No. 19-14096

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OSCAR INSURANCE COMPANY OF FLORIDA,
Plaintiff-Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:18-cv-01944 (Byron, J.)

BRIEF FOR APPELLANT

STEVEN C. SUNSHINE
TARA L. REINHART
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000

PAUL M. ECKLES
MICHAEL H. MENITOVE
MATTHEW LISAGAR
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735-3000

SETH P. WAXMAN
LEON B. GREENFIELD
CATHERINE M.A. CARROLL
KEVIN M. LAMB
DREW VAN DENOVER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

FRANCIS M. MCDONALD, JR.
SARAH A. LONG
MCDONALD TOOLE WIGGINS, P.A.
111 N. Magnolia Ave., Ste. 1200
Orlando, FL 32801
(407) 246-1800

December 16, 2019

Oscar Insurance Co. of Fla. v. Blue Cross and Blue Shield of Fla., Inc., et al.
No. 19-14096

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to and 11th Cir. R. 26.1-1 and Fed. R. App. P. 26.1, the undersigned hereby certifies that the persons and entities listed below have an interest in the outcome of this case. Appellant Oscar Insurance Company of Florida is a wholly owned subsidiary of Mulberry Health Inc., which is not publicly traded. Other than as identified, Oscar Insurance Company of Florida has no parent corporation, and no publicly held entity holds 10% or more of its stock.

1. Blue Cross and Blue Shield of Florida, Inc. (Defendant-Appellee)
2. Byron, Paul G. (District Judge)
3. Carroll, Catherine M.A. (Counsel to Plaintiff-Appellant)
4. Chesler, Evan R. (Counsel to Defendant-Appellees)
5. Conner, Timothy (Counsel to Defendant-Appellees)
6. Cravath, Swaine & Moore LLP (Counsel to Defendant-Appellees)
7. DeMasi, Karin A. (Counsel to Defendant-Appellees)
8. Eckles, Paul M. (Counsel to Plaintiff-Appellant)
9. Florida Health Care Plan, Inc. (Defendant-Appellee)
10. Greenfield, Leon B. (Counsel to Plaintiff-Appellant)
11. GuideWell Mutual Holding Corporation (Parent of Defendant-Appellee)
12. Haar, Daniel E. (Counsel for the United States)

13. Health Options Inc. (Defendant-Appellee)

14 Hoffman, Jerome W. (Counsel to Defendant-Appellees)

15. Holland & Knight LLP (Counsel to Defendant-Appellees)

16. Kennedy, Lauren Roberta (Counsel to Defendant-Appellees)

17. Kidd, Embry J. (Magistrate Judge)

18. Kuhlmann, Patrick (Counsel for the United States)

19. Lamb, Kevin (Counsel to Plaintiff-Appellant)

20. Lisagar, Matthew (Counsel to Plaintiff-Appellant)

21. Long, Sarah A. (Counsel to Plaintiff-Appellant)

22. McDonald Toole Wiggins, PA (Counsel to Plaintiff-Appellant)

23. McDonald, Francis M., Jr. (Counsel to Plaintiff-Appellant)

24. Menitove, Michael H. (Counsel to Plaintiff-Appellant)

25. Mulberry Health Inc. (Parent of Plaintiff-Appellant)

26. Murray, Michael F. (Counsel for the United States)

27. Negrette, Jeffrey J. (Counsel for the United States)

28. Oscar Insurance Company of Florida (Plaintiff-Appellant)

29. Reinhart, Tara L. (Counsel to Plaintiff-Appellant)

30. Schindel, Rebecca J. (Counsel to Defendant-Appellees)

31. Skadden, Arps, Slate, Meagher & Flom LLP (Counsel to Plaintiff-Appellant)

32. Sunshine, Steven C. (Counsel to Plaintiff-Appellant)

33. Van Denover, Drew (Counsel to Plaintiff-Appellant)

34. Varney, Christine A. (Counsel to Defendant-Appellees)

35. Waxman, Seth P. (Counsel to Plaintiff-Appellant)

36. Wilmer Cutler Pickering Hale and Dorr LLP (Counsel to Plaintiff-Appellant)

The undersigned certifies that no publicly traded company or organization is known to have an interest in the outcome of this case or appeal.

Respectfully submitted,

/s/ Seth P. Waxman
SETH P. WAXMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

December 16, 2019

STATEMENT REGARDING ORAL ARGUMENT

Appellant Oscar Insurance Company of Florida requests oral argument. This appeal presents significant legal questions about the proper scope of the McCarran-Ferguson Act's antitrust exemption for the "business of insurance," 15 U.S.C. §§ 1012-1013, as applied to exclusive-dealing arrangements between insurers and brokers in the federally regulated health-insurance market. Oscar believes that oral argument will assist the Court in resolving the legal issues and understanding the insurance industry context in which they arise.

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INTRODUCTION

The Sherman Act's prohibition of monopolies and combinations in restraint of trade "express[es] a 'longstanding congressional commitment to the policy of free markets and open competition.'" *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). Exemptions from the Sherman Act must therefore be "construed narrowly." *Id.* The district court failed to heed that admonition when it invoked the McCarran-Ferguson Act's antitrust exemption for the "business of insurance," 15 U.S.C. §§ 1012-1013, to dismiss Oscar Insurance Company of Florida's antitrust claims challenging manifestly anticompetitive conduct in the Florida health-insurance market. That application of McCarran-Ferguson, which would expand insurers' immunity from antitrust regulation far beyond the narrow exemption Congress intended, was erroneous and should be reversed.

Oscar uses cutting-edge technology to offer high-quality health insurance that has reduced consumers' costs and improved their experience. But when Oscar sought to introduce these innovations into the Orlando, Florida market, defendants-appellees (collectively, "Florida Blue") enforced an anticompetitive broker exclusivity scheme to protect their monopoly profits by keeping Oscar out. By company policy—a policy no other major insurer follows—Florida Blue demands that independent brokers who sell its individual health-insurance plans agree not to sell any other insurer's plans. And when Oscar sought to enter the Orlando

market, Florida Blue selectively enforced that policy by threatening to terminate brokers who had signed up with Oscar, withhold their commissions, and permanently bar them from selling Florida Blue plans anywhere in the State—a devastating threat, given Florida Blue's market dominance. The scheme worked: Within 48 hours after one such threat, more than 130 brokers terminated their appointments with Oscar. Altogether, Florida Blue's threats have caused hundreds of brokers to avoid working with Oscar, leaving the vast majority of Florida brokers captive to Florida Blue and denying Oscar the ability to compete. As a result, Florida consumers have had to pay more for health insurance.

Oscar accordingly brought suit under the Sherman Act and parallel state law. But the district court dismissed Oscar's claims, finding them barred by the McCarran-Ferguson Act. That was error. McCarran-Ferguson's exemption from antitrust liability applies only when the defendant's challenged practice constitutes the "business of insurance," 15 U.S.C. § 1012(b), and only when the challenged practice is not a boycott, coercion, or intimidation, *id.* § 1013(b). Neither requirement is met here. The exclusivity terms that Florida Blue selectively enforced against brokers to keep Oscar out of the Orlando market bear no relation to the transfer and spreading of risk that defines the "business of insurance" or the cooperative ratemaking Congress sought to immunize from antitrust scrutiny. And Florida Blue's threats, backed by its market dominance, are classic acts of

coercion. This Court should reverse the decision below on either of those independent grounds and allow Oscar's claims to proceed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1367. On September 20, 2019, the district court entered a final judgment disposing of all claims and dismissing Oscar's amended complaint in its entirety. Doc. 113. Oscar filed a timely notice of appeal on October 15, 2019. Doc. 114. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE

Whether the district court erred in holding that Oscar's Sherman Act claims are foreclosed by the McCarran-Ferguson Act's exemption for the "business of insurance," either (1) because the challenged conduct is not the "business of insurance," 15 U.S.C. § 1012(b), or (2) because the challenged conduct constitutes a "boycott, coercion, or intimidation," *id.* § 1013(b).

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Oscar sued Florida Blue for monopolization, attempted monopolization, and unreasonable restraint of trade under the Sherman Act and parallel state-law causes of action. The district court granted Florida Blue's motion to dismiss under Rule

12(b)(6) and dismissed the case with prejudice on the ground that Oscar's claims are barred by the McCarran-Ferguson Act, 15 U.S.C. §§ 1012-1013.

II. STATEMENT OF FACTS

A. The McCarran-Ferguson Act

Enacted in 1945, the McCarran-Ferguson Act served to confirm States' traditional authority to tax and regulate the business of insurance while asserting federal authority to regulate anticompetitive conduct by insurers. Historically, States had "enjoyed a virtually exclusive domain over the insurance industry" because it had long been assumed that issuing an insurance policy was not a transaction in interstate commerce. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-539 (1978) (discussing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869)). Under that regime, States had a "free hand" in regulating dealings between insurers and policyholders, *SEC v. National Sec., Inc.*, 393 U.S. 453, 459 (1969), and the insurance industry generally operated "outside the scope" of federal antitrust law, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 44 U.S. 205, 220 (1979). But in 1944, the Supreme Court held that Congress had not intended to exempt insurers from the Sherman Act and that insurance transactions across state lines were interstate commerce that could constitutionally be subject to federal antitrust prosecution. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 538-562 (1944). That decision "provoked widespread

concern" that States could no longer tax and regulate the insurance industry. *St. Paul*, 438 U.S. at 539; *see also National Sec.*, 393 U.S. at 459.

