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.

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

BRIEF FOR AMICI CURIAE ANTITRUST SCHOLARS HERBERT HOVENKAMP, STEPHEN CALKINS, CHRISTOPHER L. SAGERS, FELIX B. CHANG, JOSHUA DAVIS, SUSAN BETH FARMER, HARRY FIRST, THOMAS GREANEY, JOHN B. KIRKWOOD, AND TIMOTHY WU IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

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

Dated: December 23, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

STATEMENT OF THE ISSUES 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Practices Exempted By The MFA Must Be Addressed To Insurance-Specific Problems Or Concerns 6

A. The Supreme Court has carefully narrowed the MFA to exclude generic business practices, even when undertaken by insurers 6

B. Under this framework, agreements between insurers and brokers may or may not be the business of insurance 9

C. The District Court's reasoning is incorrect and dangerous 15

II. Exclusive Dealing By A Monopolist With Industry Gatekeepers Qualifies As Coercion Under §1013(b) 19

A. Coercion is properly understood to include certain exercises of market power designed to exclude others from the market 20

B. The District Court's rule is plainly incorrect 24

CONCLUSION 26

ADDENDUM: Identity of Amici Curiae

TABLE OF AUTHORITIES

Cases

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,

429 U.S. 477 (1977)..2

Grp. Life & Health Ins. Co. v. Royal Drug Co.,

440 U.S. 205 (1979)...*passim*

Hartford Fire Insurance Co. v. California,

509 U.S. 764 (1993)...*passim*

McWane, Inc. v. FTC,

783 F.3d 814 (11th Cir. 2015) 24

Owens v. Aetna Life & Cas. Co.,

654 F.2d 218 (3d Cir. 1981) 15

Reiter v. Sonotone Corp.,

442 U.S. 330 (1979)..23

Sanger Ins. Agency v. HUB Int'l., Ltd.,

802 F.3d 732 (5th Cir. 2015) 14

SEC v. Nat'l Secs., Inc.,

393 U.S. 453 (1969)..9, 13, 17

St. Paul Fire & Marine Ins. Co. v. Barry,

438 U.S. 531 (1978)...*passim*

State Bd. of Dental Examiners v. FTC,

574 U.S. 494 (2015)..7

Third Nat'l Bank in Nashville v. Impac Ltd.,

432 U.S. 312 (1977)..23

Thompson v. N.Y. Life Ins. Co.,

644 F.2d 439 (5th Cir. Unit B May 1981) 15

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458 U.S. 119 (1982)..*passim*

Statutes

15 U.S.C. §1012(b) 7, 22

15 U.S.C. §1013(b) ....*passim*

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Antonin Scalia & Bryan A. Garner, *Reading Law* (2012).......................................23

INTEREST OF AMICI[1]

Amici are antitrust scholars who write to share their disinterested perspective with the Court. The signatories and their respective positions are listed below. They have a particular interest in this case because there have been relatively few clear precedents on the scope of the McCarran-Ferguson Act, and those precedents have tended to create confusion on issues like those presented here. Health insurance markets are often highly concentrated and characterized by imperfect competition, and so it is particularly important to avoid additional, artificial barriers to entry or effective competition imposed by monopolists. And we believe that the incorrect understanding of the limited immunity that Congress created with the McCarran-Ferguson Act—articulated by the district court below—will only tend to allow those artificial barriers to proliferate. Practices like those at issue here were not among those that Congress intended to immunize from the Sherman Act, and the public interest would thus be well served by this Court reversing the decision below. The names of the signatories appear in the attached Addendum.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party, and no person other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this *amicus* brief. The views expressed herein are those of the named *amici* and not the academic institutions with which they are affiliated.

STATEMENT OF THE ISSUES

1. Whether exclusive deals between an incumbent monopolist health insurer and independent brokers that will deprive those brokers of access to all the monopolist's products if they agree to market any product from a new entrant are "the business of insurance" for purposes of the McCarran-Ferguson Act.

