No. 19-14096

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OSCAR INSURANCE COMPANY OF FLORIDA,
Plaintiff-Appellant,
v.
BLUE CROSS AND BLUE SHIELD OF FLORIDA, FLORIDA HEALTH CARE PLAN INC., and HEALTH OPTIONS INC.,
Defendants-Appellees.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 28.1, the undersigned certifies that the following persons and entities are known to him to have an interest in the outcome of this case or have participated as attorneys or judges in the adjudication of this case:

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50. Wu, Timothy (Amicus Curiae)

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: January 6, 2020

/s/ Patrick M. Kuhlmann

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STATEMENT OF INTEREST

The United States enforces the federal antitrust laws and has a strong interest in their correct interpretation. In particular, the United States seeks to ensure that antitrust exemptions are interpreted narrowly and no more broadly than necessary to carry out their purposes, given that antitrust law "is a central safeguard for the Nation's free market structures." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 502 (2015). That is especially important with the McCarran-Ferguson Act's antitrust exemption because, even when interpreted narrowly, antitrust experts have criticized the exemption as unnecessary to advance its principal purpose. Antitrust Modernization Commission, *Report and Recommendation* 351 (2007), *available at* https://govinfo.library.unt.edu/amc/commission_documents.htm.

We file this brief, under Federal Rule of Appellate Procedure 29(a), to advance this important interest. The district court's sweeping interpretation of the McCarran-Ferguson exemption disregards Supreme Court precedent and would deny Floridians purchasing health insurance the protections of federal antitrust law. We urge the Court to reverse the district court.

STATEMENT OF ISSUES

Whether the district court erred in holding that the exclusivity policy of defendants/appellees (collectively, Florida Blue) constitutes the "business of insurance."

Whether the district court erred in concluding that Florida Blue's alleged conduct to enforce broker exclusivity for individual health insurance is not "coercion," and whether it would be error to conclude that "coercion" requires concerted action.

STATEMENT

1. For decades after *Paul v. Virginia*, 8 Wall. 168 (1869), it was widely believed that the Commerce Clause did not reach the insurance business, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414 (1946). In *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), however, a case involving antitrust claims, the Supreme Court clarified that insurers operating across state lines engage in interstate commerce. The Court also held that the Sherman Act applies to the insurance industry, rejecting the argument that Congress intended otherwise.

"Th[is] decision provoked widespread concern that the States would no longer be able to engage in effective taxation and regulation of the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). Indeed, following *South-Eastern Underwriters*, insurers refused to pay state taxes and to comply with state regulations on the ground that the laws might be held unconstitutional. *Grp. Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 218 n.16 (1979). Unsurprisingly, "Congress moved quickly," passing the McCarran-Ferguson Act within a year. *St. Paul Fire*, 438 U.S. at 539.

In light of the Court's interstate commerce holding, the "primary purpose underlying the Act" was to "restore to the States broad authority to tax and regulate the insurance industry." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 508 (1993). Accordingly, the Act states that "[n]o 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 imposed a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

In addition, and as relevant here, Congress's "secondary goal . . . was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." *Fabe*, 508 U.S. at 505.[1] Congress considered a blanket exemption for the insurance industry, *Royal Drug*, 440 U.S. at 219, but decided instead that the antitrust laws "shall be applicable" unless certain conditions are met, 15 U.S.C. § 1012(b). Specifically, the exemption applies only when the challenged conduct (1) is part of the "business of insurance"; (2) is "regulated by state law"; and (3) does not involve a "boycott, coercion, or intimidation." 15 U.S.C. § 1012(b); *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1330 (11th Cir. 2004).

Consistent with this history, the Supreme Court has instructed that the Act "must be construed narrowly." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *see also Royal Drug*, 440 U.S. at 231 (same). The Act embodies "a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws," *Royal*

[1] Congress was concerned that potentially procompetitive practices, such as the collection of data on historical losses, would be condemned under then-current antitrust law. *See, e.g.*, 90 Cong. Rec. A4407. Today, however, it is clear that "such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason analysis that would fully consider the potential procompetitive benefits of such conduct and condemn it only if, on balance, it was anticompetitive." Antitrust Modernization Commission, *supra*, at 351.

Drug, 440 U.S. at 220, and provides "only a narrow exemption," *Fabe*, 508 U.S. at 505.