Congress responded the following year by enacting the McCarran-Ferguson Act to affirm States' regulatory power over the insurance industry, while recalibrating the federal antitrust laws' application to insurers. *Royal Drug*, 440 U.S. at 217-218 & n.18; *see* Act of Mar. 9, 1945, ch. 20, §§ 1-3, 59 Stat. 33, 33-34 (codified as amended at 15 U.S.C. §§ 1011-1013). The Act confirms that the business of insurance shall be subject to state law and obviates any Dormant Commerce Clause challenge by providing that congressional silence "shall not be construed" to block state regulation. 15 U.S.C. §§ 1011, 1012(a). In a "reverse preemption" provision, section 2(b) of the Act makes clear that no federal law shall be construed to preempt any state law enacted "for the purpose of regulating the business of insurance" unless the federal law itself specifically relates to the business of insurance. *Id.* § 1012(b).

Initial versions of the statute would also have restored the "blanket exemption" from federal antitrust law that had prevailed before *South-Eastern Underwriters*, leaving insurance company conduct subject to antitrust regulation only under state law. *Royal Drug*, 440 U.S. at 219 & n.19; *see also, e.g.*, H.R. 3270, 78th Cong. (1943) (bill proposing immunity not only for "the business of insurance" but for any "acts in the conduct of that business"). But Congress

rejected that blanket immunity in favor of a more limited exemption. *Royal Drug*, 440 U.S. at 219. Recognizing that some cooperation among insurers is necessary to "underwrite risks in an informed and responsible way," *id.* at 221, Congress crafted an antitrust exemption to allow insurers to "share information relating to risk underwriting and loss experience without exposure to federal antitrust liability," *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004). But Congress limited that immunity to that core "business of insurance" rather than extending it to all acts of insurance companies. *See* 15 U.S.C. § 1012(b).

Moreover, even as to the "business of insurance," Congress limited the antitrust exemption in two ways. First, while state law would retain primacy, federal antitrust laws would "appl[y] to the business of insurance" following a three-year moratorium "to the extent that such business is not regulated by State Law." 15 U.S.C. § 1012(b); *see Royal Drug*, 440 U.S. at 219-220. Second, even where a challenged practice is the "business of insurance" and regulated by state law, the federal antitrust laws would continue to apply to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). The Act thus exempts insurers' conduct from the federal antitrust laws only where the challenged practice (1) constitutes the "business of

insurance," (2) is "regulated by state law," and (3) is not a "boycott, coercion, or intimidation." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982).

B. Oscar's Allegations

1. Florida Blue's dominance in the individual health-insurance market and demands for broker exclusivity

This case concerns McCarran-Ferguson's application to practices in the market for individual health-insurance plans. Under the Patient Protection and Affordable Care Act of 2010 ("ACA"), individuals who do not obtain health insurance through an employer or association can buy individual plans on ACA-regulated exchanges or directly from insurers or insurance brokers. Doc. 75 at 11-15. Unlike many other forms of insurance, the terms and pricing of individual ACA plans are set by regulation, not by insurers' individualized underwriting decisions. Under the ACA, all individual plans must cover the same set of "essential health benefits," and insurers must charge the same premium to all purchasers of a particular plan regardless of their health status. *See* 42 U.S.C. §§ 300gg, 300gg-4(a), (b), 300gg-6; Doc. 75 at 13. The ACA addresses affordability of premiums through a program of subsidies and cost-sharing reduction payments, *see* Doc. 75 at 13-15, while spreading risk across insurers by providing for reallocation of funds from insurers with relatively low-risk policyholder pools to those with relatively higher-risk policyholder pools, *see* 42

U.S.C. § 18063. In 2018, approximately 1.75 million Floridians bought individual ACA insurance plans. Doc. 75 at 12.

As alleged in Oscar's amended complaint—which must be accepted as true for present purposes, *see Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n*, 942 F.3d 1215, 1229 (11th Cir. 2019)—Florida Blue dominates the ACA individual market in Florida. Doc. 75 at 2, 12, 31-33. As other insurers have left Florida's ACA exchanges, Florida Blue has grown to account for about 75 percent of individual ACA health plans sold statewide in 2018, with an even higher market share—ranging from 80 to 100 percent—in the four counties surrounding Orlando. *Id.* Across the State, Florida Blue's market share has reached 100 percent in 40 counties. *Id.* at 33.

To maintain market dominance, Florida Blue demands exclusivity from the independent insurance brokers who sell its plans. In Florida, licensed brokers play a crucial role in driving sales of health-insurance policies. Doc. 75 at 15. Brokers guide consumers through health-insurance purchasing decisions, providing advice and recommendations to meet their financial and medical needs. *Id.* at 15-16.

The broker sales channel accounts for a high percentage of individual plan sales in Florida—65 percent of individual ACA policies. Doc. 75 at 16, 37. Access to that channel is crucial for new market entrants because brokers help build brand awareness and educate consumers about new product lines. *Id.* at 16-

17. Certain brokers, known as contracted general agents ("CGAs"), play a particularly important role. In addition to selling plans themselves, CGAs contract with and provide services to other brokers. *Id.* at 17. CGAs thus form the primary avenue for reaching many potential customers in the Orlando market, either through their own sales or through the sales of local brokers they support. *Id.*

By company policy, Florida Blue requires brokers who sell its policies to agree not to sell any other insurer's plans. Doc. 75 at 22. That exclusivity policy applies to brokers who contract directly with Florida Blue as well as to Florida Blue's CGAs and the brokers who contract with them. *Id.* at 26. And the policy extends to the sale of plans in all product lines, across the entire State. *Id.* at 4. All told, roughly 76 percent of the 2,200 licensed brokers who actively sell individual health-insurance plans in the Orlando market have been appointed to sell Florida Blue plans and are thus subject to the exclusivity policy. *Id.* at 17, 36.

Given Florida Blue's market position, brokers appointed by Florida Blue cannot afford to refuse these exclusivity requirements. Doc. 75 at 26, 33. Florida Blue exploits its monopoly position to force brokers to accede to statewide exclusivity or else face termination from the Florida Blue network. *Id.* at 32-33. And Florida Blue is the only ACA insurer in Florida, if not the country, that requires exclusivity. *Id.* at 46. In all other States where Oscar does business, no other major health insurer demands broker exclusivity. *Id.* at 29. But Florida

Blue's market dominance—at or near 100 percent market share in many counties, including around Orlando—leaves brokers little choice but to comply. *Id.* at 33.

2. Oscar's efforts to enter the Florida market

One of the nation's fastest growing health insurers, Oscar offers ACA-compliant health plans using technology-driven tools that make it simpler and more affordable to access health care and navigate the health-care system. Doc. 75 at 2-3, 19-21. Oscar's plans include 24/7 access to telemedicine and a "concierge team" for enrollees. *Id.* at 19-20. Using mobile and web applications, enrollees can manage their care seamlessly by searching for in-network doctors, booking appointments, accessing health records, and finding specialists without the need for referrals. *Id.* at 20. Since 2014, Oscar and its affiliates have introduced its innovative model to more than 230,000 customers in ACA individual markets in 14 metropolitan areas, at premiums that are usually lower than premiums for traditional insurers' comparable plans. *Id.* at 2, 15, 20-21. Oscar's customer-satisfaction rate is three times the industry average. *Id.* at 20.

Beginning with the 2018 fall enrollment period, Oscar began selling plans in the Orlando area. Oscar intended to follow those sales by expanding into other parts of Florida the following year, and it made significant investments toward that effort. Doc. 75 at 2-3, 21. Nearly all of the individual ACA plans Oscar offered in Orlando had lower premiums than Florida Blue's comparable plans. *Id.* at 21.

Indeed, an individual purchasing an Oscar plan could expect to save hundreds of dollars per year compared to a Florida Blue plan. *Id.*; *see also id.* at 39-42.

3. Florida Blue's coercion of brokers

The success of Oscar's entry into the Orlando market depended on access to the 2,200 established independent insurance brokers in the Orlando market who could educate consumers about Oscar's plans and recommend those plans to customers for whom Oscar's superior service and lower rates would be attractive. *See, e.g.*, Doc. 75 at 4-5, 18, 36-37; *supra* pp. 8-9. When Oscar began preparing to enter the Orlando market, it reached out to brokers, including CGAs, as it has successfully done in other States. Doc. 75 at 18-19. In response, however, Florida Blue launched an aggressive campaign to block Oscar's entry by asserting its exclusivity policy to coerce brokers not to sell Oscar's health plans. *Id.* at 22.

