petitioners are entitled to summary judgment on their claim for declaratory relief.

1. The Court should grant summary judgment because the Commissioner's adoption of the Emergency Rule violated the constitutional separation of powers.

Separation of powers is a vital doctrine that is implicit in the Washington State Constitution and arises from the division of government into three separate and independent branches—legislative, executive, and judicial. *State v. Gresham*, 173 Wn.2d 405, 428, 269 P.3d 207 (2012); *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009); *State v. David*, 134 Wn. App. 470, 478, 141 P.3d 646 (Div. 2 2006). To determine whether a particular action

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violates separation of powers, a court looks not to whether the two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *Brown*, 165 Wn.2d at 718; *see also Gresham*, 173 Wn.2d at 428; *David*, 134 Wn. App. at 478. As noted above, whether an action violates the separation of powers is a question of law. *See Combs*, 176 Wn. App. at 116.

In adopting the Emergency Rule when he did, the Commissioner, as an elected executive officer,[6] invaded the prerogatives of the Washington Legislature. The Legislature was presented the opportunity to repeal or otherwise amend the statutes authorizing use of credit history and exercised its prerogative not to do so. *See City of Union Gap v. Carey*, 64 Wn.2d 43, 49, 390 P.2d 674 (1964) ("It is the exclusive prerogative of the legislature to amend its own statutes."). In suspending the use of credit history for 120 days, not even two weeks after his legislative efforts failed, the Commissioner invaded this exercise of the Legislature's prerogative.[7] *See also* Mullet Dec. ¶¶ 3, 14 (describing the Emergency Rule as a usurpation of legislative authority and a violation of the separation of powers). The Commissioner's adoption of the Emergency Rule violated the constitutional separation of powers, and Petitioners' motion for summary judgment should, therefore, be granted.

2. Summary judgment is appropriate because the Emergency Rule exceeded the Commissioner's authority.

This Court has the inherent and statutory authority to declare the Emergency Rule invalid if it determines that the Rule is contrary to law or exceeds the Commissioner's authority.

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[6] *See State ex rel. Lemon v. Langile*, 45 Wn.2d 82, 105, 273 P.2d 464 (1954).

[7] It is no answer to assert, as Respondents did previously, that courts generally do not ascribe meaning to a failure to pass a bill into law. The authority Respondents cited to support this contention involved issues of statutory interpretation. But applying the doctrine of separation of powers is not a matter of statutory interpretation, and petitioners do not ask this Court to interpret any statute in light of the Legislature's failure to amend the statutes authorizing use of credit history. All that matters is that the Legislature did not exercise its exclusive prerogative to amend those statutes. What meaning, if any, this declination may have for the interpretation of any statute is irrelevant to whether the Commissioner invaded that exclusive legislative prerogative when he adopted the Emergency Rule. He did. *See also* Mullet Dec. ¶ 13.

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RCW 34.05.570(2)(c); *Lake Union Drydock Co. v. State, Dep't of Nat. Res.*, 143 Wn. App. 644, 651-52, 179 P.3d 844 (2008).

An administrative action is contrary to law when it exceeds the agency's authority or violates rules governing its exercise of discretion. *Id.*; *see also LaRose v. Dep't of Labor & Indus.*, 11 Wn. App. 2d 862, 883, 456 P.3d 879 (2020) (agency rule is invalid if it exceeds the statutory authority of the agency). An administrative rule cannot enact, suspend, or repeal a law, as such authority can never be delegated by the Legislature. *Diversified Inv. P-ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 97, 11 P.3d 726 (2000). Any rule purporting to take such action must be invalidated. *Swinomish Indian Tribal Comm. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013); *see also Center for Biological Diversity v. Dep't of Fish & Wildlife*, 14 Wn. App. 2d 945, 968-74, 474 P.3d 1107 (2020) (ruling that agency exceeded statutory authority). A regulation also is invalid if it is inconsistent with the statute under which it was promulgated. *Postema*, 142 Wn.2d at 83. The validity of an agency rule is a question of law. *LaRose*, 11 Wn. App. 2d at 883.