In crafting the antitrust exemption, Congress's "primary concern . . . was that cooperative ratemaking efforts be exempt from the antitrust laws" given "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. The exemption would "allow insurers to share information relating to risk underwriting and loss experience without exposure to federal antitrust liability." *Gilchrist*, 390 F.3d at 1330. Thus, this Court has determined that ratemaking and the performance of an insurance contract are the "business of insurance." *Id.* at 1331. The "center" of Congress's concern was protecting "intra-industry cooperation in the underwriting of risks," not immunizing arrangements as to other aspects of the business. *Pireno*, 458 U.S. at 133 (internal quotation omitted).

2. Plaintiff/Appellant Oscar Insurance Company of Florida (Oscar) challenges Florida Blue's "exclusivity policy," whereby Florida Blue prohibits its brokers from selling plans offered by competing insurers.

Doc. 75 at 3, 25 (Am. Compl. ¶¶ 5, 64).[2] The policy is unique to Florida Blue: neither other Florida insurers nor insurers in other states—including sister Blue Cross Blue Shield entities—engage in broker exclusivity. *Id.* at 29, 45-46 (Am. Compl. ¶¶ 74, 126).

Oscar contends that the exclusivity policy has harmed competition in the sale of individual health insurance plans compliant with the Patient Protection and Affordable Care Act of 2010 (individual plans) in the Orlando area. *Id.* at 29-31 (Am. Compl. ¶¶ 76-79). Oscar alleges that, given Florida Blue's dominant market share, the policy forecloses its competitors from brokers responsible for selling the vast majority of individual plans in the Orlando area. *Id.* at 4-5 (Am. Compl. ¶ 7). By closing off "a critical sales channel," *id.*, Florida Blue raises barriers to entry and limits other insurers' ability to compete for policyholders, *id.* at 33-34 (Am. Compl. ¶ 90). Oscar alleges, among other anticompetitive effects, that Florida Blue's conduct has caused consumers to pay more for health insurance, limited consumer choice, and impeded innovation. *Id.*

[2] In this brief, the United States accepts as true the facts alleged in Oscar's complaint. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012).

at 43-44 (Am. Compl. ¶¶ 119, 121). Oscar claims that Florida Blue has violated Sections 1 and 2 of the Sherman Act, as well as parallel provisions of Florida antitrust law.

Oscar also alleges that Florida Blue enforces its exclusivity policy through "coercion and intimidation." *Id.* at 46-47 (Am. Compl. ¶ 128). Florida Blue has threatened to terminate permanently any broker appointed by Oscar, meaning "brokers face losing the right to sell Florida Blue plans *in all product lines* throughout *the entire State of Florida* if they decide to sell Oscar plans in *a single county in the state*." *Id.* at 4 (Am. Compl. ¶ 6). Certain brokers accede to exclusivity because they "have offices in other areas of Florida and multiple product lines, all of which they stand to lose if terminated by Florida Blue." *Id.* at 37 (Am. Compl. ¶ 101).

According to Oscar's allegations, Florida Blue has selectively enforced its exclusivity policy against brokers contracting with Oscar. *Id.* at 26-28 (Am. Compl. ¶¶ 68-70). Florida Blue also has threatened to withhold commission payments from brokers who violate the exclusivity policy. *Id.* at 23, 46-47 (Am. Compl. ¶¶ 56, 128). After Oscar entered the Orlando market, Florida Blue updated its exclusivity policy, directing its brokers to sign new exclusivity forms. *Id.* at 23-25 (Am. Compl. ¶¶ 58, 64).

3. Florida Blue moved to dismiss the complaint on the grounds that (1) the Act exempted Florida Blue's exclusivity policy from federal and Florida antitrust law and (2) Oscar failed to allege adequately any violation of federal or Florida antitrust law. The United States filed a Statement of Interest arguing that the Act did not exempt the exclusivity policy from the Sherman Act. Doc. 89.

The district court dismissed the complaint based on the Act. It concluded that the policy constituted the business of insurance because, *inter alia*, it enables Florida Blue "to increase the number of policyholders." Doc. 113 at 8 (Op. 8). It determined that the state-action element was "not a high bar," and was satisfied because "Florida regulates the insurance industry in general and the relationship between principles and their agents in particular." *Id.* at 19 (Op. 19). It decided that the policy did not involve "coercion" or "intimidation" because, in its view, Florida Blue was merely enforcing lawful contracts. *Id.* at 21 (Op. 21).