On several occasions in August and September 2018, after Oscar's intent to enter the market became public, Florida Blue representatives threatened brokers at meetings, at conferences, and by email, stating that any broker found to be working with Oscar would be permanently terminated from Florida Blue's network and lose their commissions, even on products already sold. Doc. 75 at 23-24. Florida Blue's CGAs similarly reminded brokers of the exclusivity policy and warned that brokers who failed to comply would be terminated. *Id.* at 24. In October 2018, Florida Blue terminated a broker who hosted a local radio show for inviting an

Oscar representative on as a guest, warning that "promoting [Oscar] in the Orlando market" is "not what [Florida Blue] [is] looking for in [its] business partners." *Id.*

In late October 2018, one week before open enrollment, Oscar's more affordable pricing became public, and Florida Blue stepped up its efforts to identify brokers who had accepted appointments with Oscar in the Orlando area. Doc. 75 at 24. Florida Blue threatened those brokers with permanent termination from selling all Florida Blue plans in all product lines—not only in Orlando, but throughout Florida—if they continued to do business with Oscar. *Id.* at 4, 24. For example, on October 24, 2018, a Florida Blue representative sent an email to brokers threatening that "[y]ou … will have 48 hours to terminate your Oscar appointment or we will terminate your Florida Blue appointment with no eligibility of reappointment with us." *Id.* at 25. The next day, Florida Blue again reminded brokers that they "must sell and solicit [Florida Blue products] exclusively at all times," and must agree "not to sell any other carriers." *Id.* Any broker that violated that requirement would be "permanently terminated." *Id.*

Prompted by Florida Blue's threats, many brokers declined to enter into agreements with Oscar, and many of those who had already done so reversed course. Within 48 hours after the email of October 24, 2018, 133 brokers backed out of agreements to sell Oscar's insurance plans. Doc. 75 at 36. As one broker explained to Oscar, "[l]osing [the Florida Blue appointment] would be a financial

disaster." *Id.* at 25. Florida Blue's threats were particularly effective with CGAs, which do business throughout the State and have large numbers of customers insured by Florida Blue. *Id.* at 37. CGAs stood to lose all of that business, statewide, if they sold Oscar plans in Orlando. *Id.* Altogether, at least 235 Florida brokers terminated appointments with Oscar. *Id.* at 36. By comparison, only 14 brokers outside of Florida terminated appointments with Oscar all year. *Id.*

Florida Blue's targeting of Oscar was highly selective. While Florida Blue terminated and threatened to terminate brokers who did business with or promoted Oscar, it has taken no action against the many brokers who canceled appointments with Oscar but continued doing business with other insurers. Doc. 75 at 26-28. Florida Blue has also allowed "grandfathering" of appointments, permitting brokers to maintain previous appointments with insurers other than Oscar. *Id.* Florida Blue has thus engaged in a targeted scheme to prevent Oscar in particular from entering the market by selectively enforcing exclusive-dealing arrangements to foreclose Oscar's access to brokers. *Id.*

As a result of Florida Blue's conduct, Oscar was able to appoint only 21 percent of the 2,200 active brokers in the Orlando market—even though Oscar pays higher broker commissions than Florida Blue—while 76 percent have appointments with Florida Blue and are thus foreclosed to Oscar. Doc. 75 at 36-

37. By contrast, in other States, Oscar has appointed approximately 60 percent of active brokers. *Id.*

Moreover, because brokers account for the majority of all individual ACA plan sales in Florida—65 percent in 2018—Oscar's foreclosure from the broker pool has translated into its foreclosure from the market to sell such plans. Doc. 75 at 36-37. Individuals who purchase insurance through brokers exclusive to Florida Blue cannot even learn about Oscar's competing offerings. *Id.* As a result, Oscar accounted for only 13 percent of the individual ACA plans sold in the Orlando market in 2018—significantly fewer plans than its lower premiums and other advantages would have enabled it to sell absent Florida Blue's conduct, and far lower than the share Oscar has obtained in markets outside of Florida. *Id.* at 38; *see id.* at 38-42. Florida consumers in turn have missed out on Oscar's lower premiums, better service, and innovative products. *Id.* at 44.

C. The District Court's Decision

Oscar filed this action under the Sherman Act and Florida antitrust law. Oscar alleges that Florida Blue's exclusive-dealing arrangements and coercive conduct constitute monopolization or attempted monopolization of the ACA individual market and that its concerted action with CGAs and brokers constitute an unreasonable restraint of trade. Doc. 75 at 47-53.

Because enrollment season for 2019 had already opened, Oscar moved promptly for a preliminary injunction and expedited consideration. Docs. 11-13. The court received briefs and held an evidentiary hearing. Doc. 63. About one week after the six-hour hearing, the court ordered Oscar to show cause why the complaint should not be dismissed for failure to prosecute. Doc. 69. The court later discharged that order, Doc. 76, but denied Oscar's motion for preliminary injunction for failure to show irreparable harm, Doc. 72, and dismissed the complaint without prejudice as a "shotgun pleading," Doc. 73.

Oscar filed an amended complaint, Doc. 75, and Florida Blue moved to dismiss under Rule 12(b)(6), Doc. 81. Florida Blue argued that the amended complaint fails to state claims under the Sherman Act or Florida law and alternatively argued that Oscar's Sherman Act claims are barred by the McCarran-Ferguson Act's antitrust exemption. As noted, that exemption applies where an insurer's challenged conduct constitutes the "business of insurance," is "regulated by state law," and does not amount to a boycott, coercion, or intimidation. *Supra* pp. 6-7; *see* 15 U.S.C. §§ 1012(b), 1013(b).

In response, Oscar argued (among other things) that the McCarran-Ferguson exemption does not apply because Florida Blue's challenged conduct is not "the business of insurance," and even if it were, Florida Blue's threats to permanently terminate brokers statewide constitute coercion, depriving Florida Blue of any

antitrust immunity. Doc. 86. The Department of Justice filed a Statement of Interest on behalf of the United States supporting Oscar's arguments. Doc. 89. Both argued that Florida Blue's exclusive-dealing arrangements have nothing to do with transferring or spreading policyholder risk—the key consideration in identifying the business of insurance—and that broker exclusivity is neither integral to the relationship between insurer and insured nor limited to the insurance industry. *See, e.g.*, *Pireno*, 458 U.S. at 129.[1]

The district court rejected those arguments and dismissed the suit with prejudice. Doc. 113. At the outset, the court questioned whether the United States had any basis to participate in the case, stating that the government's "briefing and participation at oral argument, while siding with Oscar, was unhelpful to the resolution of the issues at bar." *Id.* at 1 n.1. Without addressing whether the amended complaint stated a claim, *id.* at 2 n.2, the court then held that Florida Blue's practices as alleged in the amended complaint are immune from antitrust scrutiny under the McCarran-Ferguson Act, *id.* at 23.

In analyzing whether Florida Blue's challenged conduct constitutes the "business of insurance," the court found it "hard to imagine a relationship more

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[1] Citing a statement by the Florida Department of Financial Services that "[t]here is no law in the Florida Insurance Code that could be applied" to an insurance broker's violation of an exclusivity policy, *see* Doc. 75 at 46, Oscar also argued that Florida Blue's practices are not "regulated by state law" as required by McCarran-Ferguson.

squarely at the core of the business of insurance than the one described by Oscar as existing between Florida Blue's brokers and ACA consumers" because consumers "rely on … brokers as expert personal insurance advisors." Doc. 113 at 8-9. And Florida Blue's brokers "spread[] the risk" by "increas[ing] the number of policyholders." *Id.* at 8. Allowing Oscar to compete by gaining access to Florida Blue's brokers, the court stated, "would result in Oscar siphoning off ACA consumers" from Florida Blue and "altering the composition of policyholders, impacting Florida Blue's ability to spread risk." *Id.* at 12. The court acknowledged Oscar's argument that shifting an enrollee from one insurer to another does not affect the spreading of risk because the ACA provides for the reallocation of funds from plans with lower-than-average risk to plans with higher-than-average risk. *Id.* at 13; *see* 42 U.S.C. § 18063. But the court rejected that argument because Oscar had not alleged it in the amended complaint, and neither Oscar nor the United States had argued that the ACA's risk-adjustment provision "works." Doc. 113 at 13.

The court found Florida Blue's exclusivity practices "integral" to the policyholder relationship for similar reasons, emphasizing that brokers "provide invaluable services to customers" that are not unconnected to the transfer of risk and that Florida Blue's exclusivity requirements "'concern[] the agent's insurance dealings as such.'" Doc. 113 at 16. Finally, although exclusivity relationships can

be found outside the insurance industry, the court concluded that Florida Blue's exclusivity practices constitute the "business of insurance" because Florida Blue and its brokers operate within the insurance industry. *Id.* at 17-18.[2]

The district court also held that the alleged exclusivity practices do not constitute acts of boycott, coercion, or intimidation. Doc. 113 at 20-23. The court reasoned that Florida Blue's exclusivity agreements are "'not per se unlawful,'" *id.* at 21, and that "[i]f a contractual relationship is lawful, a party may enforce the agreement without those efforts morphing into coercion," *id.* at 22. Florida Blue's "strenuous" threats that brokers would "lose all of [its] business" if they failed to comply were therefore irrelevant because, in the court's view, Florida Blue was simply enforcing lawful, preexisting agreements with its brokers, and doing so could not amount to coercion. *Id.* ("There is nothing coercive about enforcing the contractual relationship.").

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[2] The court also rejected Oscar's argument that Florida Blue's exclusive-dealing arrangements are not "regulated by state law." Doc. 113 at 18-20. Although Florida's insurance laws do not address exclusive insurance-brokerage arrangements, the court found it sufficient that Florida law regulates "the insurance industry in general" and "the relationship between princip[al]s and their agents." *Id.* at 18-19. The court acknowledged that its holding creates a "catch-22"—resulting in no regulation of Florida Blue's conduct under either state or federal antitrust law—because conduct that is exempt from federal antitrust law is also exempt from Florida's antitrust laws. *Id.* at 19 (citing Fla. Stat. Ann. § 542.20).

III. STANDARD OF REVIEW

This Court reviews de novo a dismissal under Rule 12(b)(6) for failure to state a claim. *Cambridge Christian Sch.*, 942 F.3d at 1229. Whether a claim is barred by McCarran-Ferguson is a question of law reviewed de novo. *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001).