2. Whether the use of market power to extract and/or enforce such deals constitutes "coercion" within the meaning of the McCarran-Ferguson Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court long ago recognized that, while the McCarran-Ferguson Act (MFA) excludes the "business of insurance" from the antitrust laws under some circumstances, "[t]he exemption is for the 'business of insurance,' not the 'business of insurers.'" *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). This distinction is critical because it prevents the MFA from expanding into a blanket exemption for all kinds of anticompetitive behavior that may be carried out by insurance companies, even if it has nothing to do with the insurance business or its unique concerns. Unfortunately, however, this teaching has become the kind of cliché that courts can repeat freely without correctly understanding or applying it—not unlike the observation that the antitrust laws "were enacted for the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (internal quotation marks omitted). And that is in fact what

happened here: While the district court below acknowledged this bedrock principle, *see* Op. 5-6, it ultimately applied the MFA in a way that could easily embrace—and exempt from antitrust scrutiny—just about anything an insurance company does. It is imperative that this Court correct that misunderstanding.

The Supreme Court has instructed lower courts to distinguish the business of insurance from the business of insurers by asking whether the *practice* at issue connects to insurance-specific issues or activities: The relevant inquiries are (1) "whether the *practice* has the effect of transferring or spreading a policyholder's risk;" (2) "whether the *practice* is an integral part of the policy relationship between the insurer and the insured;" and (3) "whether the *practice* is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (emphasis added). And yet the district court below concluded that the answer to at least the first two of these questions is "yes" whenever the *result* of the practice is to increase the number of policies an insurer writes, because that result *in turn* has the effect of spreading risk more broadly and forming more policy relationships between the insurer and insureds. *See, e.g.*, Op. 8, 16. This is the very error the Supreme Court has attempted to avoid through the *Pireno* inquiry and the "insurance"/"insurer" distinction. Nearly everything an insurer does is designed to increase the number of policies it sells. If that is enough to connect the challenged

practice to the business of insurance, the MFA will swallow antitrust enforcement against insurance companies whole.

The practice at issue here—forming exclusive deals with industry gatekeepers to box out potential entry by competitors—is a quotidian business strategy that appears across many industries and raises well-recognized antitrust concerns. And, importantly, such deals have *no* obvious effects that are specific to the insurance business or its industry-specific concerns. To be sure, contractual dealings between insurers and brokers or agents *can* be the business of insurance: Brokers are not in the category of service providers that have been deemed wholly outside the industry, where the Supreme Court has placed pharmacists, repair shops, or the like. *See Royal Drug*, 440 U.S. at 232. But that does not mean that *all* dealings between insurers and brokers are the business of insurance; just as insurance companies would be liable for fixing the salaries they pay their secretaries (or actuaries), their dealings with others who ply their trades within the insurance industry are still subject to the antitrust laws if there is nothing insurance-specific about them or the concerns they address. That observation suffices to decide this case, and this Court should so hold so as to avoid sowing further confusion on this point in this important area of the law.

Separately, the district court also erred by holding that this practice does not fall within the exception to the MFA's effect for any "act of boycott, coercion, or

intimidation." 15 U.S.C. §1013(b). To be sure, a too-colloquial understanding of "coercion" would violate important canons of statutory construction: Every economic action (or at least every action that concerns the antitrust laws) is coercive in some sense, and the MFA must be given some effect notwithstanding the exception in §1013(b). But the district court's opaque discussion of this issue swings far too far in the opposite direction. The district court seemed to conclude that enforcing *otherwise* lawful contracts can *never* be coercive, even when those contracts are allegedly being enforced by a monopolist wielding market power to force the hands of other economic actors in exclusionary ways. Op. 20-23. The correct understanding of "coercion" lies in between: It relies on the canon of *nocitur a sociis* to recognize that such acts of economic bullying are—like "boycotts" and "intimidation"—among the kinds of behavior that Congress intended to subject to the antitrust laws in whatever line of business they might arise, including the business of insurance.

Simply put, Congress wisely imposed two separate limitations on the MFA that prevented extending its exemption to the kinds of economic strong-arming that *any* monopolist in *any* industry might be tempted to employ absent the protections of the Sherman Act. The district court got both those limitations wrong, and affirming those errors here will lead to all the evils that the antitrust laws restrain, in an industry that is unusually important to consumer well-being and already highly

concentrated. This Court should avoid creating such a destructive precedent, and reverse.

ARGUMENT

I. The Practices Exempted By The MFA Must Be Addressed To Insurance-Specific Problems Or Concerns.

A. The Supreme Court has carefully narrowed the MFA to exclude generic business practices, even when undertaken by insurers.