The Emergency Rule suspends for 120 days the use of credit history to price and underwrite personal insurance. But the power to suspend a law belongs solely to the Legislature and cannot be delegated. *See Diversified Inv. P-ship*, 113 Wn.2d at 24. For this reason alone, the Emergency Rule is beyond the Insurance Commissioner's authority, and Petitioners' motion for summary judgment should be granted.

But even if the Legislature could delegate authority to suspend a law, it did not do so here. The extent of an agency's statutory rule-making authority also is a question of law. *LaRose*, 11 Wn. App. 2d at 883. Moreover, a court should determine on its own whether a regulation and statute conflict, without deference to the agency. *Postema*, 142 Wn.2d at 77 ("[A]n agency's view of a statute will not be accorded deference if it conflicts with the statute.

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Ultimately, it is for the court to determine the meaning and purpose of a statute.") (citations omitted); *see also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885 (2007) (court reviewing agency's interpretation or application of a statute may substitute its interpretation of the law for the agency's). These precepts are merely specific applications of the general rule that statutory interpretation is a question of law. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012); *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430; *see also Spokane County v. Bates*, 96 Wn. App. 893, 896, 982 P.2d 642 (1999) (application of statute to a specific set of facts is an issue of law); *Sintra v. City of Seattle*, 96 Wn. App. 757, 761, 980 P.2d 796 (1999) (same).

Determining the Commissioner's rule-making authority is a matter of statutory interpretation. The court's fundamental objective when interpreting a statute is to "ascertain and carry out the Legislature's intent[.]" *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Washington follows the plain-meaning rule for interpreting statutes: "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* The plain meaning is discerned from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id*. at 11. The court should also consider legislative purposes appearing on the face of the statute and background facts of which judicial notice can be taken. *Id.* "[I]f, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Id*. at 12.

There is no ambiguity here. RCW 48.18.545(4) provides that "[a]n insurer *may use credit history* to deny personal insurance" in combination with other substantive underwriting factors (emphasis added). *See also* RCW 48.19.035(2)(a) (authorizing use of credit history to determine personal insurance rates, premiums, or eligibility for coverage provided insurance

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scoring models are filed with the Commissioner). In blatant defiance of this clear mandate, the Emergency Rule states that "[f]or all private passenger automobile coverage, renter's coverage, and homeowner's coverage issued in the state of Washington, insurers *shall not use credit history* to determine personal insurance rates, premiums, or eligibility for coverage." WAC 284-24A-89(3) (emphasis added). A starker conflict is difficult to imagine, and there is no way to reconcile the authority granted by the statutes with the prohibition imposed by the Rule.

Yet, somehow, the Commissioner cites RCW 48.19.035 as statutory authority for adopting the Emergency Rule (*see* Anderson Dec., Ex. 4 at 1). But that provision, of course, *authorizes the use of credit history*. Unless and until the Legislature says differently, RCW 48.19.035 and RCW 48.18.545 leave the decision to insurers, not the Commissioner, whether to use credit history and limits the Commissioner's authority to "adopt[ing] rules to *implement* this section." RCW 48.19.035(5) (emphasis added). Implement is not defined in the statute. To determine the plain meaning of an undefined term, the court may look to the dictionary. *Home Street, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). To "implement" means to "carry out" or "accomplish."[8] Thus, under the plain meaning of RCW 48.19.035(5), that provision authorizes the Commissioner to adopt only rules that would "carry out" or "accomplish" the specific requirements and restrictions set forth in the statute. The Emergency Rule does no such thing. Rather, it suspends operation of the statute. Not only, then, does RCW 48.19.035(5) not authorize the Emergency Rule, the Rule is inconsistent with, indeed contrary to, the statute. The Rule is, therefore, invalid. *See Postema*, 142 Wn.2d at 83 (any regulation that is inconsistent with the statute under which it is promulgated is invalid). *Lake Union*, 143 Wn. App. at 651-52 (an administrative action is contrary to law when it violates statutory authority).

[8] *Implement*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/implement (last visited April 5, 2021).