At the pleadings stage, the complaint's allegations must be accepted as true and construed in the light most favorable to the plaintiff. *Cambridge Christian Sch.*, 942 F.3d at 1229. The McCarran-Ferguson exemption is an affirmative defense on which the defendant bears the burden of proof. *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *see also, e.g.*, *Seasongood v. K&K Ins. Agency*, 548 F.2d 729, 732 (8th Cir. 1977). Dismissal for failure to state a claim on the ground that an affirmative defense applies is appropriate "only if it is 'apparent from the face of the complaint'" that the affirmative defense is satisfied. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-846 (11th Cir. 2004).[3]

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[3] Although this Court has suggested that the McCarran-Ferguson exemption is jurisdictional, *see Gilchrist*, 390 F.3d at 1330, Florida Blue moved to dismiss only under Rule 12(b)(6), and neither Florida Blue nor the district court ever asserted a lack of subject-matter jurisdiction under Rule 12(b)(1). That approach was correct, given the Supreme Court's instruction that statutory exceptions to the prohibitions in the antitrust laws are nonjurisdictional affirmative defenses that the defendant bears the burden to prove. *See Morton Salt*, 334 U.S. at 44-45; *see also, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012) (whether an otherwise cognizable claim is barred by an exception to liability presents a merits question, not a jurisdictional question of the court's power to hear the case); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-511 (2006)

SUMMARY OF ARGUMENT

The McCarran-Ferguson exemption must be "narrowly construed." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). To claim it, Florida Blue must demonstrate that its exclusive-dealing practices both (1) constitute the "business of insurance" and (2) are not an "act of boycott, coercion, or intimidation." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982); *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004). Florida Blue's practices satisfy neither criterion, and Oscar's claims should be reinstated on either of those two independent grounds.

First, Florida Blue's challenged conduct is not the "business of insurance" within the narrow meaning of the McCarran-Ferguson exemption. 15 U.S.C. § 1012(b). Florida Blue's campaign to prevent Oscar from entering the market by selectively enforcing exclusive-dealing arrangements with brokers has nothing to do with the transfer and spreading of risk—the "indispensable characteristic" of the business of insurance. *Royal Drug*, 440 U.S. at 211-212 & n.7. The challenged conduct is not integral to the policy relationship between insurer and insured. *Pireno*, 458 U.S. at 129. And exclusive-dealing arrangements are not unique to the insurance industry. *Id.*

(cautioning against reliance on "'drive-by jurisdictional rulings'"). In any event, dismissal for lack of jurisdiction would likewise be subject to de novo review. *See Sierra v. City of Hallandale Beach*, 904 F.3d 1343, 1347 (11th Cir. 2018).

Those factors confirm that Florida Blue's conduct bears no resemblance to the cooperative ratemaking and risk-spreading that Congress intended to insulate from antitrust scrutiny as the "business of insurance." The exclusive-dealing practices have no effect on the terms or pricing of Florida Blue's health-insurance plans, and they bear no logical or temporal connection to the insurance contract that effectuates the transfer of risk between insured and insurer. At most, the challenged conduct is the "business of insurers" (or, rather, uniquely of this particular insurer)—practices Florida Blue has adopted to improve its profits by excluding competitors. And "business of insurers" that is not the "business of insurance" remains subject to the federal antitrust laws. *Royal Drug*, 440 U.S. at 211, 231. The district court held otherwise only by failing to apply the Supreme Court's governing standards in favor of decisions that are readily distinguishable, no longer good law, or both.

Second, even if Florida Blue's practices were the "business of insurance," the McCarran-Ferguson exemption would not apply because the alleged conduct is classic coercion. In both its ordinary meaning and its use in the antitrust laws, "coercion" occurs when a monopolist leverages its power to compel other market actors to do what they otherwise would not. That is precisely what Oscar alleges here. Florida Blue threatened brokers with permanent termination—from all

product lines statewide—for doing business with or even promoting Oscar, and Florida Blue's market dominance made it impossible for brokers to refuse.

The district court rejected these allegations of coercion on the ground that exclusive-dealing arrangements are not per se unlawful and that enforcing such a contract can therefore never be coercive. But Oscar alleges far more than the mere enforcement of a lawful contract. Moreover, the court's analysis contravenes well-established antitrust precedent recognizing that otherwise-lawful practices may be coercive when, as alleged here, they are deployed by a monopolist to exclude competition. The district court thus erred in holding Florida Blue's anticompetitive practices immune from all antitrust scrutiny. This Court should reverse and allow Oscar's claims to proceed.

ARGUMENT

I. FLORIDA BLUE'S EXCLUSIVE-DEALING PRACTICES ARE NOT "THE BUSINESS OF INSURANCE"

The McCarran-Ferguson exemption applies to "the business of insurance," not the "business of insurers." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211, 231 (1979). Insurance companies "may do many things" that remain subject to antitrust scrutiny under the Sherman Act. *SEC v. National Sec., Inc.*, 393 U.S. 453, 459 (1969). It is "only when they are engaged in the 'business of insurance'" that the McCarran-Ferguson exemption applies, *id.* at 459-460, and many common activities of insurance companies—even though they are

"necessary to provide insurance" and directly affect an insurer's rates and costs—do not constitute the "business of insurance" within the scope of the statutory immunity, *Royal Drug*, 440 U.S. at 213 & n.9.

That limitation reflects Congress's intent that, although "'cooperative ratemaking'" should be exempt from the antitrust laws to facilitate informed and responsible underwriting, insurers' conduct should not be more broadly immune. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *see Royal Drug*, 440 U.S. at 221, 223-224. Cooperation among insurers and pooling of actuarial data are beneficial to traditional forms of insurance because "[p]roper evaluation of risk requires extensive sampling of past occurrences of the events insured against, as well as analysis of the historical sample in order to predict loss in the future." Macey & Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. Rev. 13, 47-48 (1993). But Congress rejected a blanket exemption for all acts of insurance companies. *Supra* pp. 5-6.

Drawing on these legislative purposes, the Supreme Court has articulated a three-part test for defining the "business of insurance": (1) whether the practice "has the effect of transferring or spreading a policyholder's risk"; (2) whether the practice is "integral" to the policy relationship between the insurer and the insured; and (3) whether the practice is "limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. The exemption focuses on "[t]he relationship between

insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." *National Sec.*, 393 U.S. at 460. Each of those criteria confirms that Florida Blue's exclusive-dealing practices are not the "business of insurance."

A. Florida Blue's Exclusive-Dealing Practices Do Not Concern The Transfer Or Spreading Of Risk

1. Florida Blue's exclusivity arrangements have no logical or temporal connection to risk-spreading

Florida Blue's selective enforcement of exclusive-dealing arrangements to exclude Oscar from the market is not the "business of insurance" because it has no relationship to the transfer and spreading of risk. The "indispensable characteristic" of insurance is the underwriting and spreading of risk from insured to insurer by means of a policy in which the insurer undertakes to indemnify the insured against the perils specified in the policy. *Royal Drug*, 440 U.S. at 211-212 & n.7; *see also Pireno*, 458 U.S. at 130; *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 73 (1959). While none of the three criteria defining the "business of insurance" is "necessarily determinative in itself," *Pireno*, 458 U.S. at 129, the relationship to risk-spreading is key, and the absence of any connection between a challenged practice and the spreading of risk may be "decisive" in concluding that the practice is not the "business of insurance." *In re Insurance Brokerage Antitrust*

Litig., 618 F.3d 300, 356 (3d Cir. 2010); *see also Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 742 (5th Cir. 2015).

The Supreme Court has therefore made clear that activities that are "ancillary" to the risk-transferring mechanism of an insurance contract are not "the business of insurance," *Pireno*, 458 U.S. at 134 n.8, even though they may be the "business of insurers," *Royal Drug*, 440 U.S. at 231. That is true even of business practices that are necessary to providing insurance, *id.* at 213 n.9, or that reduce costs or increase profits for the insurer, *id.* at 214. In *Royal Drug*, for example, certain pharmacies agreed to sell prescription drugs to Blue Shield of Texas policyholders at a low fixed price in exchange for Blue Shield reimbursing the pharmacies for their costs. *Id.* at 209. Owners of competing pharmacies sued, claiming the agreements caused Blue Shield policyholders not to do business with them, in violation of the Sherman Act. *Id.* at 207. Blue Shield invoked the McCarran-Ferguson exemption, arguing that the pharmacy agreements involved the underwriting of risk because they were the means by which Blue Shield assumed and covered its policyholders' prescription drug needs and thus enabled performance of the insurance contracts. *Id.* at 213.

The Supreme Court disagreed. The pharmacy agreements were merely "arrangements for the purchase of goods and services by Blue Shield" that served to minimize Blue Shield's costs. 440 U.S. at 213-214. They "d[id] not involve

any underwriting or spreading of risk." *Id.* While the agreements were "necessary" for Blue Shield to be able to provide insurance, that did not make them the "'business of insurance.'" *Id.* at 213 n.9. The agreements simply enabled Blue Shield to keep its costs and premiums low, amounting to a sound business practice that benefited policyholders. *Id.* at 214. The transfer of risk was effectuated separately by the terms of the insurance policies, and policyholders were "basically unconcerned with arrangements made between Blue Shield and participating pharmacies" so long as Blue Shield fulfilled its promises. *Id.* at 213-214.

Pireno further confirmed that activities "logically and temporally unconnected" to the transfer of risk accomplished by an insurance policy are not "the business of insurance." 458 U.S. at 130. *Pireno* involved health-insurance policies that covered certain "necessary" treatments if billed at "reasonable" rates. *Id.* at 122. The defendant insurer contracted with the peer-review committee of a chiropractic association to opine on the necessity of chiropractic treatments and the reasonableness of charges for them. *Id.* at 122-123. An independent chiropractor challenged this practice as an unlawful conspiracy to fix prices for chiropractic services. *Id.* at 123-124.

