No. 21-1142

IN THE
United States Court of Appeals for the Third Circuit

LIFEWATCH SERVICES, INC.,
Plaintiff-Appellant,

v.

HIGHMARK INC., et al.,
Defendants-Appellees.

On Appeal from the
United States District Court for the Eastern District of Pennsylvania
Honorable Eduardo G. Robreno
No. 2:12-cv-05146

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

RICHARD A. POWERS
Acting Assistant Attorney General
KATHLEEN S. O'NEIL
Senior Director of Investigations and Litigation
DANIEL E. HAAR
PATRICK M. KUHLMANN
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave., NW,
Room 3224
Washington, DC 20530-0001
(202) 305-4639
patrick.kuhlmann@usdoj.gov

Counsel for the United States

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INTRODUCTION AND INTEREST OF THE UNITED STATES

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 exemptions from the antitrust laws are interpreted narrowly and no more broadly than necessary to carry out their purposes. 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), and overly broad application of antitrust exemptions sacrifices the important benefits that the antitrust laws provide consumers and undermines the national policy favoring robust competition.

The United States files this brief, under Federal Rule of Appellate Procedure 29(a), to advance this important interest. The McCarran-Ferguson Act (the MFA) establishes a limited antitrust exemption for the "business of insurance," doing so only "to the extent" a practice is "regulated by State law." 15 U.S.C. § 1012(b). Thus, the MFA preserves state authority to regulate in the field of insurance, while ensuring that either state regulation or federal antitrust law safeguards the interests of policyholders.

The district court misinterpreted the state-regulation requirement, which carefully limits the scope of MFA protection. The court suggested that "the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit," suffices, and held that the defendants had established state regulation merely by pointing to statutes that "generally authorize or permit certain standards of conduct." JA23 (Op. 23) (internal quotations and brackets omitted). This approach cannot be reconciled with the statutory text, and would create a gap between the protections of state and federal law, where policyholders would be subject to "regulation by private combinations and groups." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 554 (1978) (quoting 91 Cong. Rec. 1483 (1945) (Sen. O'Mahoney)). Without taking a position on whether the state-regulation requirement is satisfied in this case, the United States urges the Court to reject the district court's erroneous standard.

The United States also briefly addresses the Competitive Health Insurance Reform Act of 2020, signed into law after the district court's dismissal of the complaint. This law removes the "business of health insurance" from the MFA antitrust exemption, 15 U.S.C. § 1013(c), and potentially preserves certain of plaintiff's claims for relief.

STATEMENT OF THE ISSUE

Whether challenged conduct is exempt from federal antitrust law under the McCarran-Ferguson Act, which applies only "to the extent" a practice is "regulated by State law," if the State in question has only "generally authorized or permitted certain standards of conduct"—"even on an issue unrelated to the antitrust suit"—but has not regulated the particular practice at issue.

STATEMENT OF THE CASE

A. The McCarran-Ferguson Act and the Competitive Health Insurance Reform Act

1. For decades after *Paul v. Virginia*, 8 Wall. 168 (1868), it was widely believed that the Commerce Clause did not reach the insurance business, *Prudential Ins. Co. v. Benjamin Ins. Comm'r*, 328 U.S. 408, 414 (1946). However, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), 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.

"Th[is] decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the

insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). Indeed, 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.,* 440 U.S. 205, 218 n.16 (1979). Unsurprisingly, "Congress moved quickly," passing the McCarran-Ferguson Act (the MFA) within a year. *St. Paul Fire*, 438 U.S. at 539.

a. In light of the Supreme 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). "One of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *FTC v. Travelers Health Ins. Ass'n*, 362 U.S. 293, 302 (1960).

Accordingly, the MFA 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

imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Courts often describe this provision as a reverse-preemption provision. *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 160 (3d Cir. 2000).

b. 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. 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.*, 91 Cong. Rec. 1444 (1945), 1487; 90 Cong. Rec. A4407 (1944).[1] Congress also was concerned that the application of federal antitrust law could interfere with state regulation. *See, e.g.*, 91 Cong. Rec. 1485 (1945).