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The Commissioner's citation to RCW 48.02.060 (*see* Anderson Dec., Ex. 4 at 1) as authorizing the Emergency Rule is equally unavailing. To begin, nothing in RCW 48.02.060 authorizes the Commissioner to suspend laws duly enacted by the Legislature. To the contrary, RCW 48.02.060(3)(a) authorizes the Commissioner to "make reasonable rules for *effectuating*" any provision of the Insurance Code. (Emphasis added.) "Effectuate" means "to put (something) into effect or operation."[9] The Commissioner's authority to "put…into effect" the Insurance Code—which includes statutes that authorize credit scoring—certainly does not allow him to suspend the use of credit scoring.

Moreover, RCW 48.02.060 limits the Commissioner's emergency authority to four discrete topics: 1) reporting requirements for claims; 2) grace periods for payment of insurance premiums and performance of other duties by insureds; 3) temporary postponement of cancellations and nonrenewals; and 4) medical coverage to ensure access to care. RCW 48.02.060(4). The Emergency Rule plainly does not pertain to any of these topics, and RCW 48.02.060 therefore does not authorize the Rule. Indeed, because RCW 48.02.060 specifically sets forth and limits the Commissioner's emergency authority, its limitations prevail over the general grants of authority that the Commissioner has cited in support of the Emergency Rule (RCW 48.19.020 and RCW 48.18.480), even if those general statutes otherwise authorized the Commissioner's actions. *See Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (Div. 2 2017) (specific statute will supersede a general one when both apply).[10]

But even if those general statutes could authorize the Commissioner's actions, they do not. RCW 48.19.020 (*see* Anderson Dec., Ex. 4 at 1) merely recites the universal standard that

[9] *Effectuate*, MERRIAM WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/effectuate (last visited April 5, 2021).

[10] Previously, Respondents contended that the limitations on the Commissioner's emergency authority found in RCW 48.02.060 apply only to orders the Commissioner may issue, not to rules he may adopt. The Commissioner did not cite any authority for this distinction, and we are aware of none. Moreover, the Emergency Rule is actually titled "Rule-Making Order."

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insurance premium rates shall not be excessive, inadequate, or unfairly discriminatory. RCW 48.18.480 (Anderson Dec., Ex. 4 at 1) is similar. By no stretch of the imagination could these general pronouncements reasonably be interpreted as authorizing the Commissioner to suspend by emergency edict the operation of specific statutes (RCW 48.19.035 and RCW 48.18.545) that *expressly authorize* the use of credit history in determining rates, premiums and eligibility for coverage for personal lines of insurance, statutes that the Legislature declined to modify just two weeks before the Commissioner adopted the Emergency Rule. If such general statements were sufficient to suspend a specific statute and defy legislative intent, the Commissioner would have virtually unfettered regulatory power.

In addition, the Commissioner's citation to RCW 48.19.080 (waiver of filing) (*see* Anderson Dec., Ex. 4 at 1) is of no consequence here. This procedural provision merely permits the Commissioner to suspend or modify filing requirements by order or to examine rates affected by such order pursuant to the standard prescribed in RCW 48.19.020. It authorizes no further action by the Commissioner.

Finally, Respondents' own conduct confirms the Commissioner's lack of statutory authority to adopt the Emergency Rule. Specifically, as Senator Mullet attests, at no time during the entire eight-month period that Respondents attempted to secure a legislative ban on the use of credit history did they state or suggest that the Commissioner had the authority to suspend such use. Mullet Dec. ¶ 14.

The Emergency Rule is an exercise of a non-delegable power of the Legislature, is inconsistent with the statutes authorizing use of credit history and is beyond any statutory authority conferred on the Commissioner. For each of these reasons, it is invalid as a matter of law, and the Court should grant Petitioners' motion for summary judgment on their claim for declaratory relief.

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3. Summary judgment is appropriate because the Commissioner lacked good cause to take immediate action.

RCW 34.05.350(1)(a) of Washington's Administrative Procedure Act (the "APA") permits an agency to adopt an emergency rule only if the agency, for "good cause," finds "[t]hat immediate adoption . . . of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." The Commissioner parrots this provision to justify his assertion of good cause. Anderson Dec., Ex. 4 at 1. But that assertion is unfounded, and the Commissioner lacked good cause to adopt the Emergency Rule.