The insurer argued that the peer-review process helped determine whether a treatment was covered by the policy—and thus whether the risk had in fact been transferred—but the Supreme Court held that the arrangement was not "the

business of insurance." 458 U.S. at 129-130. The transfer of risk was accomplished by the policy between the insured and the insurer, and the peer-review arrangement was "logically and temporally unconnected" to that transfer. *Id.* It was logically unconnected because peer review had no effect on the policy terms; it did not define the scope of the transferred risks. *Id.* at 130-131. And it was temporally unconnected because peer review occurred only when the insured's claim was settled, not when the insurance contract was executed. *Id.* at 131; *see also Insurance Brokerage Antitrust Litig.*, 618 F.3d at 356-357 (insurers' alleged conspiracy to allocate market did not involve risk transferring or spreading, and was not the business of insurance, because agreement did not involve "who could receive insurance coverage, or the type of coverage they could obtain").

Here, Florida Blue's demands for broker exclusivity and its campaign to selectively enforce that policy against Oscar have nothing to do with transferring and spreading risk. At most, the exclusivity arrangements are a business practice that enables Florida Blue to increase its profits by preventing a rival from competing for customers. As in *Pireno* and *Royal Drug*, the transfer of risk from Florida Blue's policyholders to Florida Blue is effectuated by the terms of the insurance policies—not by Florida Blue's exclusivity practices, which are "logically … unconnected" to any transfer or spreading of risk. *Pireno*, 458 U.S. at 130; *see also Ray v. United Family Life Ins. Co.*, 430 F. Supp. 1353, 1357

(W.D.N.C. 1977) (agent's suit challenging insurer exclusivity policy "involves the relationship of agent and company, not the relationship of policyholder and company" and is not the "business of insurance"). The exclusive-dealing arrangements do not define the scope of the risk transferred in those policies, *Pireno*, 458 U.S. at 130-131, and Florida Blue's policyholders are "'basically unconcerned'" with the terms of those brokerage arrangements, *Royal Drug*, 440 U.S. at 213-214. Any given Florida Blue individual health plan transfers and spreads risk on the same terms, for the same premium, regardless of whether it is purchased through a broker appointed by multiple insurers or a broker appointed exclusively by Florida Blue. That is especially so in the context of the ACA individual market, given that premiums and benefits are governed by statute and individualized underwriting is prohibited. *Supra* p. 7.

There is also no "temporal[]" connection. *Pireno*, 458 U.S. at 130. Florida Blue maintains its exclusivity practices by company policy and imposes it on brokers from the moment it appoints them. Doc. 75 at 3, 22. And Florida Blue selectively enforced that policy against Oscar by threatening brokers with permanent termination just when Oscar was poised to enter the market. *Id.* at 23-26. Florida Blue's imposition and enforcement of the exclusivity policy thus occurs entirely separately from the issuance of its insurance policies and the concurrent transfer of risk.

With no connection to the transfer and spreading of risk, there is no justification for cloaking Florida Blue's conduct with antitrust immunity. As discussed, the "primary concern" behind the limited antitrust exemption for insurers was the "widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Royal Drug*, 440 U.S. at 221. Congress adopted the McCarran-Ferguson Act "to allow insurers to share information relating to risk underwriting and loss experience without exposure to federal antitrust liability." *Gilchrist*, 390 F.3d at 1330. "[R]ate-making and the performance of an insurance contract," including the adjustment of claims, therefore constitute "the business of insurance" because that is what distinguishes insurance from other businesses and prompted Congress to enact a limited antitrust exemption. *Id.* at 1331. But Congress rejected a return to the regime of blanket immunity from federal antitrust law for all acts of insurance companies. *Supra* pp. 5-6. Florida Blue's campaign to exclude Oscar from the market has nothing to do with spreading risk, cooperative ratemaking, sharing claims experience, or any other concerted activity Congress sought to protect.

2. The district court improperly focused on the role of brokers in advising consumers and expanding Florida Blue's customer base

The district court's contrary holding rested on two fundamental errors. First, the court erroneously focused on the role brokers play in advising consumers and

helping them purchase health plans. Doc. 113 at 8. Relying on *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. 1981), the court emphasized that a broker operates at the "'center'" of the insurer-insured relationship—"'a middle-man in the truest sense'"—and that the "'terms and conditions of the agency contract [are], a fortiori, within the business of insurance.'" Doc. 113 at 9 (quoting *Thompson*, 644 F.2d at 443).

That focus was misplaced because, as the Supreme Court and this Court have since made clear, the McCarran-Ferguson analysis focuses on the challenged practice—*i.e.*, the particular conduct the complaint attacks. *Gilchrist*, 390 F.3d at 1332. The "business of insurance" exemption "single[s] out one activity from others," not "one entity from another." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781 (1993). The question is whether the "'particular *practice*'" is the business of insurance, and the criteria governing that inquiry concern the "qualit[ies] of the practice in question." *Id.* at 781-782. Here, the amended complaint attacks Florida Blue's exclusive-dealing practices. *Supra* p. 14. It does not challenge Florida Blue's sale of insurance policies or its use of brokers in making those sales. Brokers' role as "middle-men" is thus irrelevant because the question is not whether *brokers* are central to the insurer-insured relationship, but whether *exclusivity* is central to that relationship. The answer to that question is no, because the exclusivity requirement is a term of the relationship between

Florida Blue and its brokers, not the relationship between Florida Blue and its policyholders. *Supra* pp. 27-29.[4]

Thompson does not control here because it addressed a different type of broker arrangement—and in any event, it is no longer good law. In *Thompson*, the plaintiff insurance agent had entered into two contracts with the defendant life insurance company—a basic agency contract and a separate, optional contract that provided additional benefits in exchange for the agent's agreement to devote his time and skill to the sale of insurance, to meet minimum sales targets, and to refrain from engaging in other work or representing other insurers. 644 F.2d at 441. The insurer terminated the agent when he violated the requirement not to engage in other work besides the sale of insurance, and the agent challenged that restriction. *Id.* The court agreed with the insurer that the challenged provision was the "business of insurance." *Id.* at 442-444.

The court began by noting that *Royal Drug* had not resolved whether agency restrictions are the business of insurance, 644 F.2d at 443 (citing *Royal Drug*, 440 U.S. at 224 n.32), and that "[c]learly not all provisions that could be placed in an agency contract, nor all dealings between insurance companies and their agents are exempted by the McCarran-Ferguson Act," *id.* at 444. Focusing on the particular

[4] In *Royal Drug*, the Supreme Court left open the question whether dealings between insurers and agents might constitute the "business of insurance" under McCarran-Ferguson, noting that the legislative history was ambiguous on the point. 440 U.S. at 224 n.32.

restriction at issue—prohibiting employment other than selling insurance—the court asked whether that challenged practice "concerned the agent's insurance dealings as such," which the court considered to be a "strong indication that the scheme has a bearing on the core relationship between insurer and insured." *Id.* (quotation marks omitted). Applying that test—and with no other analysis—the court found it "dispositive" that the challenged provision "did not force [the plaintiff] to engage in activities unrelated to insurance," but instead offered the plaintiff "incentives, beyond the usual agency relationship," to "focus all his entrepreneurial skills solely on selling insurance." *Id.*

Thompson thus did not involve a challenge to the type of exclusivity practices at issue here, and the court reserved judgment on whether requirements other than the particular one it considered amounted to the business of insurance. 644 F.2d at 444. The decision is therefore not controlling. *See, e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (statements going beyond facts of case are "not binding on anyone for any purpose"). Moreover, even if *Thompson* were on point, it has been "undermined to the point of abrogation" and is no longer binding. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Decided before *Pireno*, *Thompson* addressed none of the criteria the Supreme Court and this Court have distilled more recently in defining the "business of insurance." *See Pireno*, 458 U.S. at 129; *Gilchrist*, 390 F.3d at 1331.

The court in *Thompson* ignored the transfer and spreading of risk altogether and focused instead on the challenged practice's effect on the agent. 644 F.2d at 444. That approach cannot be reconciled with the Supreme Court's subsequent articulation of the standard in *Pireno*, and this Court is bound to follow the latter. *See Archer*, 531 F.3d at 1352.

The district court here noted *Thompson*'s observation that "'exclusive agency clauses have been deemed exempt from anti-trust scrutiny as part of the business of insurance.'" Doc. 113 at 9 (quoting *Thompson*, 644 F.2d at 443). But that observation was dicta because *Thompson* did not consider exclusive-dealing arrangements. *See Edwards*, 602 F.3d at 1298. Although the plaintiff's contract included such a term, he did not challenge it, and the Court emphasized that a different analysis would apply to provisions other than the one before it. *Thompson*, 644 F.2d at 441, 444. Moreover, in support of that dicta, *Thompson* cited only two out-of-circuit district court decisions, neither of which carries weight. *See id.* at 441 (citing *Black v. Nationwide Mut. Ins. Co.*, 429 F. Supp. 458, 463 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978), and *Steinberg v. Guardian Life Ins. Co. of Am.*, 486 F. Supp. 122, 124 (E.D. Pa. 1980)). Both pre-dated *Royal Drug* and *Pireno*, and both went so far as to assert that *all* insurer-agent relationships are within the "business of the insurance"—a proposition that

Thompson itself rejected. *See* 644 F.2d at 443-444.[5] In any event, other decisions of similar vintage held that agent exclusivity arrangements are *not* the business of insurance. *See Ray*, 430 F. Supp. at 1358; *American Family Life Assur. Co. of Columbus v. Planned Mktg. Assocs., Inc.*, 389 F. Supp. 1141, 1142-1143, 1146-1147 (E.D. Va. 1974). *Thompson* and the decisions it cited thus lend no support to the district court's analysis.