As an initial matter, is important to understand that the Supreme Court has adopted a very narrow construction of the MFA, beginning with *Royal Drug* in 1979, and continuing from there. As the leading treatise explains, "[a]ll the cases after *Royal Drug* differ less in their logic than on the policy question of how narrow the insurance exemption ought to be. *Royal Drug* itself adopts a narrow construction of the statute," and "[c]ases like *Pireno* … in turn provide a narrow reading of *Royal Drug*." *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶219b6 (Areeda & Hovenkamp). This narrowing has embraced both aspects of the statute at issue here: "[T]he Supreme Court has severely reduced the immunity by narrowing the definition of 'the business of insurance' and broadening the definition of 'boycott.'" *Id.* ¶219a. And while this trend has come from the Supreme Court rather than Congress itself, it "does seem to reflect a general view that the immunity had been interpreted too broadly or perhaps even that it has become unnecessary." *Id.*

Indeed, while the purpose of this brief is to discuss the law as it is rather than the law as it should be, it is worth noting that there is a robust academic consensus that the MFA tends to have "perverse" effects under current legal doctrine, to the extent it has any effects at all. *See* Areeda & Hovenkamp ¶219e. The primary purpose of the MFA was to give the States the lead in regulating insurance, and the MFA thus grants antitrust immunity to the insurance business only "to the extent that such business is … regulated by State Law." 15 U.S.C. §1012(b); *see also Royal Drug*, 440 U.S. at 217-25 & n.18 (discussing legislative history and "primary purpose" of MFA). But under modern precedents, actions that are closely regulated by state law or supervised by state actors under a policy to displace free-market competition are already immune from antitrust scrutiny in *any* industry. *See, e.g.*, *State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 503-07 (2015) (explaining modern "*Parker* immunity"). Thus, even if Congress repealed the MFA entirely, or the Supreme Court narrowed it even further, that would have *no* likely effect on the main goal Congress intended the MFA to achieve. *See* Areeda & Hovenkamp ¶219a. This means that courts generally need not worry that a narrow construction of the MFA will disrupt settled industry expectations or frustrate congressional intent. *Id.*

Meanwhile, logic dictates that the MFA can have an affect only where adequate state regulation or supervision is absent for purposes of *Parker* immunity. And this means in turn that contemporary applications of the MFA tend to protect

from antitrust scrutiny only the *un*regulated, *un*supervised, and self-enriching actions of industry participants, rather than policies adopted and supervised by the States for the public good. *See* Areeda & Hovenkamp ¶¶219a, 219e. The Supreme Court itself has emphasized the legislative history indicating that Congress did not intend this result. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 549 (1978) (emphasizing lawmakers' expectation that "*every effective combination or agreement to carry out a program against the public interest*" in the insurance business would remain "*prohibited*" under the MFA) (emphasis in original). To be sure, the statute's terms must still be applied as written. But the foregoing at least demonstrates the wisdom behind the Supreme Court's unambiguous and binding instruction that the MFA should be "construed narrowly," *Pireno*, 458 U.S. at 126.

As noted above, the Supreme Court has imposed this narrow construction through a careful effort to distinguish the "business of insurance" under the MFA from the general business of insurers. As the Court put it in *Royal Drug*, "the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the Commerce Clause. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only 'the business of insurance.'" 440 U.S. at 218 n.18 (citation omitted). Or, in its most famous formulation, "[t]he exemption is for the 'business of insurance,' not the business of 'insurers.'" *Id.* at 211.

Thus, in "*Royal Drug* and later in *Pireno* the Supreme Court identified three criteria for determining whether a practice is part of the 'business of insurance':

> *first,* whether the practice has the effect of transferring or spreading a policy holder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured, and *third*, whether the practice is limited to entities within the insurance industry."

Areeda & Hovenkamp ¶219b1 (quoting *Pireno*, 458 U.S. at 129)). The manifest point of these criteria is to recognize that "[i]nsurance companies may do many things which"—though they are (necessarily) carried out in the course of performing the business of insurance because of the company that is doing them—are nonetheless not themselves "the business of insurance" within the meaning of the MFA. *See Royal Drug*, 440 U.S. at 211 (quoting *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969)). Each of the three factors helps to distinguish what insurers do in their capacity as generic, profit-maximizing companies from that which they undertake uniquely within the business of insurance. Put another way, the bigger question—to which each of these inquiries points—is whether the practice at issue is addressed to insurance-specific issues or concerns, and not just a practice used across industries to make companies more profitable.