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

[1] Today, however, such practices, if procompetitive, would not violate the antitrust laws. *E.g.*, Antitrust Modernization Commission, *Report and Recommendations* 351 (2007), *available at* https://govinfo.library.unt.edu/amc/commission_documents.htm).

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), 1013; *LifeWatch Servs., Inc. v. Highmark Inc.*, 902 F.3d 323, 343 (3d Cir. 2018).

Consistent with this history, the Supreme Court has instructed that the exemption "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 MFA embodies "a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws," *Royal Drug*, 440 U.S. at 220, and provides "only a narrow exemption," *Fabe*, 508 U.S. at 505.

2. On January 13, 2021, the Competitive Health Insurance Reform Act of 2020 (CHIRA) became law. Pub. L. No. 116-327 (2021). CHIRA amends the MFA's antitrust exemption by reapplying the antitrust laws to the "business of health insurance." 15 U.S.C. § 1013(c)(1) (the MFA does not "modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance"). It excludes a handful of potentially procompetitive practices, specifically,

certain contracts involving historical loss data, loss-development factors, actuarial services, and standard policy forms. 15 U.S.C. § 1013(c)(2).

A congressional proponent of CHIRA stated that the MFA "has outlived any utility it may have had," and that the bill would bar anticompetitive conduct while permitting "the health insurance industry to engage in procompetitive collaboration that benefits customers." 166 Cong. Rec. H4572 (2020) (Rep. Scanlon). Greater competition among health insurers, another proponent predicted, could "help[] Americans afford health insurance, lowering their deductibles, lowering their copays, lowering their exclusions on prescription drugs." 166 Cong. Rec. H4573 (2020) (Rep. DeFazio).

B. Factual and Procedural Background

1. Plaintiff LifeWatch Services, Inc. sells telemetry monitors, one of several types of outpatient cardiac monitors used to diagnose cardiac arrhythmia.[2] JA31, JA37 (Third Am. Compl. (TAC) ¶¶ 6, 29). According to LifeWatch, telemetry monitors are superior to other types of monitors and are medically necessary for certain patients and conditions. JA31

[2] Because this appeal arises from a dismissal under Federal Rule of Civil Procedure 12(b)(6), the United States treats the allegations as if they were true, without taking any position on their accuracy.

(TAC ¶ 6). Telemetry monitors, however, cost about three times more than competing devices. JA31 (TAC ¶ 7).

LifeWatch claims that the defendants (the Blue Cross Blue Shield Association (the Association) and certain insurers licensed by the Association (the Blue Plans)) conspired not to cover telemetry monitors under Blue Cross and Blue Shield health-insurance plans. The Association and the Blue Plans maintain a model medical policy recommending which services, procedures, and medical devices should be covered by the Blue Plans. JA49 (TAC ¶¶ 57-59). Pursuant to a "Uniformity Rule," the Blue Plans must conform substantially with the model medical policy, and can be penalized if they deviate substantially. *Id.*

For years, the model medical policy has excluded telemetry monitors from coverage as "not medically necessary" or "investigational." JA31, JA49-50 (TAC ¶¶ 7, 60). This provision has persisted despite mounting scientific evidence of the efficacy and superiority of telemetry monitors and contrary to the practice of Medicare, Medicaid, and other insurers. JA31, JA46 (TAC ¶¶ 7, 46). The Blue Plans have adopted the recommendation to exclude telemetry monitors in near lockstep. JA50,

JA56 (TAC ¶¶ 61, 82). LifeWatch claims that this conduct violates Section 1 of the Sherman Act, which proscribes agreements that unreasonably restrain trade. JA59 (TAC ¶¶ 91-97).