The district court's second critical error was its assumption that exclusive brokers spread risk by increasing the number of Florida Blue policyholders. Doc. 113 at 8. According to the district court, allowing Oscar to compete by having access to Florida Blue's brokers "would result in Oscar siphoning off ACA consumers and altering the composition of policyholders, impacting Florida Blue's ability to spread risk." *Id.* at 12.

Under that flawed reasoning, all anticompetitive conduct—regardless of its logical and temporal connection to risk-spreading—would come within the "business of insurance" exemption because all anticompetitive conduct aims to prevent new market entrants from "siphoning off" customers. But business practices that merely serve to insulate an insurer's customer base from competitors

[5] *Black*, for example, found the insurer-agent relationship to be "the business of insurance" in part because agent commissions "affect rate structures." 429 F. Supp. at 463. But *Royal Drug* later held that the mere fact that a challenged practice affects an insurer's costs and rates does not render it the "business of insurance." 440 U.S. at 214-215.

do not automatically constitute the "business of insurance" even though they can affect the composition of the insured pool. As the Third Circuit explained in holding that alleged market-allocation agreements among insurers did not constitute "the business of insurance," such arrangements do not control "*whether* or *to what extent* a prospective insurance purchaser w[ill] transfer its risk to an insurer, but merely to *which* insurer that risk w[ill] be transferred." *Insurance Brokerage Antitrust Litig.*, 618 F.3d at 357. They thus do not involve the transfer or spreading of risk in any way. *Id.*

The district court's contrary analysis contravenes *Royal Drug*, which distinguished between the underwriting of risk and practices that merely reduce an insurer's risk. *See* 440 U.S. at 214 n.12. Practices an insurer adopts to reduce its own risk—including measures taken to reduce its liability to policyholders—do not necessarily entail any "underwriting of risk" and are therefore not "the business of insurance" without an element of "spreading risk more widely." *Id.* Exclusive-dealing practices that merely reduce Florida Blue's own risk by protecting it from competitors who might siphon off customers do not constitute the "business of insurance" absent some connection to the transfer or spreading of risk. *Id.* As shown, there is no such connection here. *Supra* pp. 24-29.

In holding otherwise, the district court relied heavily on a misreading of *Sanger Insurance Agency v. HUB International, Ltd.*, 802 F.3d 732 (5th Cir. 2015).

See Doc. 113 at 10-12. In *Sanger*, the defendant, HUB, served as exclusive broker for the American Veterinary Medical Association ("AVMA"), which offered insurance to its member veterinarians. The AVMA engaged HUB to negotiate rates, service insureds, and monitor claims on behalf of the association, and in that capacity HUB obtained master policies underwritten by various insurance companies to cover the risk-purchasing group. 802 F.3d at 734-735. Individual AVMA members could obtain certificates of insurance under the master policies. *Id.* at 734. Sanger, an agency that wished to sell insurance policies to members of other veterinary associations, objected that HUB had leveraged its market power as exclusive broker for the AVMA to insist that insurers refrain from writing policies through other brokers to insure members of other veterinary associations. *Id.* at 735-736, 742-743. The Fifth Circuit held that HUB's conduct was exempt under McCarran-Ferguson. *Id.* at 741-747.

Sanger emphasized that the challenged exclusivity arrangements directly affected the risk profile of the insured entity—*i.e.*, the risk-purchasing group. The challenged practices "inevitably involve[d] the transferring or spreading of risk because HUB's role as the broker is to funnel a broad risk pool to particular insurers." 802 F.3d at 744. HUB acted as broker for a risk-purchasing group (the AVMA) that purchased master policies covering all participating members. *Id.* at 734. "Keeping a large, geographically and professionally diverse pool of

veterinarians" in that risk-purchasing group by insisting that insurers refrain from selling policies outside the AVMA program "spread[] risk" across the association's members. *Id.* at 743. And HUB's activities "'define[d] a pool of insureds over which risk [wa]s spread'" and "'distribut[ed] risk across the membership.'" *Id.* (quoting *Feinstein v. Nettleship Co. of L.A.*, 714 F.2d 928, 932 (9th Cir. 1983)). But if Sanger could "siphon off" veterinarians in HUB's group by offering plans through other associations, it would "alter the composition of policyholders" in the AVMA program and affect the program's "ability to spread risk" under the group policy. *Id.* at 744.

That is a far cry from this case. HUB's role did not resemble that of a broker in Florida's individual ACA market, which does not involve the underwriting of group policies that cover multiple insureds under a single master policy. Subject to narrow exceptions, insurers in the individual ACA market are prohibited from taking individual risk profiles into account when setting premiums or determining coverage. *See* 42 U.S.C. §§ 300gg, 300gg-4, 300gg-6; *supra* p. 7. The terms and pricing of each individual ACA plan do not depend on those individual risk profiles, and the transfer of risk effectuated by a given policy remains unchanged when other individuals enter or leave the insured pool. The risk profiles of individual policyholders thus have no bearing on the transfer of risk accomplished through the issuance of any particular policy.

Under a group policy like the one at issue in *Sanger*, in contrast, a change to "the composition of policyholders" does affect the spreading of risk across the group and from the group to the insurer and alters the rationale for the pricing of the policy. *See Sanger*, 802 F.3d at 743-744. The challenged arrangements in *Sanger* were logically connected to the transfer of risk effectuated by the group insurance policies because exclusivity prevented other associations from creating competing insurance programs, thereby enabling the spreading of risk across "a large, geographically and professionally diverse pool of veterinarians" and improving the risk profile of the insured group. *Id.* at 743. And the arrangements were temporally connected in that they were a condition of insurers' sale of policies to the association. *Id.* at 734, 743.

Sanger thus lends no support to Florida Blue's defense, and the district court erred in concluding otherwise. Although competition from Oscar would indeed "siphon[] off" ACA policyholders from Florida Blue and "alter the composition" of Florida Blue's policyholders, that would not—as the district court wrongly concluded—"impact[] Florida Blue's ability to spread risk," Doc. 113 at 12, because the policies at issue here are individual policies. On the ACA individual market, the transfer of risk is effectuated and defined by an insurance policy between a single consumer and a single insurer with terms and premiums governed by regulation. Whether the insurer loses or gains the business of a separate

customer who is a stranger to that policy does not affect that transfer and spreading of risk. It affects only the insurer's own costs, risk, and potential liability, which are the business of insurers but not the business of insurance. *Supra* pp. 25-26, 35; *see Royal Drug*, 440 U.S. at 214 n.12 (distinguishing between the underwriting of risk and business practices that simply reduce the insurer's risk).[6]

Moreover, even if the insurer's own financial risk were relevant to the inquiry, it would not change the analysis. Any impact on Florida Blue's own risk or costs is minimal because the ACA's risk-adjustment provisions are designed to make the gain or loss of an individual policyholder risk-neutral for insurers. Under the ACA, insurers must charge the same rates to all purchasers of a given plan regardless of health status. As a result, lower-risk enrollees generally pay premiums higher than their expected cost of claims, while higher-risk enrollees generally pay premiums lower than their expected cost of claims. *See* Kehres, Cong. Research Serv., R45334, *The Patient Protection and Affordable Care Act's (ACA's) Risk Adjustment Program: Frequently Asked Questions* 7 (Oct. 4, 2018).

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[6] *Sanger* asserted that, even viewing HUB's conduct "more narrowly as just a 'broker' case," other courts have found "routine dealings between insurers and brokers or agents" to be the business of insurance. 802 F.3d at 744; *see* Doc. 113 at 12. In support, however, *Sanger* cited only *Thompson* and the district court cases it relied on, *see supra* pp. 33-34 & n.5, along with two other decisions that commented in passing only on the general practice of using brokers to sell policies. *See Sanger*, 802 F.3d at 744-745; *see also Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 225-226 & n.6 (3d Cir. 1981) (asserting that authorizing agents to solicit policies is the business of insurance); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005) (citing *Owens*).

The statute levels that risk across insurers by providing for funds to be reallocated from insurers whose policyholder pools have lower-than-average actuarial risk to insurers whose policyholder pools have higher-than-average actuarial risk. *See* 42 U.S.C. § 18063. Insurers with higher-risk enrollees receive risk-adjustment payments to cover the difference between premiums and expected costs, while insurers with lower-risk enrollees pay a portion of the premiums they collect to other insurers as risk-adjustment charges. Kehres, *supra*, at 7. That arrangement eliminates any incremental risk to Florida Blue from the "siphoning off" it would face in the presence of true competition and confirms that Florida Blue's exclusivity practices have no connection to the transfer and spreading of risk.

The district court discounted the ACA context because, in the court's view, it was not adequately alleged in the amended complaint or in Oscar's (and the government's) submissions responding to the motion to dismiss. Doc. 113 at 13. But the McCarran-Ferguson antitrust exemption is an affirmative defense on which Florida Blue, not Oscar, bears the burden of proof. *Morton Salt*, 334 U.S. at 44-45. It is the applicability of that exemption, not Oscar's responses to it, that must be "clearly indicated" and apparent "on the face of the pleading" to justify dismissal. 5B Wright & Miller, *Federal Practice & Procedure Civil* § 1357 & n.63 (3d ed. updated Aug. 2019). Any doubts the district court harbored as to facts material to the exemption required the court to deny the motion to dismiss, not grant it. *Id.*

B. Florida Blue's Exclusive-Dealing Practices Are Not Integral To The Policy Relationship

The lack of any connection between Florida Blue's exclusivity practices and the spreading of risk alone mandates reversal. *See Insurance Brokerage Antitrust Litig.*, 618 F.3d at 356. The remaining criteria likewise confirm that Florida Blue's conduct is not the "business of insurance." The second criterion asks whether the challenged practice is "an integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129. Activities integral to the policy relationship are those that influence "'the type of policy which c[an] be issued, its reliability, interpretation, and enforcement.'" *Royal Drug*, 440 U.S. at 215-216. None of that is present here.