No Washington case comprehensively discusses RCW 34.05.350's good cause requirement or the level of scrutiny to apply to an agency's assertion of good cause. However, when enacting Washington's APA, of which RCW 34.05.350 is a part, the Legislature codified its intent and specifically admonished courts to "interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." *See* RCW 34.05.001. Consistent with this directive, the Supreme Court has stated that in the absence of Washington case law, federal precedent may serve as persuasive authority. *See King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179, 979 P.2d 374 (1999).

In *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), the Ninth Circuit Court of Appeals discussed why the federal APA counterpart to RCW 34.05.350's "good cause" requirement should be "narrowly construed":

> Exceptions to notice and comment rulemaking are not lightly to be presumed. [I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later. Failure to follow notice and comment rulemaking may be excused when good cause exists . . . .

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> Good cause is to be narrowly construed and only reluctantly countenanced. As such, the good cause exception is usually invoked in emergencies, and an agency must overcome a high bar to do so. . . .

Id. at 575-76 (citations and quotation marks omitted). As *Azar* suggests, the Commissioner's assertion of good cause should be viewed with a skeptical eye. Indeed, because good cause is the only prerequisite under Washington law to engage in the extraordinary action of emergency rule-making, it is particularly critical that the requirement be applied rigorously to ensure that executive agencies and officers do not invoke emergency power as a matter of course to impose regulations before anyone has an opportunity to comment on them.

The Commissioner did not satisfy the good-cause standard because his claimed emergency was an archetype of an artificial fabrication. *See State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (indicating that a fabricated or artificial emergency does not satisfy the good cause requirement). The Commissioner cites to certain actions taken by the President, Congress, and the Governor that he says have disrupted credit reporting and thereby made credit-based insurance scoring unreliable. Anderson Dec. ¶¶ 7-11, Exs. 6-10. These are the Governor's Proclamations 20-05 (declaring a state of emergency in Washington) (Anderson Dec., Ex. 6); 20-19 (placing a moratorium on evictions) (Anderson Dec., Ex. 7); 20-49 (placing a moratorium on garnishments) (Anderson Dec., Ex. 8); the President's declaration of a National Emergency (Anderson Dec., Ex. 9); and the federal CARES Act (Anderson Dec., Ex. 10). The original dates of enactment of these measures were February 29, 2020 (Anderson Dec., Ex. 6 at 2), March 18, 2020 (Anderson Dec., Ex. 7 at 3), April 14, 2020 (Anderson Dec., Ex. 8 at 3), March 13, 2020 (Anderson Dec., Ex. 9 at 1), and March 27, 2020 (Anderson Dec., Ex. 4 at 1), respectively. The Commissioner has offered no evidence to show why these measures, most over one year old when the Emergency Rule was adopted, suddenly caused an emergency justifying immediate adoption of the Rule.

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The Commissioner contends that an emergency existed, justifying immediate action, because it was uncertain when the federal and state measures (in particular the CARES Act) he relies upon will expire. Anderson Dec., Ex. 4 at 2. But the Commissioner has failed to offer any evidence to show that expiration of any of these measures was so imminent that good cause existed for immediate adoption of the Emergency Rule and circumvention of the regular procedure codified in the APA. To the contrary, the credit-reporting moratorium in the CARES Act will not expire until 120 days after the President's March 13, 2020 declaration of a National Emergency expires. *See* CARES Act Section 4021 (Anderson Dec., Ex. 10 at 3). And the President recently extended that declaration for as long as another year (Anderson Dec. ¶ 12, Ex. 11). Similarly, Proclamation 20-49 has been amended and extended 14 times, and the latest version, 20-49.14, will not expire until termination of the COVID-19 State of Emergency or until rescinded, whichever is first. (Anderson Dec. ¶ 13, Ex. 12). And although the latest version of Proclamation 20-19 has an end date of June 30, 2021 (Anderson Dec. ¶ 14, Ex. 13), the proclamation has already been amended and extended six times, and there is no suggestion in the latest iteration that the Governor will not extend it again. There simply was and is no genuine emergency.