B. Under this framework, agreements between insurers and brokers may or may not be the business of insurance.

With this understanding in place, it should be clear that dealings that occur between insurance companies and brokers may or may not be the business of

insurance, depending on whether or not the allegedly anticompetitive practice at issue is addressed to insurance-specific concerns. Unfortunately, however, this point has been somewhat obscured by imprecise language in some lower-court cases placing insurance agents or brokers within the insurance industry for MFA purposes. Those cases are largely a response to the Supreme Court's holding in *Royal Drug*, which seemed to categorically *exclude* agreements with third-party, non-insurance firms from the business of insurance. But the key point is that merely placing both insurers and insurance agents within the insurance industry does not suffice to make *all* their dealings the business of insurance; while dealings with extra-industry actors can generally be eliminated from the business of insurance under *Royal Drug*, dealings among intra-industry actors might or might not be the business of insurance, and so courts must examine the particular *practice* at issue and be careful not to overread prior and more generic statements about insurance agents.

To begin, observe that—even though *Pireno* eventually clarified that none of its three criteria was "necessarily determinative in itself," 458 U.S. at 129—the Supreme Court very strongly emphasized what would become the third *Pireno* criterion in both *Royal Drug* and *Pireno* itself. *Royal Drug* concerned the practice of insurance companies making discount deals with pharmacies in exchange for reimbursement rules that tended to direct their insureds to those firms. *See* 440 U.S. at 209. And while the Court did discuss what would become the first two *Pireno*

factors (*i.e.*, this practice's connection to risk-spreading and the insurer-policyholder relationship), it seemed to place far greater emphasis on the fact that pharmacists were "wholly outside the insurance industry." *See, e.g.*, *id.* at 231 (narrow application of MFA was "particularly appropriate … because the Pharmacy Agreements involve parties wholly outside the insurance industry"). Likewise, *Pireno* concerned the use of peer review boards to determine the propriety of and reimbursement for chiropractic services. 458 U.S. at 123-24. And the Court again treated it as quite relevant that the peer review board was not an insurance-industry player, even though it was engaged in a function that would have looked quite like the business of insurance (namely, claims adjustment) to the extent that function was carried out internally by the insurance company. *See id.* at 132-34 & n.8.

Thus, particularly between *Royal Drug* and *Pireno* (and even thereafter), lower courts felt compelled to decide whether insurer dealings with agents should be considered in or out of the insurance industry—a question *Royal Drug* had explicitly reserved. *See Royal Drug*, 440 U.S. at 224 n.32. And many concluded that, at least for this purpose, they could be viewed as intra-industry deals, and so might be "within the immune category." Areeda & Hovenkamp ¶219b5.

But here is where the confusion has crept in: The fact that *agreements* between insurance companies and brokers occur within the business of insurance does not settle the question whether the *practice* that may be at issue in any such

agreement is itself "the business of insurance." For one thing, *Pireno* explicitly directs courts to consider "the practice" embodied in the agreement, not just the parties to that agreement. *See supra* p.3. For another, the parties to the agreement are only one of the three *Pireno* criteria, and *Pireno* itself instructs that no factor is determinative. *Supra* pp.9-10. Thus, identifying such agreements as occurring within the insurance business is only the first step—it rejects the proposition that such agreements are categorically "not part of the exempt business of insurance" because agents are only generic salespeople, but it does no more than that. *See* Areeda & Hovenkamp ¶219b5.

The upshot is that *some* insurer/agent dealings will be the business of insurance and some will not, depending on whether they spread risk, go to the insurer-policyholder relationship, and ultimately involve concerns unique to the insurance business. And that is as it should be, because there is no good reason to categorically apply the Sherman Act (or not) to certain practices that are allegedly the business of insurance based solely on the characterization of one of the two parties involved.[2] Indeed, it has now become quite clear that "[t]he 'business of

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[2] To this end, it is worth noting that—despite its friendly attitude towards narrowing the MFA generally—the leading treatise is relatively critical of the reasoning in *Royal Drug* and *Pireno* to the extent that the practices at issue do seem generally responsive to concerns arising particularly within the insurance business. *See* Areeda & Hovenkamp ¶219b1-b2. For example, the *Royal Drug* practice involved managing the moral hazard that arises when insureds have a choice of

insurance' standard is a conduct-oriented rather than an entity-oriented test." 2-14 Am. Bar Ass'n, *Antitrust Law Developments* 14G (8th ed. 2017). But it took at least until the Supreme Court's decision in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 781 (1993), for the law to settle on that view, and there is thus a significant danger of overreading the language in earlier cases about the status of insurance agents or brokers as such.