The court also concluded that, because the policy was exempt from federal antitrust law, it also was exempt from Florida antitrust law. *Id.* at 19 (Op. 19); Fla. Stat. § 542.20 (any conduct "exempt from the provisions of the antitrust laws of the United States is exempt from" Florida antitrust law).

SUMMARY OF ARGUMENT

The McCarran-Ferguson Act creates "only a limited exemption" from federal antitrust law. *Grp. Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 218 n.18 (1979). In concluding that Florida Blue's exclusivity policy comes within the exemption, the district court disregarded the Supreme Court's instruction that the exemption "must be construed narrowly." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). It ignored the Court's analysis of the criteria for determining whether a practice constitutes the "business of insurance," fashioning instead its own standards that would shelter practices plainly outside the "business of insurance." It decided that, contrary to how the Court has used the term, Florida Blue's alleged leveraging of its market power in other markets, and other coercive conduct, to enforce broker exclusivity against Oscar does not constitute "coercion." The district court's erroneous decision denies Floridians purchasing individual plans—and, potentially, other consumers—the vital protections of federal antitrust law, and should be reversed.

ARGUMENT

I. The District Court Erred in Concluding That Florida Blue's Exclusivity Policy, as Alleged, Is the "Business of Insurance"

In *Royal Drug* and *Pireno*, the Supreme Court "identified three criteria relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws": (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 insurer and 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) (citing *Grp. Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 215, 220-21, 231 (1979)). "None of these criteria is necessarily determinative in itself." *Id.* Because the Sherman Act embodies "a longstanding congressional commitment to the policy of free markets and open competition," the

Supreme Court has construed these criteria narrowly. *Id.* at 126 (internal quotation omitted).

In concluding that Florida Blue's exclusivity policy is "the business of insurance," the district court misapplied this framework. As a threshold matter, the court repeatedly analyzed the entities involved, not the particular practice at issue, a fundamental error undercutting its conclusion. It also misinterpreted the risk-transfer and integral-to-the-policy-relationship criteria, disregarding the canon of narrow construction, and crafting its own standards. Properly evaluated in light of *Pireno* and *Royal Drug*,[3] Florida Blue's exclusivity policy does not transfer risk or figure as an integral part of the policy relationship between the insurer and the insured. Consequently, it does not fall within the business of insurance.

A. The District Court Erred in Focusing on the General Role of Brokers Rather Than on Particular Practices

In applying the *Pireno* factors, the district court focused on the role of brokers generally, not the exclusivity policy specifically, a fundamental

[3] The Supreme Court has not addressed specifically whether agreements between agents and insurers constitute the business of insurance. *Royal Drug*, 440 U.S. at 224 n.32 ("whatever may be the status of agreements between an insurer and its agents").

error vitiating its conclusions. The Supreme Court "explicitly framed the question as whether 'a particular practice,'" rather than an entity or the routine dealings of an entity, "is part of the 'business of insurance.'" *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 781-782 (1993) (internal quotation omitted).

Though it identified the "issue" as "whether Florida Blue's exclusivity agreements with its brokers constitute the business of insurance," Doc. 113 at 6 (Op. 6), the court nonetheless repeatedly analyzed the conduct of brokers generally. For example, in concluding that Florida Blue satisfies the risk-transfer criterion, it stated that "[i]t is hard to imagine a relationship more squarely at the core of the business of insurance." *Id.* at 8 (Op. 8); *see also id.* at 15 (Op. 15) ("The relationship between the insurer and its brokers is at the core of the business of insurance."). Similarly, in concluding that Florida Blue satisfies the integral-to-the-policy-relationship criterion, it stated that "brokers employed by Florida Blue provide invaluable services to customers." *Id.* at 16 (Op. 16); *see also id.* (discussing "[t]he services provided by Florida Blue's brokers"). The court even concludes with a categorical assessment: "The brokers act within the business of insurance." *Id.* at 23 (Op. 23).

True or not, none of the court's categorical and general conclusions about brokers are relevant to whether the exclusivity policy meets the *Pireno* factors. "The cases confirm that 'the business of insurance' should be read to single out one activity from others, not to distinguish one entity from another." *Hartford Fire*, 509 U.S. at 781. By looking beyond the conduct at issue, the court created a loophole beyond what Congress intended.