Senator Mullet's declaration confirms that no genuine emergency necessitating the Emergency Rule ever existed. Respondents first began their latest effort to secure a legislative ban on credit history in June 2020. That effort ended on March 10, 2021, more than eight months later. At no time during this entire period did Respondents ever assert that action was necessary to address any kind of emergency or that any emergency existed. The Senator avers that the timing of the Emergency Rule is the result, not of any actual emergency, but of the respondents' failure to convince the Legislature to ban credit history. Mullet Dec. ¶¶ 4-5, 7, 10, 15-16. Indisputably, the Commissioner fabricated an artificial emergency as a pretext to justify his extraordinary actions.

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The rule-making record confirms this. Nowhere in that record is there any indication that the OIC or the Commissioner believed, or even discussed, that an emergency existed that required immediate action. Only when required to do so by the CR-103 E form itself, did the Commissioner identify, for the first time, the claimed emergency. Anderson Dec. ¶ 15, Ex. 14. It is hard to imagine a clearer example of the fabrication of an artificial emergency.

The Commissioner's conduct shows a breathtaking disregard for the rule of law. Having failed to achieve his legislative aim, he has circumvented the normal rule-making process by conjuring out of thin air an artificial emergency based upon alleged concerns and considerations that he never raised during the entire eight-month period of his legislative efforts. His actions reflect, not a desire to follow the law, but to evade it.

The Commissioner can offer no evidence to create a genuine issue of material fact over whether the good cause requirement of RCW 34.05.350(1)(a) was satisfied. It was not. For this independent reason, Petitioners' motion for summary judgment on their claim for declaratory judgment should be granted.

4. Summary judgment also is appropriate because the Emergency Rule is arbitrary and capricious.

Agency action is not arbitrary and capricious when the evidence on which the agency based its decision leaves room for two opinions even though the court may believe that the agency reached an erroneous conclusion. *Floating Homes Ass'n v. WA Dep't of Fish and Wildlife*, 115 Wn. App. 780, 789, 64 P.3d 29 (2003). Agency action that has no evidentiary support, or that is based upon speculation, is arbitrary and capricious. *See Norway Hill Preservation & Prot. Ass'n v. King*, 87 Wn.2d 267, 274, n.5, 552 P.2d 674 (1976); *Hamilton Corner I, LLC v. City of Napavine*, 200 Wash. App. 258, 273-74, 402 P.3d 368 (2017) (upholding agency determination because based on evidence, not speculation).

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Respondents contend in this action that consumer-protection measures such as the CARES Act have caused insurers' use of credit history to become unfairly discriminatory in the actuarial sense that it results in improper discrimination against consumers whose credit was impaired before the pandemic and who therefore are not entitled to the credit reporting protections of the CARES Act. But the rule-making record is devoid of any evidence to support this speculation or any evidence demonstrating the extent and magnitude, if any, of such effect, assuming it exists at all.[11] And Senator Mullet attests that Respondents never asserted to him that credit scoring was unfairly discriminatory in the actuarial sense. Mullet Dec. ¶¶ 7, 10. Summary judgment is, therefore, appropriate on the ground that the Emergency Rule is arbitrary and capricious.

C. The Court should enter a permanent injunction enjoining implementation and enforcement of the Emergency Rule.

Once a petitioner has demonstrated entitlement to relief, the Court has an array of options, including issuing an injunction. RCW 34.05.574(1)(b); *see also Rios v. Washington Dep't. of Labor & Indus.*, 145 Wn.2d 483, 508, 39 P.3d 961 (2002); *Dodge City Saloon, Inc. v Washington State Liquor Control Bd*., 168 Wn. App. 388, 395, 288 P.3d 343 (2012); *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 165, n.16, 93 P.3d 885 (2004).

Petitioners have demonstrated that the Emergency Rule is invalid. Accordingly, to prevent the substantial harm Petitioners and the public have sustained and will continue to sustain as a result of the Rule, pursuant to RCW 34.05.574(1)(b), the Court should enter a permanent injunction enjoining Respondents from implementing and enforcing the Rule.