The practices at issue in *Pireno* and *Royal Drug* both failed this criterion because they involved separate arrangements between the insurers and third parties that were distinct from the insurers' contracts with their policyholders. The pharmacy agreements in *Royal Drug* were "not 'between insurer and insured,'" but were "separate contractual arrangements" between Blue Shield and the participating pharmacies. 440 U.S. at 216. And the insurer's arrangements with the peer-review committee in *Pireno* were "obviously distinct" from its contracts with its policyholders. 458 U.S. at 131. In both cases, the defendants argued that the challenged practices directly affected the interpretation and enforcement of the insurance policies and the costs and premiums associated with coverage, but in

both cases the Supreme Court held that those effects did not bring the practices within the "business of insurance." *Id*. at 131-132; *Royal Drug*, 440 U.S. at 214, 216-217. The practices were "a matter of indifference to the policyholder." *Pireno*, 458 U.S. at 132.

Here, Florida Blue's enforcement of exclusivity terms in its dealings with brokers are likewise distinct from the health plans it issues to policyholders. As in *Royal Drug* and *Pireno*, the exclusivity practices are "separate contractual arrangements" between Florida Blue and third parties other than the policyholder. *Royal Drug*, 440 U.S. at 216. Those exclusivity arrangements have no effect on the types of policies Florida Blue can issue or the reliability, interpretation, or enforcement of those policies. *Id*. at 215-216. At most, given brokers' role with consumers, the exclusivity arrangements might affect whether an individual purchases a plan, and if so, what type and from which insurer. But Florida Blue's exclusivity arrangements have no bearing on the nature of the policies Florida Blue offers, and the terms of its exclusivity arrangements are a "matter of indifference" to consumers (except insofar as captured brokers cannot inform consumers of their full range of options). *Pireno*, 458 U.S. at 132. As the amended complaint alleges, Florida consumers can obtain the exact same coverage from Florida Blue with or without the assistance of a broker, and regardless of whether brokers do business with Florida Blue exclusively. Doc. 75 at 46. Moreover, as the amended

complaint alleges, Florida Blue is the only ACA insurer to require exclusivity from its brokers. *Id.* That practice can hardly be "integral" to the policy relationship if no other insurer uses it. Indeed, Florida Blue itself enforces the exclusivity policy only selectively, *supra* p. 13—confirming that it does not consider the practice "integral" even to its own policy relationships.

The district court thought this issue "require[d] little discussion" because brokers "provide invaluable services to customers" and because, as in *Thompson*, Florida Blue's exclusivity policies "'concern[] the [brokers'] insurance dealings as such'" and do not compel brokers "to engage in activities unrelated to insurance." Doc. 113 at 16 (quoting *Thompson*, 644 F.2d at 444). But, as discussed, that is not the analysis *Royal Drug* and *Pireno* require. *Supra* pp. 23-24, 32-33. Whether independent brokers "are instrumental in selling policies," Doc. 113 at 9 n.10, or help customers "navigate" the purchase of health insurance, *id.* at 16, does not affect the types of policies Florida Blue issues or establish any connection between the challenged practice—exclusivity terms between Florida Blue and third-party brokers—and Florida Blue's relationship with its policyholders.

Again, the district court's reliance on *Thompson* was misplaced. As discussed above, *Thompson* did not consider a practice like the one at issue here. *Supra* pp. 31-33. And the district court's focus, following *Thompson*, on whether Florida Blue "force[d] its brokers to engage in activities unrelated to insurance,"

Doc. 113 at 16, is incompatible with the analysis required under *Royal Drug* and *Pireno*. Forcing agents to engage in non-insurance business might be one indication that a practice falls outside the business of insurance. But as *Royal Drug* and *Pireno* make clear, that is not the only activity insurance companies can engage in that does not constitute the business of insurance.

The district court further erred in analogizing this case to the "incentives" the agent in *Thompson* received "beyond the usual agency relationship" in his optional contract. Doc. 113 at 16 (citing 644 F.2d at 444). As Oscar's amended complaint makes clear, there was nothing optional for brokers about Florida Blue's exclusivity policy, and that policy did not merely offer an "incentive" beyond "the usual agency relationship." *Supra* pp. 8-10, 11-14. Florida Blue required exclusivity as a condition of doing any business, statewide, and it backed up that requirement with threats of permanent termination. *Id.*

In any event, as discussed, *Thompson* is no longer good law. *See Archer*, 531 F.3d at 1352; *supra* pp. 32-33. It failed to address any of the factors current precedent requires, including whether the challenged practice is "integral" to the insurer-insured relationship or instead part of a "separate contractual arrangement" with a third party. As explained above, the latter considerations are dispositive under *Royal Drug* and *Pireno* that Florida Blue's exclusivity arrangements are not the "business of insurance." *Supra* pp. 42-44.

C. Exclusive-Dealing Arrangements Are Not Limited To The Insurance Industry

Pireno's third criterion similarly shows that Florida Blue's exclusivity practices are not the "business of insurance." That criterion asks whether the challenged practice "is limited to entities within the insurance industry." 458 U.S. at 129. Congress's focus in adopting the limited antitrust exemption in McCarran-Ferguson was on protecting "intra-industry" cooperation in ratemaking and underwriting among insurers, *Royal Drug*, 440 U.S. at 221, and when a "challenged … practice[] [is] not limited to entities within the insurance industry," it does not implicate that concern, *Pireno*, 458 U.S. at 132. Thus, when entities outside the insurance industry engage in a challenged practice, it is not the business of insurance. *See FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1236 (11th Cir. 2014) (challenged practice was "not limited to entities within the insurance industry" and not within the "business of insurance" because "[n]on-insurance company associations" frequently engaged in it); *American Family*, 389 F. Supp. at 1145, 1147 (exclusivity practices not exempted because they could as "easily be employed by one stock brokerage firm against another as by one insurance company against another").

Exclusive-dealing arrangements are not "limited to entities within the insurance industry," but are regularly used in many industries. Nothing about Florida Blue's exclusivity demands is peculiar to insurance, and nothing

distinguishes broker-exclusivity activities within the insurance industry from those outside it. Thus, in *Ray*, the district court held that an exclusive-dealing arrangement was not the "business of insurance" in part because Congress nowhere indicated any intent to treat insurance agents "differently than any other kind of agent." 430 F. Supp. at 1357.

The district court acknowledged that "exclusive relationships can be found in businesses unrelated to insurance." Doc. 113 at 17. But the court rejected that test as "too expansive" because excluding any activity that occurs in other industries from the "business of insurance" would "effectively exclude nearly all activity from the McCarran-Ferguson Act." *Id.* at 17-18. That analysis—which assumes that "nearly all" the insurance practices that Congress intended to shield from antitrust liability are also found in other industries—is incorrect. The inquiry under McCarran-Ferguson is whether the challenged practice is uniquely characteristic of insurance. *Royal Drug*, 440 U.S. at 211. The activities that are characteristic of insurance—*e.g.*, ratemaking and the issuance and performance of an insurance contract, *see Gilchrist*, 390 F.3d at 1331—are not found in other industries. Those are the practices that define the "business of insurance" and justify an exemption from antitrust scrutiny. *See Royal Drug*, 440 U.S. at 224. Contrary to the district court's view, applying the third *Pireno* criterion to exclude from the "business of insurance" ordinary business practices that occur in other

industries would not exclude those activities that are core to the business of insurance from the McCarran-Ferguson exemption. It instead correctly excludes those practices—like Florida Blue's—that are simply the "business of insurers" rather than the "business of insurance." *Royal Drug*, 440 U.S. at 211.

The district court also noted that the conduct at issue in *Pireno* involved agreements with "'third parties wholly outside the insurance industry,'" whereas insurance brokers "are not parties wholly outside the insurance industry." Doc. 113 at 18. But as discussed, the focus under the McCarran-Ferguson Act is on the challenged practice, not the nature of the entity engaged in the practice. *See supra* pp. 30-31; *Hartford Fire Ins.*, 509 U.S. at 781. Activities conducted by entities within the insurance industry can nonetheless fall outside the business of insurance. *See, e.g.*, *Insurance Brokerage Antitrust Litig.*, 618 F.3d at 357; *In re Blue Cross Blue Shield Antitrust Litig.*, 26 F. Supp. 3d 1172, 1191 (N.D. Ala. 2014). Given that Florida Blue's exclusive-dealing arrangements are in no way unique to the insurance industry, that is the case here. Florida Blue's exclusive-dealing arrangements are not the "business of insurance" and are not exempt from the antitrust laws.[7]

[7] Oscar additionally argued below that Florida Blue's exclusive-dealing arrangements are not "regulated by state law" as McCarran-Ferguson requires. *Supra* nn.1, 2. Oscar does not press that issue before the panel here, *see, e.g.*, *Gilchrist*, 390 F.3d at 1334, but preserves it for en banc review if necessary.

II. FLORIDA BLUE'S EXCLUSIVE-DEALING ARRANGEMENTS CONSTITUTE "COERCION"

Even where conduct is properly deemed the "business of insurance" that is "regulated by state law," the McCarran-Ferguson Act removes federal antitrust immunity for "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). Congress was willing to defer to state regulation of competition in the business of insurance "with respect to matters such as rates and terms of coverage." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547-548 (1978). But it kept boycotts, coercion, and intimidation within the purview of the Sherman Act as "an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action." *Id.* at 547.