B. Florida Blue's Exclusivity Policy Does Not Transfer Risk

1. Florida Blue's exclusivity policy does not "have the effect of transferring or spreading a policyholder's risk." *Pireno*, 458 U.S. at 129. "The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and the transfer is complete at the time that the contract is entered." *Id.* at 130. An arrangement that is "logically and temporally unconnected to the transfer of risk accomplished by [the insurance policy]" does not meet this criterion. *Id*.

The exclusivity policy is logically and temporally unconnected to the transfer of risk from any policyholder to Florida Blue. The vehicle for risk transfer is the insurance policy between Florida Blue and a policyholder. The exclusivity provision is part of a separate agreement between a broker and Florida Blue; it does not involve a policyholder, and it does not transfer risk. Likewise, the threats of withheld commissions and permanent termination are entirely separate from the transfer of risk through the writing of specific policies.

2. The district court disregarded this analysis from *Pireno* and *Royal Drug*, defining risk transfer in a singular and sweeping way. Specifically, it reasoned that the exclusivity policy transfers risk because it prevents Oscar from "siphoning off ACA consumers." Doc. 113 at 12 (Op. 12). Put differently, "Florida Blue's brokers increase the number of policyholders, therefore spreading the risk." *Id.* at 8 (Op. 8).

"Siphoning off" is not the right test. The inquiry mandated by the Supreme Court is whether a practice has "the effect of transferring or spreading a policyholder's risk," *Pireno*, 458 U.S. at 129, and a practice that increases market share need not involve any transfer of risk. For example, an insurer could prevent a competitor from "siphoning off" customers by acquiring that insurer, but the Court in *Royal Drug* made clear that a merger of two insurers is not exempt. 440 U.S. at 215 n.13. Similarly, an insurer could "increase the number of policyholders" by acquiring a "must-have" hospital and refusing to allow that hospital to be in its competitors' networks. *Cf. id.* at 215 (stating in a discussion of risk transfer that an insurer's acquisition of a chain of drug stores is not exempt).

More generally, virtually any exclusionary practice that violates Section 2 of the Sherman Act could be said to prevent the "siphoning off" of the monopolist's customers. *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004) (Section 2 bars "practices that have the effect of preventing or excluding competition within the relevant market"). The district court's standard, thus, would direct this critical criterion in every Section 2 defendant's favor, a result at odds with Congress's directive that the entire Sherman Act apply to the insurance industry unless the conditions of the exemption are satisfied. 15 U.S.C. § 1012(b) (establishing the applicability of "the Sherman Act"). Indeed, this reading essentially upends Congressional intent, at least in the Section 2 context, by applying the exemption precisely when a violation has occurred.

The Supreme Court's use of the term "spreading" does not justify the district court's sweeping test. "Both the 'spreading' and the 'underwriting' of risk refer in this context to the transfer of risk characteristic of insurance." *Pireno*, 458 U.S. at 130. That is, "a policyholder's risk" is "spread[]" when it is transferred from the policyholder to the insurer and thus pooled with other risks. *Id.* at 129; *cf. Royal Drug*, 440 U.S. at 211 ("The primary elements of *an* insurance contract are the *spreading* and *underwriting* of *a* policyholder's risk." (emphasis added)). To illustrate, this Court has concluded that a product "involve[d] the spreading—or underwriting—of a policyholder risk" when the seller assumed a risk for the policyholder. *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1247 (11th Cir. 1999).

Additionally, under the district court's standard, whether a practice spreads risk can depend on whether the defendant has market power. Here, for example, the exclusivity policy increases the number of policyholders only because "Florida Blue wrongfully uses its monopoly power to compel brokers to sell only its plans." Doc. 75 at 3 (Am. Compl. ¶ 5). Had a smaller insurer implemented the same policy, but with no increase in policyholders, the court's logic would have necessitated an alternate finding, namely, that the practice did not transfer risk.

This result cannot be squared with the text or purpose of the Act. For example, a new entrant's use of an exclusivity policy might be subject to antitrust scrutiny while Florida Blue would be exempt under the district court's holding. The dominant insurer—which has the market power potentially to harm competition and consumers—alone gets an antitrust free pass. Nothing in the statute or the case law supports such an illogical result.