2. The district court dismissed the complaint, concluding that LifeWatch failed to allege anticompetitive effects. *LifeWatch Servs., Inc. v. Highmark Inc.*, 902 F.3d 323, 332 (3d Cir. 2018). This Court reversed and remanded the case for consideration whether the defendants have shown that they are exempt under the MFA. *Id.* at 344.

On remand, the district court again dismissed the complaint, holding that the MFA exempted the challenged conduct. LifeWatch conceded that the conduct does not amount to a boycott, coercion, or intimidation, JA7 (Op.7), and the district court held that the conduct constitutes the "business of insurance," JA7-16 (Op.7-16), and is regulated by the 17 states where it occurred, JA20-24 (Op.20-24).

Regarding state regulation, the district court stated that the element "is satisfied when 'a state has generally authorized or permitted certain standards of conduct.'" JA21, JA23 (Op.21, 23) (quoting *In re N.J. Title Ins. Litig.*, No. 08-1425, 2010 WL 2710570, at *10 (D.N.J. July 6, 2010), *aff'd on other grounds*, 683 F.3d 451 (3d Cir. 2012)). It described

the requirement as "not a high bar for antitrust defendants to clear," and stated that "the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity." JA23 (Op.23) (quoting *Sanger Ins. Agency v. HUB Int'l, Ltd.*, 802 F.3d 732 (5th Cir. 2015), and Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 219 (4th ed. 2020)). Accordingly, in the court's view, the defendants demonstrated state regulation by citing statutes or regulations in the affected states that "generally authorize or permit certain standards of conduct in the health insurance industry." JA22-23 (Op.22 n.7, 23) (internal quotations and brackets omitted).

ARGUMENT

The McCarran-Ferguson Act (the MFA) establishes "a narrow exemption" from federal antitrust law. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 508 (1993). Among other conditions, the exemption applies only "to the extent" that a practice "is regulated by State law," 15 U.S.C. § 1012(b), meaning that the exemption reaches only as far as the state regulatory apparatus. By requiring state regulation of a particular

practice, the statute ensures that policyholders are protected either by federal antitrust law or state law.

The district court diluted the state-regulation requirement, concluding that "general[]" or "unrelated" regulation is sufficient, and finding state regulation without any analysis of the scope of regulation in the 17 states at issue. JA23 (Op.23) (internal quotations omitted). This error potentially exposes policyholders to the dominion of self-interested commercial parties without the protection of federal antitrust law or state regulation.

Additionally, the Court should consider the applicability of the Competitive Health Insurance Reform Act of 2020 (CHIRA), which removes the "business of health insurance" from the MFA antitrust exemption. CHIRA became law after the dismissal of the complaint, but nonetheless may preserve some of LifeWatch's requests for relief.

I. The District Court Erred in Holding That the Relevant States Regulated the Challenged Conduct Without Determining That the States Specifically Regulated That Conduct

A. A Practice Is "Regulated by State Law" Only If the State Regulates the Particular Practice at Issue

The text of the MFA, its history, and governing precedent all establish that conduct is "regulated by State law" only if the State regulates the particular practice at issue.

1. The MFA states that federal antitrust law "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). The "business of insurance" consists of "particular practice[s]" meeting certain criteria. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). Thus, the exemption applies only "*to the extent*" that a challenged practice (constituting the "business of insurance") is "regulated by State law," *id.* at 124 (emphasis added), reaching no further than those practices specifically subject to state regulation.

"Extent" means "[t]he degree to which a thing extends." *American Heritage Dictionary* 627 (5th ed. 2016).[3] Thus, the exemption traces the reach of a State's regulatory apparatus. The word "extent" contemplates a *spectrum* of possibilities regarding the application of federal antitrust law to the business of insurance—ranging from fully applicable to not-at-all, measured on a practice-by-practice basis—not a binary measure of whether there is any regulation at all (even entirely unrelated regulation).