In fact, even putting aside the express instruction in *Pireno* not to treat any factor as determinative, it is clear from examples that the Supreme Court has discussed that dealings exclusively involving participants in the industry may or may not be the business of insurance for purposes of the MFA. For example, the Supreme Court has expressly held that a merger "*between two insurance companies*" is not the business of insurance. *See Royal Drug*, 440 U.S. at 215 n.13 (emphasis added) (discussing holding of *Nat'l Sec.*, 393 U.S. at 453). And both the majority and dissent in *Royal Drug* seemed to agree that certain arrangements between an insurance company *and its own employees* would not be the business of insurance

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providers for an insured service. And the *Pireno* practice involved an activity that was almost indisputably the business of insurance except insofar as it occurred at an outside peer review board. All this demonstrates, however, is that the first two *Pireno* factors tend to be more relevant than the third in identifying practices that address insurance-specific concerns—a point that was eventually confirmed by the Court's holding in *Hartford Fire*.

for purposes of the Act. *See* Areeda & Hovenkamp ¶219b1 (*Royal Drug* majority viewed "insurer's dealings with employees or banks" as "surely not 'the business of insurance'" and dissenters "[a]dmitt[ed] the parallel between insurer agreements with providers and with banks or employees," but "emphasize[d] the distinction of degree"). That is surely right: If two insurance companies who represented the largest employers in a town conspired to fix their labor costs or practices, the resulting practice would involve only insurance-industry players (*i.e.*, insurance firms and insurance employees) but also would not involve the business of insurance in any meaningful sense. And because a company's relationship to its own employees is *at least* as close as its relationship to its independent brokers, the same observation must apply *a fortiori* to dealings with brokers or agents.

The ultimate point is that this Court should view with caution any putative quotations from the cases or from discussions of them in scholarly materials that seem to suggest a categorical rule that "'routine dealings between insurers and brokers or agents do constitute the business of insurance even if that relationship may not be distinctively different from ordinary relationships with dealers marketing a product or service.'" *See* Op. 12 (quoting *Sanger Ins. Agency v. HUB Int'l., Ltd.*, 802 F.3d 732, 744 (5th Cir. 2015)). Indeed, however such an explanation of the law might be phrased, it *cannot* be correctly stating a categorical rule, because both

Pireno and *Hartford Fire* eventually rejected just such a categorical, party-based approach.

Notably, many of the lower court cases to which these quotes point predate *Pireno* and/or *Hartford Fire*, and almost all such quotes ultimately point back to two circuit-court cases that were decided *between* the Supreme Court's decisions in *Pireno* and *Royal Drug*—explaining their (now overstated) emphasis on the intra-industry character of insurer/broker relationships, and their failure to discuss the essential role of risk-spreading in identifying the business of insurance. *See Owens v. Aetna Life & Cas. Co.*, 654 F.2d 218, 226 (3d Cir. 1981); *Thompson v. N.Y. Life Ins. Co.*, 644 F.2d 439, 444 (5th Cir. Unit B May 1981). This case thus represents a good opportunity for this Court to clarify that the relevant precedents do not create any kind of categorical rule that dealings between insurers and insurance agents or brokers are the business of insurance, and that any such rule would run afoul of binding Supreme Court precedent.

C. The District Court's reasoning is incorrect and dangerous.

In any event, the district court's reasoning in this case must be rejected because it collapses the business of insurance and the business of insurers in the precise way that the Supreme Court's precedents have endeavored to avoid. The court's rationale appears to have been that, because the practice of exclusive dealing with brokers causes them to originate *more* policies for Florida Blue, the practice

should be understood as both risk-spreading and integral to the policy relationship for purposes of *Pireno*'s first two criteria. *See* Op. 8 ("Florida Blue's brokers increase the number of policyholders, therefore spreading the risk. It is hard to imagine a relationship more squarely at the core of the business of insurance[.]"); *id.* at 15 (similar); *id.* at 16 (concluding that second *Pireno* inquiry favored Florida Blue with "little discussion" because "brokers agreed to focus all their entrepreneurial skills on selling only Florida Blue's insurance products"). This is a dangerous notion. Nearly every business practice is designed to increase a firm's volume of revenue. As applied to the insurance industry, this means that every practice that matters will almost certainly "spread risk" and be "integral to the policyholder relationship" in the narrow sense that it increases the number of policyholder relationships formed. If that is all it takes to meet *Pireno*'s test, there will be nothing left of the distinction between the business of insurance and the business of insurance companies.