3. Neither *Sanger* nor *Feinstein*, cited by the district court, supports its standard. Each case involved a group insurance policy under which members of a professional association could obtain coverage. *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732, 734 (5th Cir. 2015); *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 930 (9th Cir. 1983). Both associations obtained a single master policy, and their professionals (dentists in *Feinstein*, veterinarians in *Sanger*) received certificates of insurance under that policy. *Id*. Coverage was offered to a defined pool of all members of the association, including those in high-risk specialties, in exchange for exclusivity (in *Feinstein*, the broker had an exclusive relationship with the association; in *Sanger*, the broker

prohibited participating insurers from writing insurance for other group plans). *Sanger*, 802 F.3d at 743; *Feinstein*, 714 F.2d at 930, 932.

Thus, in both *Sanger* and *Feinstein*, the practices at issue directly affected the scope of the risk transferred under the group policy. *Sanger*, 802 F.3d at 743 (a lack of exclusivity "would alter the composition of policyholders in the Program"). Each practice brought a broader array of risks under a single policy; without exclusivity, the type of policy provided by the broker would have differed, and, in fact, high-risk prospective customers would have been denied coverage.[4]

By contrast, Florida Blue's exclusivity policy clearly is not logically or temporally connected to the transfer of risk. The policy "does not involve any restriction on the type of coverage offered or the risk profile of insurable entities." *Sanger*, 802 F.3d at 744 (quoting *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 357 (3d Cir. 2010)). The individual or a family seeking coverage presents the same risk of medical expenses whether the broker placing that risk is exclusive to Florida Blue or not. *Cf. In re Ins. Brokerage*, 618 F.3d at 357 (no risk transfer because

[4] Additionally, the *Feinstein* court analogized the group policy to "cooperative rate-making schemes." 714 F.2d at 932. No such analogy is possible in this case.

"the complaint asserts conduct affecting not *whether* or *to what extent* a prospective insurance purchaser would transfer its risk to an insurer, but merely to *which* insurer the risk would be transferred"). The absence of any effect on risk profiles means that, unlike in *Sanger*, there is no risk transfer, and that absence is "decisive" on the business-of-insurance issue. *Sanger*, 802 F.3d at 742 (quoting *In re Ins. Brokerage*, 618 F.3d at 356).[5]

C. Florida Blue's Exclusivity Policy Is Not Integral to the Policy Relationship

1. Florida Blue's exclusivity policy is not "an integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129. In fact, it is not a part of that relationship at all. This criterion looks to whether the practice is "distinct from [] contracts with [] policy holders" or whether it "closely affect[s] the reliability, interpretation, and enforcement of the insurance contract." *Id.* at 131-32 (internal quotations omitted). If the practice "is a matter of indifference

[5] In rejecting Oscar's argument that the exclusivity policy did not spread risk because, under the Patient Protection and Affordable Care Act of 2010, each customer is risk-neutral, the district court noted that the United States did not advance this argument in its Statement of Interest. Doc. 113 at 13 (Op. 13). The United States took—and takes—no position on the issue either way.

to the policyholder," the criterion is not met. *Id.* at 132. Applying these considerations, the exclusivity policy is decidedly not integral to the policy relationship.

To start, the exclusivity policy is "obviously distinct" from the insurance policy, standing as a separate agreement involving separate parties. *Id.* at 131. The broker is not a party to the insurance policy. Likewise, the policyholder is not a party to the broker/insurer agreement. That "separate contractual arrangement[]" does not affect the reliability, the interpretation, or the enforcement of the insurance contract, nor in any other respect. *Royal Drug*, 440 U.S. at 216.

Nor does the exclusivity policy affect an insured's eligibility for, or access to, any given policy. Doc. 75 at 45-46 (Am. Compl. ¶ 126). Exclusivity does not necessarily "affect the insurers from which a prospective purchaser could obtain coverage." *Sanger*, 802 F.3d at 745 (internal quotation omitted). If the prospective policyholder is unsatisfied with Florida Blue's insurance offerings, she may seek out other brokers (or utilize other sales channels), Doc. 75 at 45-46 (Am. Compl. ¶ 126), until finding one that offers a suitable alternative.

Finally, the exclusivity policy is unique to Florida Blue. If, as alleged, Florida Blue is the only insurer in the country to impose exclusivity on its agents, and enforces the policy only against certain insurers, *Id.* at 3, 26-27, 45-46 (Am. Compl. ¶¶ 5, 68-70, 126); Doc. 86 at 5 (Opp'n Mot. Dismiss 5), that suggests that the practice is not integral to policy relationships when the policies themselves are standardized across insurers by regulation, Doc. 75 at 13 (Am. Compl. ¶¶ 29-30). Where an insurer implements a unique practice, that practice must manifest in unique insurance offerings to overcome allegations that the practice is merely commercial and "the business of insurers."