[11] Petitioners propounded substantial discovery on Respondents to, *inter alia*, obtain any and all evidence Respondents may contend supports the Emergency Rule. Respondents objected to Petitioners' discovery and refused to produce any documents other than the rule-making record, which they already were required to do. *See* RCW 34.05.566(1). Respondents should, therefore, be limited to the rule-making record in defending the Emergency Rule in this action.

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D. This Court should supplement the record with Petitioners' additional evidence.

RCW 34.05.562 provides in pertinent part:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
>
> (b) Unlawfulness of procedure or of decision-making process; or
>
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

Petitioners submit that their supplemental evidence satisfies the test for when a court may receive additional evidence under RCW 34.05.562, and their request to supplement the rule-making record should, therefore, be granted.

Petitioners contend that the Commissioner lacked good cause to adopt the Emergency Rule on an emergency basis and that the Rule is arbitrary and capricious. Respondents disagree with both contentions. Those issues are, therefore, disputed. Moreover, the dispute over good cause falls readily within RCW 34.05.562(1)(b) as it involves whether the Commissioner was lawfully entitled to employ the emergency rule-making procedure or was instead required to proceed by regular rule-making. Moreover, the dispute over whether the Emergency Rule is arbitrary and capricious self-evidently involves material facts in rule making and thus comes within the ambit of RCW 34.05.562(1)(c).

Petitioners' supplemental evidence consists of Exhibits 1-3 and 6-12 to the Anderson Declaration and the Mullet Declaration. Much of this evidence previously was offered and considered without objection in connection with Petitioners' prior motion for a preliminary injunction.

Exhibits 1 and 2 to the Anderson Declaration (which were offered and considered previously by this Court) are 2021 Washington Senate Bill 5010, banning the use of credit

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scoring for personal lines of insurance, and the Bill History of SB 5010. Exhibit 3 (also offered and considered previously) contains excerpts of the transcript of the public hearing on SB 5010 held before the Senate Committee on Business Financial Services and Trade on January 14, 2021, in particular, the testimony of OIC actuary Eric Slavich.

As discussed above, Petitioners contend that the Emergency Rule arose out of the Commissioner's failure to get SB 5010 passed, and not out of a bona fide emergency resulting from actuarial unfair discrimination allegedly caused by credit scoring. Exhibits 1 and 2 simply provide the content and history of SB 5010. Exhibit 3 demonstrates that actuarial unfair discrimination was not a reason that the OIC offered in support of SB 5010, and indeed, that the OIC recognized that credit scoring was actuarially sound. These facts tend to show that actuarial unfair discrimination was a pretext for the Emergency Rule and not the true reason for its adoption. The exhibits therefore satisfy both RCW 34.05.562(1)(b) and (c).

Exhibits 6-10, which also were submitted previously, are not really evidence at all. They are instead copies of the state and federal proclamations and CARES Act provisions that Respondents relied upon to demonstrate good cause for emergency rule-making. They are provided for the Court's convenience. Similarly, Exhibits 10-12 are amendments to those same state and federal proclamations, all issued prior to adoption of the Emergency Rule, and are also submitted for the Court's convenience.

The other supplemental evidence is Senator Mullet's Declaration. Senator Mullet makes clear that at no time during their legislative efforts did Respondents suggest that they had the regulatory authority to suspend the use of credit history. Nor did Respondents ever suggest that action was necessary to address an emergency, that any emergency even existed, or that credit scoring was unfairly discriminatory in the actuarial sense that Respondents claim in this litigation. Senator Mullet's declaration is powerful evidence that the Emergency Rule, adopted so soon after SB 5010's demise, was not supported by good cause (thus satisfying RCW

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34.05.562(1)(b), pertaining to unlawful procedure) and was arbitrary and capricious because it was not genuinely intended to address actuarial unfair discrimination allegedly resulting from insurers' use of credit scoring (thus satisfying RCW 34.05.562(1)(c), relating to material facts in rulemaking).

Petitioners' supplemental evidence satisfies RCW 34.05.562, and the Court should consider it in connection with the Petitioners' motion for summary judgment and for entry of a permanent injunction.

IV. CONCLUSION

For the foregoing reasons, Petitioners' motion for summary judgment, for entry of a permanent injunction, and to supplement the record should be granted.

DATED this 14th day of June, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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