A few simple examples make this clear. First, the district court's idea that any practice that leads to more policies spreading risk more thinly will suffice is in the teeth of the Supreme Court's holdings regarding cost controls in *Royal Drug* and *Pireno*. Both practices would have allowed the relevant insurers to contain the costs of insurance, thereby reducing policy premiums and expanding the number of contracts it would expect to sign with policyholders. But in both cases, the Supreme

Court said that this was not enough. *See Royal Drug*, 440 U.S. at 214-15 (specifically identifying cost-minimization as insufficient); *see also Pireno*, 458 U.S. at 131-32 (same). It is hard to see how the district court's rationale can be distinguished from these bedrock holdings.

Moreover, consider the example of a merger, which the Supreme Court specifically addressed and rejected in *Royal Drug*. *See* 440 U.S. at 215 & n.13. Insurance industry mergers manifestly result in a larger and more thinly spread risk pool. And when a purchasing insurance company swallows a rival, it will necessarily form many new policy relationships. But the Supreme Court has never understood the inquiry in this thin sense. As the Court explained in *National Securities*, the "set of problems" entailed in regulating corporate mergers is far different in its focus and far broader in scope than the set of problems that arises in "attempting to regulate … the insurance relationship." 393 U.S. at 460. This means that what the MFA immunizes are practices that *themselves* address issues related to risk-spreading or the insurer/policyholder relationship, not practices that simply result in *more* such relationships. Practices that directly affect "the type of policy which could be issued," or "its reliability, interpretation, and enforcement," are the business of insurance, *id.*; practices that cause generic, second order effects on the business of the insurance company—particularly effects like "growth"—cannot suffice.

Under this approach, it is possible for many practices involving brokers still to qualify as the business of insurance. For example, a practice of terminating brokers if too large a proportion of their clients have pre-existing conditions would be responsive to insurance-specific concerns. Likewise, an agreement among companies *not* to reward brokers for delivering healthier consumers—or, more broadly, an agreement on how to regularize compensation incentives for brokers to avoid a spiraling competition for the healthiest patients—might be responsive to some of the unique moral hazards that appear in the insurance industry. In each such case, however, there must be a relatively immediate connection between the "practice" at issue and the risk profile of the insurer and/or the nature of the policy relationship between insurer and insured. Conversely, the correct analysis is not characterized by asking simply whether the practice creates more business for the insurer, and then accepting this as sufficient in itself to constitute the spreading of risk or an integral aspect of the policyholder relationship.

As applied to exclusive deals made by a monopolist with industry gatekeepers like brokers, the consequences of this analysis are clear. Such deals will tend to prevent entry and thereby increase the number of policyholders a monopolist like Florida Blue will have. But this incentive to exclude potential competition is utterly disconnected from insurance-specific concerns. More importantly, exclusive broker deals do not themselves result in risk spreading or alter the risk profile of insurers,

nor do they affect the policy relationships of Florida Blue in any way except for tending to create more of them. For that reason, the practice of requiring brokers to write exclusively for Florida Blue is not a part of the business of insurance. It is, instead, a part of the business of sales or marketing more generally, and so remains within the province of the federal antitrust laws, even if the alleged wrongdoer happens to be an insurance company.

II. Exclusive Dealing By A Monopolist With Industry Gatekeepers Qualifies As Coercion Under §1013(b).

Even if this Court were to believe that the exclusive deals at issue here constitute the business of insurance, they would still fall within the language of the MFA preserving the applicability of the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *See* 15 U.S.C. §1013(b). Although the courts have not had much occasion to interpret this exception—particularly the language regarding "coercion"—it must at least embrace actions taken by monopolists that put direct pressure on other economic actors to act in ways they otherwise would not so as to exclude others from the market. *See, e.g.*, Joseph E. Coughlin, *Losing McCarran Act Protection Through "Boycott, Coercion, Or Intimidation,"* 54 Antitrust L.J. 1281, 1295 (1985) (explaining that "courts have limited the 'coercion or intimidation' exemption to acts that eliminate the choice of a market participant as to with whom he may deal."). As we explain below, this is the best way to understand the words of the statute in

context. And, in any event, this Court cannot accept the district court's far-too-narrow approach, under which the enforcement of any *otherwise* lawful contract cannot be coercive for purposes of the MFA.