2. In holding otherwise, the district court inexplicably focused on the exclusivity policy's effect on brokers rather than on policyholders. Doc. 113 at 16 (Op 16). This faulty analysis results from the court's reliance on *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. 1981), which held that an agreement barring an agent from outside employment constituted the business of insurance. The *Thompson* court ignored the agreement's effect on policyholders, and instead asked whether it "concern[s] the agent's insurance dealings as such." *Id.* at 444 (internal quotation omitted). It did offer that, if a practice concerns the

agent's insurance dealings, "this is a strong indication that the scheme has a bearing on the core relationship between insurer and insured." *Id.* This connection, however, is tenuous: a broker's "insurance dealings" (or her "activities []related to insurance," *id.*) may have only an indirect (at best) impact on the core relationship between the insurer and insured. *Pireno* establishes a much more rigorous standard, requiring that the challenged practice be "integral" to the relationship, not just have some "bearing" on it.[6]

More generally, *Thompson* does not govern this case. That case involved a different practice, the termination of an agent for, *inter alia*, engaging in outside employment while working as an agent. The analysis focuses on the "particular practice" at issue and not on the general dealings of the entity involved. *Hartford Fire*, 509 U.S. at 781-782.

[6] It is too much to say that the exclusivity policy is integral to a policyholder relationship because it benefits Florida Blue financially (and, for example, increases Florida Blue's reserves, thereby enhancing the reliability of its policies, or ultimately changes the premium for a policy). A financial benefit to an insurer alone does not bring a practice within the "business of insurance" because "every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a reliable insurer." *Royal Drug*, 440 U.S. at 216-17.

To the extent that *Thompson* is interpreted to extend to the facts at bar, it is inconsistent with, and does not survive, *Pireno*, decided one year later. The *Thompson* court did not apply the criteria distilled in *Pireno*, omitting the risk-transfer or insurance-entities criteria, and, as discussed above, not applying the integral-to-the-policy-relationship criterion. Instead, the court concluded that the restriction in question was the business of insurance, reasoning that it "did not force [the agent] to engage in activities unrelated to insurance," but instead incentivized the agent to "focus all of his entrepreneurial skills solely on selling insurance." 644 F.2d at 444. This framework is inconsistent with *Pireno* (and even with the prior guidance of *Royal Drug*) and accordingly is not good law. *See United States v. Mendez*, 528 F.3d 811, 817 n.3 (11th Cir. 2008) ("When a prior panel decision conflicts with a subsequent Supreme Court decision, we must depart from the prior panel precedent and follow the Supreme Court decision.").

None of the other cases cited by the district court rehabilitate *Thompson*. In dicta, *Sanger* generalized that "most courts have held that routine dealings between insurers and brokers or agents do constitute the business of insurance." 802 F.3d at 744. Even if true, *Hartford Fire*'s direction to analyze the "particular practice" precluded the district court from presuming that the exclusivity policy is the business of insurance based on generalizations about brokers. 509 U.S. at 781. Neither *Gilchrist* nor *Arroyo-Melecio* cites *Thompson*, and both involve very different practices—in *Gilchrist,* an agreement among insurers to limit coverage for autobody repairs to the cost of less expensive parts, 390 F.3d at 1328, and, in *Arroyo-Melecio*, a horizontal agreement among competing insurers "not to use brokers to sell policies," *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005). None of these cases endorse *Thompson*'s obsolete test of whether the "scheme concerned the agent's insurance dealings as such." *Thompson*, 644 F.2d at 444.[7]

[7] Oscar has not pressed at this time its argument that the challenged policy is insufficiently regulated by the state to qualify for the McCarran-Ferguson exemption. Br. 47 n.7. The text and history of the Act establish that there is sufficient state regulation only if the state regulates the particular practice at issue. The exemption applies only "*to the extent*" that the business is "regulated by State law," 15 U.S.C. § 1012(b) (emphasis added), indicating that it reaches no further than the state regulation. Congress did not authorize "regulation by private combinations and groups," thus creating an unintended gap where consumers are unprotected by state regulation or federal antitrust law. 91 Cong. Rec. 1483 (1945). The district court thus erred in concluding that Florida Blue's exclusivity policy "is regulated by state law" even though Florida law "does not specifically regulate exclusive brokerage agreements." Doc. 113 at 18 (Op. 18). The district court's supporting

II. The District Court Erred in Concluding That Oscar Has Not Alleged "Coercion"

Even if Florida Blue's exclusivity policy could constitute the business of insurance, and is regulated by Florida law, the Sherman Act remains applicable if the policy involves an "act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). In concluding that Oscar has not alleged coercion or intimidation, the district court again ignored the Supreme Court's guidance, and its ruling would weaken an "important safeguard" for consumers. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 547 (1978).