Given that purpose, the language of the exception for "boycott," "coercion," and "intimidation" is "broad and unqualified." *St. Paul*, 438 U.S. at 550. Courts have applied it according to its "common understanding." *Id.* at 552; *see also id.* at 531, 541 & n.11 (citing dictionary definitions of the "generic concept of boycott"); *Hartford Fire Ins.*, 509 U.S. at 802, 808 n.6 (analyzing coercion "in the usual sense of that word"). Moreover, that language "evokes a tradition of meaning … elaborated in the body of decisions interpreting the Sherman Act" and should therefore "be read in light of that tradition." *St. Paul*, 438 U.S. at 541.

Oscar's amended complaint alleges conduct that clearly amounts to "coercion" within the "common understanding" of that term. *St. Paul*, 438 U.S. at 552. "Coercion," in its usual sense, entails "the improper use of economic power to compel another to the wishes of one who wields it." *Black's Law Dictionary* 275 (10th ed. 2014); *see also Webster's Second New International Dictionary* 519 (1934) (defining coercion as "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done"). The term carries that same "tradition of meaning" under the Sherman Act—especially in monopolization cases like this one. Those cases recognize that coercion occurs when a monopolist uses its market power "to break the competitive mechanism and deprive [other market actors] of the ability to make a meaningful choice." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 285 (3d Cir. 2012). Conduct becomes coercive, and thus anticompetitive, when a monopolist's power makes it an indispensable trading partner and other actors have no realistic choice but to accede to terms they would not otherwise accept. *See, e.g.*, *id.* (holding conduct coercive and anticompetitive where dominant firm "leveraged its position as a supplier of necessary products to coerce [others] into entering" *de facto* exclusivity arrangements); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 195 (3d Cir. 2005) (when "faced with an all-or-nothing choice," dealers that would prefer to sell products of multiple manufacturers "may accede to

[a] dominant firm's wish for exclusive dealing" (quotation marks omitted)); *see also, e.g.*, *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 978 (5th Cir. 1977) (liability may lie for tying arrangement in which franchisees are "coerced" into buying goods they otherwise would not buy).

Economic pressure of that kind constitutes "coercion" under any common understanding of the word, and that is precisely what Oscar's amended complaint alleges. Florida Blue exploited its dominance in the individual ACA market in Florida to force brokers against their will, on pain of permanent termination and loss of commissions, not to do business with Oscar. *Supra* pp. 11-14. Absent those threats, brokers would have accepted appointments with Oscar—indeed hundreds had already done so before reversing course to avoid the "financial disaster" that would have followed had they defied Florida Blue's demand. Doc. 75 at 25. Moreover, Florida Blue's threat to terminate brokers from all business statewide—using unrelated insurance sales in markets Oscar had not even entered as leverage to compel exclusivity—gave the brokers an "all-or-nothing" choice, *Dentsply*, 399 F.3d at 195, thereby adding even "'great[er] coercive force.'" *Gilchrist*, 390 F.3d at 1335 (explaining, in boycott context, how refusals to deal in collateral transactions can "coerce terms" in a primary transaction (citing *Hartford Fire Ins.*, 509 U.S. at 801-805)).

Courts applying McCarran-Ferguson have readily found "coercion" in similar cases. *See Ray*, 430 F. Supp. at 1358 (insurer's "threat to cut off [plaintiff]'s agency and thereby deprive him of renewal commissions and deferred funeral business constituted coercion"); *Weatherby v. RCA Corp.*, 1986 WL 21336, at *5 (N.D.N.Y. May 9, 1986) (complaint challenging alleged termination of agents sufficiently alleged coercion). Far from offering a mere economic inducement that left brokers with a range of options, Florida Blue threatened and carried out punitive acts to coerce brokers and leave them with no choice but to refuse to deal with Oscar.

The district court's sole basis for holding otherwise was its conclusion that contractual exclusive-dealing arrangements are "'not per se unlawful'" and that Florida Blue's enforcement of such agreements therefore could not be coercive. Doc. 113 at 21-22 (quoting *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015)). That analysis was both procedurally improper and legally erroneous. Oscar alleges far more than the mere enforcement of lawful exclusive-dealing arrangements. It alleges that Florida Blue holds monopoly power in the relevant market and selectively used its exclusive-dealing arrangements and threats of statewide termination to maintain its market dominance by preventing Oscar's entry. *Supra* pp. 8-10, 11-14 . Rather than crediting those allegations and drawing reasonable inferences in Oscar's favor, the district court discounted those allegations—which are clearly sufficient to establish coercion—and failed to hold

Florida Blue to its burden to prove the McCarran-Ferguson affirmative defense. *See Morton Salt*, 334 U.S. at 44-45.[8]

Moreover, contrary to the court's view, the law is clear that enforcing a lawful contract can amount to unlawful coercion when, as here, it is done by a monopolist to suppress competition. Antitrust law differentiates between the same conduct depending on whether the actor has market power. As the monopolization cases discussed above demonstrate, otherwise-permissible practices can constitute coercion and violate the Sherman Act when undertaken by a monopolist. *See supra* pp. 49-50. The law governing "tying" arrangements similarly makes this clear. *Cf. St. Paul*, 438 U.S. at 541 ("coercion" should be interpreted in light of Sherman Act jurisprudence). A tying arrangement entails "'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992). The arrangement thus involves a type of agreement that is not invariably unlawful. *Id.* at 461-462. But where the seller has appreciable economic power in the tying market, the otherwise-lawful agreement can become

[8] The district court disregarded the allegations in other respects as well. For example, the court assumed that Florida Blue's conduct entailed enforcement of contract terms, but the amended complaint alleges that many brokers do not have contractual relationships directly with Florida Blue but contract instead with CGAs. Doc. 75 at 26.

coercive and unlawful when the seller "exploit[s]" its power in the market "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). The arrangement—although premised on the enforcement of a contract that would be lawful in other circumstances—becomes unlawful precisely because an element of "'forcing'" is employed to restrain the market. *Id.* "Coercion" is the "essential element" that transforms a lawful contractual provision into an illegal tying arrangement when one party leverages its market power to force others to do what they otherwise would not have done. *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1263 (11th Cir. 1998).

The district court's reasoning contravenes those settled principles. Oscar alleges that Florida Blue holds market power and selectively requires exclusivity to maintain a monopoly in violation of the Sherman Act. In that context, it is no defense that exclusive-dealing requirements are not invariably unlawful. *McWane*, on which the district court relied, is not to the contrary. That case considered whether McWane, a producer of domestic pipe fittings, violated the Sherman Act by requiring distributors to purchase all their domestic pipe fittings from McWane or else lose rebates and be cut off from purchases for 12 weeks. 783 F.3d at 819.

This Court observed that exclusive-dealing arrangements "are not per se unlawful" and therefore evaluated McWane's conduct under the rule of reason. *Id.* at 832. In doing so, the Court did not consider whether the distributors had been coerced; it focused instead on the substantial foreclosure of competition and injury to competitors caused by McWane's conduct and the absence of any procompetitive justification for it. *Id.* at 832-842. And the Court concluded that the exclusive-dealing requirement indeed violated the Sherman Act. *Id.*

McWane thus demonstrates why Florida Blue's conduct violates the Sherman Act on the merits. But it sheds no light on the application of the McCarran-Ferguson exemption and does not support the district court's view that exclusive-dealing arrangements cannot be coercive. In purpose and effect, Florida Blue's practices as alleged here are coercive in every sense of the word. *Supra* pp. 50-51. They are precisely the type of "restrictive agreements" that Congress made clear should be stripped of any immunity under the McCarran-Ferguson Act. *St. Paul*, 438 U.S. at 547-548. Even if Florida Blue's conduct were otherwise entitled to the McCarran-Ferguson exemption for the "business of insurance"—and it is not—its coercive practices therefore remain subject to the Sherman Act.[9]

[9] Florida Blue argued below that unilateral conduct cannot be "coercion." The district court did not address that issue. Doc. 113 at 23 n.19. Should Florida Blue raise that argument here, Oscar reserves the right to argue in reply that no concerted action is required. McCarran-Ferguson's plain language eliminates antitrust immunity for both "agreement[s] to … coerce" and "act[s] of …

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/ Seth P. Waxman

SETH P. WAXMAN
LEON B. GREENFIELD
CATHERINE M.A. CARROLL
KEVIN LAMB
DREW VAN DENOVER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-2000

STEVEN C. SUNSHINE
TARA L. REINHART
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000

PAUL M. ECKLES
MICHAEL H. MENITOVE
MATTHEW LISAGAR
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036
(212) 735-3000

FRANCIS M. MCDONALD, JR.
SARAH A. LONG
MCDONALD TOOLE WIGGINS, P.A.
111 N. Magnolia Ave., Ste. 1200
Orlando, FL 32801
(407) 246-1800

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coercion." 15 U.S.C. § 1013(b). Only the former requires any degree of concerted action, as the leading treatise confirms. *See* Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 220a (4th ed. 2018). In any event, any requirement of concerted action would be met because the amended complaint alleges that Florida Blue acted in concert with CGAs and brokers to exclude Oscar. Doc. 75 at 23, 26, 47, 50-51.

STATUTORY ADDENDUM

15 U.S.C. § 1011

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012

(a) State Regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal Regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. § 1013

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act [15 U.S.C. 41 et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 12,950 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

December 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
Seth P. Waxman