As Senator McCarran, the MFA's namesake, wrote in the wake of its passage, the statutory language

> does not mean that all of the business of insurance in a particular State is exempt from the anti-trust laws if any particular proportion of such business is regulated by State law. If a State has enacted laws which regulate ninety percent of the business of insurance in that State, the mere fact that the other ten percent is not specifically dealt with by State law would probably mean that, for purposes of the enforcement of Federal anti-trust laws, that particular ten percent will be considered as not regulated by State law, and that if that ten percent includes any practices which are in violation of federal anti-trust law laws, such practices shall be subject to prosecution.

[3] *See also, e.g., Webster's New International Dictionary* 901 (2d ed. 1958) ("Space or amount to which a thing is extended."); *Funk & Wagnalls New Standard Dictionary* 881 (1946) ("The dimension or degree to which anything is extended.").

Patrick A. McCarran, *Federal Control of Insurance*, 34 A.B.A. J. 539, 541 (1948); *see also id.* at 542 (exemption does not apply "if the *particular practice* complained of is one which the State has not by law attempted to regulate and over which the State has not asserted jurisdiction" (emphasis added)). As his fellow namesake, Senator Ferguson, summarized, the exemption would apply "only if the States were specifically to legislate upon a particular point." 91 Cong. Rec. 1481 (1945); *see also* 91 Cong. Rec. 1443 (1945) (Sen. Ferguson) ("But insofar as the State is concerned which has specifically legislated on the subject, the [antitrust laws] shall not apply.").

2. This careful limitation on the exemption's reach reflects Congressional concern with preserving state power to regulate insurance, while not conferring antitrust immunity on unregulated private conduct. Congress sought to permit "combinations and agreements among the companies in the public interest provided those combination and agreements were in the open and approved by law." 91 Cong. Rec. 1486 (1945) (Sen. O'Mahoney).[4] By contrast, practices

[4] Senator O'Mahoney served on the conference committee that drafted the final bill. H.R. Rep. No. 213, at 2 (1945).

constituting "regulation by private combinations and groups" would be subject to federal antitrust law. 91 Cong. Rec. 1483 (1945) (Sen. O'Mahoney).[5]

Additionally, absent state regulation of a specific practice, federal antitrust law does not interfere with state regulation or expose the insurer to the conflicting requirements under state and federal law. Accordingly, the MFA leaves federal antitrust law "applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved." Franklin D. Roosevelt, *Public Papers and Addresses of Franklin D. Roosevelt* 587 (1945) (signing statement).

[5] *See also, e.g.*, 91 Cong. Rec. 1486 (1945) (Sen. O'Mahoney) ("Public supervision of agreements is essential."); 91 Cong. Rec. 1485 (1945) (legislation would give States the "authority to repeal, pro tanto, the applicability of the Sherman Act" (Sen. Pepper)); 91 Cong. Rec. 1444 (1945) ("If, however, the State goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State's activity" (Sen. White)); 91 Cong. Rec. 1444 (1945) ("Insofar as [the States] fail to cover the same ground covered by the Sherman Act and the Clayton Act, those acts become effective again." (Sen. Murdock)).

3. Consistent with statutory text and purpose, the Supreme Court has determined whether the State regulates the particular conduct at issue in assessing whether there is state regulation. In *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), the FTC found certain advertising practices by insurers false, misleading, and deceptive in violation of the Federal Trade Commission Act. The Court held that the MFA "withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating *those practices* under their own laws." *Id.* at 563 (emphasis added). Because "[e]ach state in question has enacted prohibitory legislation which *proscribes unfair insurance advertising* and authorizes enforcement through a scheme of administrative supervision," those states had regulated the challenged conduct. *Id.* at 564 (emphasis added).[6]

[6] As the Supreme Court subsequently explained, "the issue [in *National Casualty*] involved the effect of state laws regulating the advertising practices of insurance companies." *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 297 (1960). Those statutes specifically prohibited "Misrepresentations and false advertising of policy contracts" and "False information and advertising generally." Brief for the Federal Trade Commission at 45, 68, *FTC v. Nat'l Casualty Co.*, 357 U.S. 560 (1958) (No. 57-435), 1958 WL 92025 (Kansas statute "typical" of the statutes at