A. Coercion is properly understood to include certain exercises of market power designed to exclude others from the market.

Most of the decisions respecting §1013(b) concern the term "boycott." For example, the Supreme Court first applied that term in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541-55 (1978), and then gave it a comprehensive definition in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 800-11 (1993). In contrast, there are very few cases concerning the term "coerce" or "coercion." But the Supreme Court's definition of a boycott itself refers to coercion: The elements of a boycott include a collective decision "refusing to hold relations" with a target "so as to punish him for the position he has taken up, or *coerce him into abandoning it*." *Hartford Fire*, 509 U.S. at 801 (emphasis added). Given both this overlapping definition and their statutory proximity, *amici* believe that the correct interpretation of the MFA's coercion term ought to be derived from the concept of a boycott and should refer to a similar class of anticompetitive behavior—albeit without the requirement for collective action that is the unique hallmark of a boycott. That reading corresponds to the plain meaning of the text, to the context of the surrounding statutory language, and to the applicable canons of construction.

As an initial matter, the term "coercion" includes "[c]onduct that constitutes the improper use *of economic power* to compel another to submit to the wishes of one who wields it." *Black's Law Dictionary* 315 (10th ed. 2014) (emphasis added). And, in general, that definition is adequate to the task of understanding the MFA. If a monopolist uses its market power to compel another to act in a way that party would otherwise refuse to act, such action should generally be viewed as falling within the coercion exception to the MFA, subject to a few important caveats.

First, we would caution against the risk of understanding this coercion too broadly or colloquially. When a monopolist refuses to sell a product to another at the competitive price—insisting on the inflated, monopoly price instead—that may coerce the party into paying a supracompetitive price or into finding a less convenient supplier, but that is not coercive within the meaning of the MFA. *See, e.g.*, *Hartford Fire*, 509 U.S. at 802 (holding that "concertedly exacting terms like those which a monopolist might exact" is "not engaging in a boycott because" it is "not coercing anyone, at least in the usual sense of that word" (citations omitted)). Indeed, at that level of abstraction, all economic behavior undertaken by a monopolist is likely to be viewed as "coercive," and there is no reason to suppose that Congress intended the "coercion" exception to the MFA to swallow its rule. *See, e.g.*, *Barry*, 438 U.S. at 559-60 & n.6 (Stewart, J., dissenting) (cautioning

against a "reading of [§1013(b) that] would plainly devour the broad antitrust immunity bestowed by [§1012(b)]").

For similar reasons, it would generally not be coercion for a monopolist to refuse to sell their product to someone with whom they would prefer not to deal, or to refuse a buyer's preferred terms for that sale itself. The essence of coercion under the MFA is the effort to use one transaction to get a counterparty to "submit to the wishes" of the other regarding some separate matter—in the sense of changing the coerced party's behavior outside the transaction itself. Roughly speaking, this parallels the way in which a "boycott" is designed to punish a party for a position that the boycotters want that party to abandon by refusing to deal with the punished party *at all*. Put another way, a coercive demand will require the counterparty to act or to refuse to act in some way that that party would otherwise reject and that is collateral to the decision to engage in the transaction itself. *See Hartford Fire*, 509 U.S. at 803-06 (discussing a similar requirement in the boycott context). Practices like refusing to sell a firm an essential input that they need for their business at a discount, or requiring bulk purchases, or refusing to sell to it at all, can certainly harm that firm without thereby being coercive. It is only in combining that conduct with a collateral demand—like refusing to sell the part unless the counterparty refrains from dealing with competing firms or potential future competitors—that the demand becomes coercive.