A. Florida Blue's Alleged Leveraging of its Market Power and Other Conduct to Secure Broker Exclusively Constitutes "Coercion"

Congress did not define "coercion" or "intimidation," and instead "employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act." *St. Paul Fire*, 438 U.S. at 541. It used "broad and unqualified" language, which should be given its full meaning. *Id.* at 550. That broad language plainly encompasses Oscar's allegation that Florida Blue leverages its market

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argument that the element is "not a high bar," *id*. at 19 (Op. 19), also runs headlong into the Supreme Court's rule of narrow construction.

power in other markets, and uses other coercive conduct, to compel broker exclusivity in the sale of individual plans in the Orlando area.

In the antitrust lexicon, "coercion" clearly includes this type of leveraging. For example, in a tying arrangement, the seller uses its "economic muscle" over one product to "*coerce* buyer acceptance of [another] product," a product that "he did not want or would have preferred to buy elsewhere on other terms." *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1415-16 (11th Cir. 1987) (emphasis added). As the Supreme Court explained, nearly contemporaneously with the Act's passage, "[b]y conditioning [the] sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953) (emphasis added); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-13 (1984) (same).

Confirming this view, the Supreme Court similarly conceptualized "coercion" in *Hartford Fire*. There, the Court concluded that the plaintiffs had pleaded a "boycott" by alleging that a group of reinsurers refused to write risks (1) on forms containing an objectionable term as well as (2) on forms not containing that term. *Hartford Fire Ins. Co. v. Cal.*, 509 U.S.

764, 810 (1993). The Court implied that this type of leveraging also constitutes "coercion."[8] It stated in dicta that "a concerted agreement to terms" alone (the first type of refusal alleged) does not constitute coercion or intimidation because such agreements "do not coerce anyone." *Id.* at 808 n.6 (internal quotation omitted). By implication, then, where "unrelated transactions are used as leverage to achieve the terms desired" (the second type of refusal alleged), *id.* at 803, there is coercion.

Given the Court's repeated inclusion of leveraging in "coercion," the district court erred in dismissing as "irrelevant to the issue of coercion that brokers who violate the agreement lose all of Florida Blue's business." Doc. 113 at 22 (Op. 22). Among Oscar's allegations, "brokers face losing the right to sell Florida Blue plans in *all product lines* throughout *the entire State of Florida* if they decide to sell Oscar plans in *a single county in the state*." Doc 75 at 4 (Am. Compl. ¶ 6); *see also id.* at 25, 37, 46-47 (Am. Compl. ¶¶ 64, 101, 128). This termination would be

[8] This does not render "coercion" duplicative of "boycott" because coercion includes unilateral conduct, Section II.B, *infra*, and encompasses more than this type of leveraging, *see, e.g.*, *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 68 (1st Cir. 2005) (telling members of the insurance community that broker was acting illegally); *Battle v. Liberty Nat'l Ins. Co.*, 493 F.2d 39, 51 (5th Cir. 1974) (acts of physical violence).

permanent. *Id.* at 23, 24 (Am. Compl. ¶¶ 56, 60). Because of Florida Blue's dominant position in many markets, some brokers "have no choice but to agree to exclusively sell Florida Blue plans statewide." *Id.* at 33 (Am. Compl. ¶ 87). Additionally, Florida Blue allegedly has threatened to withhold commissions to pressure brokers not to deal with Oscar. *Id.* at 23, 46-47 (Am. Compl. ¶¶ 56, 128).

In other words, the complaint alleges that Florida Blue is using "unrelated transactions"—the authority to write other lines of business and individual business outside of the Orlando area, now and in the future—as "leverage" to obtain and enforce its exclusivity policy and maintain a monopoly in Orlando. *Hartford Fire*, 509 U.S. at 803. By "conditioning" access to Florida Blue products in other markets on exclusivity in individual plans in Orlando, and by threatening to withhold commissions, Florida Blue "coerces the abdication of [brokers'] independent judgment." *Times-Picayune Publ'g Co.*, 345 U.S. at 605.