This Court likewise considers whether the relevant State specifically regulates the conduct at bar. In *Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), a competing insurer challenged Blue Cross's contracts with hospitals that gave Blue Cross rates approximately 15% lower than other insurers. The court concluded that Pennsylvania regulated the contracts because state law required the insurance department to approve all contracts between insurers such as Blue Cross and hospitals—including the rates of payment. *Id.* at 83. In fact, "the features of the contract which [plaintiff] finds objectionable were mandated by Insurance Department guidelines designed to encourage high quality care at reasonable costs." *Id.* at 83-84.

Other decisions in this Circuit show the same attention to the specificity of state regulation. For example, in *Owens v. Aetna Life & Casualty Co.*, this Court held that New Jersey regulated decisions, made individually or jointly through a rating bureau, to rate individual and groups plans differently because, inter alia, (1) differences between group

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issue); Brief for the American Hospital and Life Insurance Co. at 15-16, 34-35, *FTC v. Nat'l Casualty Co.*, 357 U.S. 560 (1958) (No. 436), 1958 WL 91886 (citing Tennessee statute as representative).

and individual policies are "subject to control by the Commissioner of Insurance" and (2) the State licensed rating bureaus, regulated their membership, and encouraged their use. 654 F.2d 218, 226 (3d Cir. 1981); *see also Doctors, Inc. v. Blue Cross of Greater Phila.*, 431 F. Supp. 5, 8 (E.D. Pa. 1975), *aff'd* 557 F.2d 1001 (3d Cir. 1976) (insurance department approved the challenged agreement and "wanted the action alleged to be illegal here"); *Frankfort Hosp. v. Blue Cross of Greater Phila.*, 417 F. Supp. 1104, 1113 (E.D. Pa. 1976), *aff'd* 554 F.2d 1253 (3d Cir. 1977) ("[t]he subject of this action . . . is being aggressively regulated by the Commonwealth of Pennsylvania").

B. The District Court's Reading of the State-Regulation Requirement Conflicts with Statutory Text and Supreme Court Precedent

The district court read the state-regulation requirement much more broadly, concluding that it is satisfied if a State regulates the class of insurance in any manner. It characterized the requirement as "not a high bar for antitrust defendants," satisfied by "even minimal state regulation, even on an issue unrelated to the antitrust suit." JA21, JA23 (Op.21, 23) (internal quotations omitted). Its analysis goes no further than citations to insurance statutes and regulations in the 17 states in

question, without any explanation of how those provisions govern the challenged conduct. JA22 (Op.22 n.7). This approach cannot be reconciled with the text of the statute or with Supreme Court precedent interpreting it.

1. The text of the statute—which the district court ignored—forecloses its interpretation. The text expressly provides that federal antitrust law applies "to the extent that" conduct is not "regulated by State law." 15 U.S.C. § 1012(b). If the state regulation is "unrelated" to the challenged practice, that practice is not "regulated by State law." *Id.*; *see* Section I.A.1, *supra*.[7]

[7] Before the district court, the defendants argued that "[t]he term 'such business' relates back to the business of insurance, and merely requires that the insurance industry be regulated by the state." JA389 (Defs.' Reply). Indeed, "such business" refers back to the "business of insurance." However, the "business of insurance" refers to "particular practice[s]," not the insurance industry as a whole. *Pireno*, 458 U.S. at 129; *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 356 (3d Cir. 2010) ("precise characterization of the defendants' conduct can be dispositive" in determining whether it qualifies as the "business of insurance"). Defendants' argument, thus, ignores the phrase "to the extent that," rewriting that statute to read something like the antitrust laws "shall be applicable to the business of insurance [*if*] such business is not regulated by State Law." 15 U.S.C. § 1012(b) (edited as emphasized).