These requirements bring "coercion" close in meaning to boycott, but also preserve an independent meaning for every term in the statute. Unlike a boycott, coercion need not involve collective action of any kind. *See, e.g.*, Areeda & Hovenkamp ¶220a ("[T]he terms 'coercion' and 'intimidation' do not ordinarily require concerted conduct at all. Further, the structure of the statute appears to condemn *either* an agreement by multiple actors to boycott, coerce, or intimidate; or an actually completed act of boycott, coercion, or intimidation even if that act is unilateral."). Nor must coercion turn on a refusal to deal—it is possible to imagine a defendant engaging in coercion by threatening to take certain actions (like buying up a necessary input or dropping prices to predatory levels) unless another party accedes to its demands. But this is as it should be; "coercion" should be expected to have a meaning that is similar to, but not *exactly* the same as, "boycott." That will simultaneously respect two of the best known canons of statutory construction: (1) the "surplusage canon," under which "courts avoid a reading that renders some words altogether redundant," Antonin Scalia & Bryan A. Garner, *Reading Law* 176 (2012) (citing *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.")); and (2) the "associated words" (or *nocitur a sociis*) canon, under which "words grouped in a list should be given related meanings." *Id.* at 195 (quoting *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977)).

The correct reading of the MFA's coercion exception easily captures the situation at hand. Absent coercion, an insurance broker would have no reason to refuse to sell Oscar's policies to potential insureds—the broker's business is generally served by having a variety of policies for customers to choose from, and the broker could easily lose sales entirely by having an inadequate variety of products available. Florida Blue can, however, exert its alleged monopoly power to force brokers to write *only* Florida Blue policies, on pain of losing access to Florida Blue's products entirely. Notably, this threat is the unilateral-conduct version of a classic boycott: Florida Blue's threat is that it will stop doing business of *any* kind with a broker if that broker refuses to route all ACA policy sales to Florida Blue. If this does not constitute coercion, it is hard to imagine something that does.

B. The District Court's rule is plainly incorrect.

In any event, the district court's version of the coercion analysis under the MFA cannot be accepted. The district court's reasoning on this issue is somewhat opaque, but it appears to have endorsed at least one of two dubious propositions. At first, the court's discussion suggests that the enforcement of Florida Blue's exclusivity contracts cannot be coercive because exclusivity contracts are not *per se* unlawful under the antitrust laws. *See, e.g.*, Op. 21-22 (discussing this Court's holding in *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015)). Later, however, the court's discussion seems to suggest that unless a contract violates a law

entirely apart from the Sherman Act, its enforcement cannot amount to coercion. *See* Op. 22-23 (holding that "[i]f a contractual relationship is lawful, a party may enforce the agreement without those efforts morphing into coercion," even if those contracts are used by monopolist for "the maintenance of monopoly power"). Neither proposition is remotely correct.

First, the rule that a contract is not coercive unless it would be a *per se* violation of the antitrust laws makes little sense, is in the teeth of Supreme Court precedent, *see Barry*, 438 U.S. at 542-43 (rejecting this precise rule in defining boycotts), and appears to be entirely backwards. Recall that, at least in the business context, coercion is achieved through "the improper use of *economic power*." *Supra* p.21. But unlike rule-of-reason cases, cases alleging *per se* violations frequently do not require proof of market power at all. If anything, a practice like exclusive dealing, which is illegal *only if* carried out by a holder of monopoly power, is just the sort of thing the antitrust laws treat as the "improper use of economic power." By contrast, price-fixing, market division, agreements not to compete for employees, and a variety of other conduct will violate the Sherman Act without regard to market power, and so are unlikely to constitute coercion for purposes of the MFA, even though they fall within the *per se* rule.

This leads to the district court's second suggestion, which is that a contract must violate some law other than the Sherman Act in order for its enforcement to be

coercive. There is nothing in the statutory text or the ordinary meaning of the term coercion that suggests this unlikely rule, and it is unclear why Congress would have acted so carefully to preserve the operation of the antitrust laws only for practices that are already unlawful under another statute. In fact, the legislative history of §1013(b)—and the very structure of the Act—suggest that Congress retained the effect of the antitrust laws for acts of "boycott, intimidation, or coercion" precisely so that these actions would remain unlawful *even if* they were permitted by state laws. *See Barry*, 438 U.S. at 549-51. Accordingly, this Court should not endorse a rule that would render §1013(b)'s important backstop against coercive conduct into merely a reinforcement for laws that already prohibit the relevant conduct on their own.

CONCLUSION

This court should reverse the judgment of the district court, find that the exclusive-dealing practice at issue is not within the business of insurance, and further hold that this practice constitutes coercion for purposes of §1013(b).

Dated: December 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rules 29-2 and 28-1(m), the undersigned hereby certifies:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,447 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman Font.

Dated: December 23, 2019 /s/ Eric F. Citron

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2019, 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/ Eric F. Citron

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