Legislative history confirms that Oscar has alleged coercion. The phrase "boycott, coercion, or intimidation" apparently derives from *South-Eastern Underwriters*, which stated that the defendants allegedly "employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into conspiracies." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 535 (1944). Among other conduct, "independent sales agents who defiantly represented [insurers outside the conspiracy] were punished by withdrawal of the right to represent the members [of the conspiracy]." *Id.* at 535-36. Congress, then, apparently considered conduct of this type—refusing to deal with an agent who deals with a competitor—"coercion." That is just the type of conduct that Oscar has alleged.

B. "Coercion" Does Not Require Concerted Action

The district court did not reach Florida Blue's flawed argument that "coercion" requires concerted action. Doc. 113 at 23 n.19 (Op. 23 n.19). By its plain meaning, and in antitrust parlance, the term contemplates unilateral action. *See, e.g.*, *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 17 (1964) ("*a supplier* may not use *coercion* on its retail outlets to achieve resale price maintenance" (emphasis added)); *Tic-X-Press*, 815 F.2d at 1415 ("the plaintiff must establish that the seller *forced* or *coerced* the buyer into purchasing the tied product"); *Black's Law Dictionary* 326 (11th ed. 2019) (defining coercion as "[c]onduct that constitutes the improper use of economic power to compel another to submit to the wishes of *one* who wields it" (emphasis added)); *Black's Law Dictionary* 345 (3d ed. 1933) ("where the relation of the parties is such that one is under subjection to the other").

Moreover, the statute speaks separately of an "*act* of boycott, coercion, or intimidation" or "any *agreement* to boycott, coerce, or intimidate," 15 U.S.C. § 1013(b) (emphasis added), indicating that the statute encompasses both unilateral and concerted coercion. The Supreme Court has concluded that a "boycott" requires concerted action, *St. Paul Fire*, 438 U.S. at 555, but that highlights the error of Florida Blue's position. Since there cannot be an "act" of boycott by a party, the words "act" and "agreement" are unnecessary if there cannot be a unilateral "act" of "coercion" or "intimidation." *In re Appling*, 848 F.3d 953, 959 (11th Cir. 2017) ("[i]f possible, every word and every provision is to be given effect" (internal quotation omitted)).

Finally, the statute provides that the "Sherman Act" applies in full force to coercion. The Sherman Act comprises prohibitions on both certain concerted action and certain unilateral conduct,[9] including

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[9] Section 2 proscribes monopolization, attempted monopolization, and combinations or conspiracies to monopolize. 15 U.S.C. § 2.

prohibiting a firm from using anticompetitive conduct to acquire or maintain a monopoly. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004). Reading the statutory text as Florida Blue does, to require concerted action in addition to coercion, would render this important component of the Sherman Act inapplicable in this context, without any indication that such a limitation was intended.

None of the authorities cited by Florida Blue below allow it to escape the statute's plain meaning. *Sanger Insurance Agency v. HUB International, Ltd.*, 802 F.3d 732, 747 n.12 (5th Cir. 2015), expressly reserves the issue. *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 933 (9th Cir. 1983), addresses a separate issue, whether the existence of monopoly power alone—without the additional element of anticompetitive conduct—can constitute a boycott or coercion.[10] Finally, the capsule summary of the charged conduct in *South-Eastern Underwriters*, 322 U.S. at 535-36, is "certainly not dispositive," 1A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 220a (4th ed. 2014). Even if that case involved acts of coercion and intimidation done

[10] In fact, *Feinstein* indicates that concerted action is not required, suggesting that a violation of Section 2 of the Sherman Act plus an act of coercion or intimidation is not exempt. 714 F.2d at 934.

collectively, its particular facts do not indicate that Congress intended the terms to have a specialized, limited meaning. *St. Paul Fire*, 438 U.S. at 546-50 (declining to limit "boycotts" to actions directed at competitors even though the boycott in *South-Eastern Underwriters* was directed at competitors).

CONCLUSION

The Court should reverse the decision below and remand for further proceedings.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,361 words, excluding the parts of the brief exempted by Rule 32(f).

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January 6, 2020 /s/ Patrick M. Kuhlmann
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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, I electronically filed the foregoing Brief of the United States of America as Amici Curiae Supporting Plaintiff-Appellant and Reversal with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I also sent 7 copies to the Clerk of the Court by FedEx next day delivery.

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