Additionally, the district court's broad interpretation contravenes the Supreme Court's instruction that the exemption "must be construed narrowly." *Pireno*, 458 U.S. at 126; *see also Owens*, 654 F.2d at 225 (being "mindful of the rule of construction that exemptions to the antitrust laws must be narrowly construed" when applying the state-regulation requirement). Reading the requirement so broadly that any "minimal" or "unrelated" regulation suffices, JA23 (Op.23) (quoting Areeda & Hovenkamp, *supra*, § 219), does not square with the Supreme Court's statement that the MFA provides "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).

Moreover, this interpretation effectively nullifies the state-regulation requirement. Congress sought to preserve "the continued regulation and taxation by the several States of the business of insurance," 15 U.S.C. § 1011, and "must have had full knowledge of the nation-wide existence of state systems of regulation and taxation," *Prudential Ins. Co. v. Benjamin Ins. Comm'r*, 328 U.S. 408, 430 (1946). If a class of insurance is "regulated by State law" whenever there is any regulation of that class, 15 U.S.C. § 1012(b), then there was no need for

Congress to include that element in the statute—States already "generally" regulated insurance. Similarly, there would have been no reason for the MFA to impose a moratorium until 1948 on the application of federal antitrust law to the "business of insurance"—so that States could adjust their regulatory schema in light of *South-Eastern Underwriters* and the MFA—if any state regulation preempted federal antitrust law. 15 U.S.C. § 1013(a); H.R. Rep. No. 79-68, at 2-3 (1945) (the legislation would "assure a more adequate regulation of this business in the States" by suspending application of federal antitrust laws "for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress").

Finally, the district court's approach leaves a regulatory gap. For example, suppose that a State's regulatory framework only requires insurers writing automobile insurance to maintain certain reserves. Under the district court's interpretation, the auto insurers in the State could fix their rates or allocate customers with impunity (assuming that the agreement is the "business of insurance" and does not involve a boycott, coercion, or intimidation"), notwithstanding the lack of protection for consumers under state law and the absence of any conflict

between federal and state law. *Contra Royal Drug*, 440 U.S. at 224 ("Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." (quoting President Roosevelt's signing statement)).

2. In support of its erroneous interpretation, the district court overreads non-binding decisions stating that "the state regulation requirement of § 1012(b) is satisfied when 'a state has generally authorized or permitted certain standards of conduct' for insurance companies." JA21 (Op.21) (quoting *In re New Jersey Title Insurance Litigation*, No. 01-1425, 2010 WL 2710570, at *10 (D.N.J. July 6, 2010) (quoting *Ohio AFL-CIO v. Ins. Rating Bureau*, 451 F.2d 1178, 1181 (6th Cir. 1971), *aff'd on other grounds* 683 F.3d 451 (3d Cir. 2012)). In those cases, the State specifically regulated the challenged conduct, and the decisions do not support the district court's reading of that sentence. In *Ohio AFL-CIO*, where the plaintiffs alleged price-fixing by auto insurers, the court concluded, "Crucial to the present case is the fact that the Ohio statutes have *specifically* provided for the regulation of rating organizations such as [a defendant], and the making, filing and use of

rates for casualty insurance, including motor vehicle insurance." 451 F.2d at 1182 (emphasis added). Because Ohio "generally proscribe[d] or permit[ted] or authorize[d] *certain conduct* on the part of the insurance companies," the court found state regulation. *Id.* at 1181 (emphasis added) (quoting *Cal. League of Indep. Ins. Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959)).

Similarly, in *N.J. Title Ins. Litig.*, the plaintiffs challenged a price-fixing conspiracy among members of a rating bureau, and New Jersey had "a comprehensive regulatory scheme for the setting of title insurance rates," including authorization of joint rate filings and review of filed rates. 2010 WL 2710570, at *10. The court did not hold that any regulation satisfies the requirement, but instead rejected the plaintiffs' argument that New Jersey did not actively supervise the defendants' conduct. *Id.* at *11. Thus, the decisions cited by the district court do not establish that "unrelated" regulation satisfies the state-regulation requirement.

The quoted language originated in *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F. Supp. 857 (N.D. Cal. 1959). But there, in stating that there is state

regulation "if a State has generally authorized or permitted certain standards of conduct," the court was not holding that *any* regulation satisfies the requirement. *Id.* at 860. Citing *National Casualty*, the court explained that there is state regulation "when a state statute generally proscribes or permits or authorizes *certain conduct* on the part of the insurance companies." *Id.* (emphasis added). It held that California regulated the challenged conduct—an alleged agreement among insurers to fix agent commissions—because the California Insurance Code established "an elaborate and comprehensive scheme for ratemaking" and "the rate of commission paid to agents is a vital factor in the ratemaking structure." *Id.*; *see also id.* ("the defendants are alleged to have violated the Sherman Act *in matters* generally authorized or permitted by the State of California").

3. Other authorities relied upon by the district court do not justify its approach. In fact, in *Sanger Insurance Agency v. HUB International, Ltd.*, 802 F.3d 732 (5th Cir. 2015), the court questioned this type of approach. It described the state-regulation requirement as "not a high bar for antitrust defendants to clear given how courts have interpreted *the statutory language that on its face seems to require a more concrete*

conflict between the federal and state regulation." *Id.* at 745 (emphasis added). The court, however, had other grounds for its decision, and did not need to explore the apparent contradiction between certain cases and the statutory text. *Id.* at 746 (concluding that the plaintiff lacked standing, waived the state-regulation issue in the district court, and, on appeal, failed to "identify any particular states that it contends do not regulate insurance").

The district court also cited the leading treatise for the proposition that "the presence of even minimal state regulation, even on an issue unrelated to the antitrust suit, is generally sufficient to preserve the immunity." JA23 (Op.23) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 219 (4th ed. 2020)). In the cited passage, however, the treatise merely interprets certain non-binding decisions.[8] Notably, it questions these decisions, and recommends that the "requirement might

[8] Some courts appear to have concluded that there is state regulation on the basis of a general regulatory framework. *See, e.g.*, *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984); *Hopping v. Std. Life Ins. Co.*, No. 81-167, 1983 WL 1946, at *9-10 (N.D. Miss. Sept. 14, 1983). If so, these decisions are wrongly decided, disregarding the text of the statute and Congressional purpose. *See* Section I.A, *supra*.

itself be tightened up to reflect judicial thinking about the antitrust significance of state regulation in the [state-action] context." Areeda & Hovenkamp, *supra*, § 219. This description provides no ground to depart from the plain text of the statute.

4. The United States takes no position as to whether any of the 17 States in question regulate the challenged conduct. If the Court determines that the challenged conduct is "the business of insurance," the Court should remand the case to the district court for application of the correct legal standard for determining whether the conduct is "regulated by State law": whether the State regulates the particular practice at issue.

This test necessitates careful and case-specific analysis of the challenged conduct and the state regulatory apparatus. A court should examine the statute(s) or regulation(s) purportedly regulating the challenged conduct to determine whether the State has assumed regulatory authority over that conduct. A court should remain "mindful of the rule of construction that exemptions to the antitrust laws must be narrowly construed" and that the defendant bears the burden of

establishing its exemption. *Owens*, 654 F.2d at 218; *LifeWatch Servs., Inc. v. Highmark Inc.*, 902 F.3d 323, 334 (3d Cir. 2018).

A State need not prohibit the exact practice at bar (e.g., specifically prohibit agreements not to cover telemetry monitors). But only if the State's regulatory scheme addresses the challenged conduct—and the scheme is not "mere pretense," *Nat'l Casualty*, 357 U.S. at 564—is the conduct "regulated by State law," 15 U.S.C. § 1012(b).

II. This Court Should Consider CHIRA's Effect on LifeWatch's Claims

CHIRA became law after the district court dismissed the complaint. The Court, nonetheless, should consider CHIRA's effect on LifeWatch's claims for relief.[9]

CHIRA provides that the MFA does not "modify, impair, or supersede the operation of any of the antitrust laws with respect to the business of health insurance," 15 U.S.C. § 1013(c)(1), and thereby generally withdraws application of the MFA to health insurance. The

[9] LifeWatch argues that CHIRA applies to its prayer for injunctive relief. Appellant's Br.22 n.4. The United States does not address whether the presumption against retroactive legislation would bar injunctive relief or other relief sought by LifeWatch. *See generally Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

challenged conduct unquestionably concerns "health insurance." *E.g.*, JA30 (TAC ¶ 1) (alleging that the Blue Plans sell commercial health insurance). Therefore, the challenged conduct either (1) is not the "business of insurance" and thus not protected by the MFA in the first place, as LifeWatch contends, or (2) constitutes the "business of health insurance" and thus is removed from the MFA by CHIRA. Either way, the MFA would not apply to the challenged conduct.

CHIRA does, however, preserve MFA coverage of four categories of health-insurance practices. 15 U.S.C. § 1013(c)(2). Only one of these exceptions could even potentially apply to the challenged conduct: "making a contract, or engaging in a combination or conspiracy . . . to develop or disseminate a standard insurance policy form (including a standard addendum to an insurance policy form and standard terminology in an insurance policy form) if such contract, combination, or conspiracy is not to adhere to such standard form or require adherence to such standard form." 15 U.S.C. § 1013(c)(2)(D).

It is doubtful that this exception would apply at this stage of the litigation. The exception must be construed narrowly, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982), and the defendants would

bear the burden of establishing its applicability, *LifeWatch Servs., Inc. v. Highmark Inc.*, 902 F.3d 323, 343 (3d Cir. 2018).

This Court's prior decision in this case suggests that the defendants could not satisfy their burden at this stage. The Court concluded that LifeWatch has alleged that "the Blue Plans agreed with each other and the Association that they would *substantially comply with* the model policy." *Id.* at 334. That allegation—which must be treated as true on a motion to dismiss—would remove the agreement from the exception because it would be "to adhere to such standard form or require adherence to such standard form." 15 U.S.C. § 1013(c)(2)(D).

CONCLUSION

The Court should hold that the district court applied an incorrect legal standard for determining whether the challenged conduct is regulated by state law. Additionally, the Court should consider CHIRA's effect on LifeWatch's claims for relief.

Respectfully submitted.

/s/ Patrick M. Kuhlmann

RICHARD A. POWERS
Acting Assistant Attorney General
KATHLEEN S. O'NEIL
Senior Director of Investigations and Litigation
DANIEL E. HAAR
PATRICK M. KUHLMANN
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
(202) 305-4639
patrick.kuhlmann@usdoj.gov

Counsel for the United States

May 10, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), this brief contains 5,639 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Word 2019 using 14-point Century Schoolbook font, a proportionally spaced typeface.

I further certify that this brief complies with Third Circuit Local Rule 31.1(c) because the text of the electronic brief is identical to the text in the paper copies.

May 10, 2021

/s/ Patrick M. Kuhlmann
Counsel for the United States

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Rules 28.3(d), 46.1(e), and 113.2(a), I certify that I represent the United States and thus am not required to be a member of the bar of this Court.

May 10, 2021

/s/ Patrick M. Kuhlmann
Counsel for the United States

CERTIFICATE OF VIRUS PROTECTION

Pursuant to Third Circuit Local Rule 31.1(c), I certify that Windows Defender has been run on this file and that no virus was detected.

May 10, 2021

/s/ Patrick M. Kuhlmann
Counsel for the United States

CERTIFICATE OF SERVICE

I certify that on May 10, 2021, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

May 10, 2021

/s/ Patrick M. Kuhlmann
Counsel for the United States