No. 02-50721

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE C. DEHOYOS, EVA PEREZ-DEHOYOS, GEORGIA HARRISON, CHARLES WHITE, SHERYL H. FRANKS, and MARTEL SHAW,

Plaintiffs – Appellees,

v.

ALLSTATE CORPORATION, ALLSTATE INSURANCE COMPANY, ALLSTATE TEXAS LLOYD'S, and ALLSTATE INDEMNITY COMPANY,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS (SAN ANTONIO DIVISION)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING DEFENDANTS–APPELLANTS AND URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE CONTINUED MAINTENANCE OF THIS PUTATIVE NATIONWIDE CLASS ACTION IS BARRED BY THE MCCARRAN-FERGUSON ACT BECAUSE IT WOULD "INVALIDATE, IMPAIR, OR SUPERSEDE" MULTIPLE STATE INSURANCE LAWS 4

A. The McCarran-Ferguson Act Generally Prohibits Federal Laws That Do Not Specifically Relate To The Business Of Insurance From Being "Construed To Invalidate, Impair, Or Supersede" State Insurance Laws 4

B. The Supreme Court's Decision in *Humana* v. *Forsyth* Defines "Impair" As Frustrating Declared State Policies Or Interfering With A State's Administrative Regime 6

C. Unlike the *Humana* Plaintiffs, The Plaintiffs In This Case Seek To Impose Substantive Requirements On Insurer Conduct, To Employ Procedural Mechanisms, And To Obtain Remedies That Are Vastly Different From Those Available Under State Insurance Law 10

D. The Maintenance Of Plaintiffs' Disparate-Impact Claims Would In Multiple Respects "Invalidate, Impair, Or Supersede" State Insurance Laws 14

E. Principles Of Federalism Require That Any Doubt About Whether The Maintenance Of Plaintiffs' Disparate-Impact Claims Would "Impair" State Insurance Laws Must Be Resolved In Allstate's Favor 24

F. This Court Should Make Clear That Nationwide Class Actions Targeting Some Aspect Of The "Business Of Insurance" Regulated By The States Are Presumptively Barred By The McCarran-Ferguson Act 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Albert H. Wohlers & Co. v. *Bartgis,* 114 Nev. 1249 (1999) 12, 14

Barnett Bank v. *Nelson*, 517 U.S. 25 (1996) 6

BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 24

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 12

Cipollone v. *Liggett Group Inc.*, 505 U.S. 504 (1992) 12

Colorado Interstate Gas Co. v. *FERC*, 324 U.S. 581 (1945) 27

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 25

Humana Inc. v. *Forsyth*, 525 U.S. 299 (1999) . . . . *passim*

Moore v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001),
cert. denied, 122 S. Ct. 1608 (2002) 21

NAACP v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992),
cert. denied, 508 U.S. 907 (1993) 20, 21, 22, 23

National Organization for Women, Inc. v. *Scheidler*,
267 F.3d 687 (7th Cir. 2001), cert. granted, 122 S. Ct. 1604 (2002) 13

Nationwide Mut. Ins. Co. v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995),
cert. denied, 516 U.S. 1140 (1996) 20-21, 22

Northwest Airlines v. *County of Kent*, 510 U.S. 355 (1994) 27

Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 (1946) 5

Religious Tech. Ctr. v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987) 13

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 12

SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969) 5-6, 9

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 9, 15

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978) 4, 5

United States v. *Bass*, 404 U.S. 336 (1971) 25

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 4

United States Dep't of Treasury v. *Fabe*, 508 U.S. 491 (1993) 4

Vermont Agency of Natural Resources v. *United States*, 529 U.S. 765 (2000) 25

Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 25

Statutes:

McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*. . . . . *passim*

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964 6

15 U.S.C. § 1012(a) 5

15 U.S.C. § 1012(b) . . . . *passim*

18 U.S.C. § 1964(c) 6

42 U.S.C. § 1981 2

42 U.S.C. § 1982 2

42 U.S.C. § 3604 2

Miscellaneous:

BLACK'S LAW DICTIONARY (6th ed. 1990) 9, 15

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947) 24

S. HARRINGTON & G. NEIHAUS, RISK MANAGEMENT AND INSURANCE (1999) 19

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

This appeal involves issues of substantial importance to the Chamber's members. Although the scope of the McCarran-Ferguson Act is important in its own right, this case also raises broader issues about the use (and misuse) of class action litigation, the risk of allowing lay juries to second-guess the ratemaking judgments of expert regulators, and the need to enforce the allocation and division of regulatory authority in our federal system. The Chamber's members, including those outside the insurance industry, have a substantial interest in seeing these broader issues properly resolved as well as in helping to curb litigation such as this, which threatens the vitality of American businesses.[1]

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[1] All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

In passing the McCarran-Ferguson Act, Congress intended to preserve the traditional regulatory authority of the States – and expert insurance regulators – to regulate the business of insurance. Toward that end, Congress directed that, as a general matter, *federal* laws that do not "specifically relate[] to the business of insurance" shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Nevertheless, in this litigation, a putative nationwide class action, the plaintiffs have invoked three generally applicable federal civil rights statutes, 42 U.S.C. §§ 1981, 1982, and 3604, which do not "specifically relate[]" to the business of insurance, as a basis for challenging an insurance company's pricing practices under a "disparate-impact" theory of liability. Plaintiffs have sought to do so even though ratemaking is a quintessentially legislative function, involving complex actuarial and policy judgments, that has long been carried out by specialized insurance regulators in the fifty States.

The maintenance of this federal lawsuit would work a serious incursion on the state regulatory prerogatives, procedural and administrative schemes, and remedial choices that Congress intended to preserve and protect in passing the McCarran-Ferguson Act. That impairment of state authority is all the more pronounced because this is a putative nationwide class that, if certified and permitted to go to judgment,

could substitute the ratemaking decision of a single federal judge or lay jury for the varied, policy-laden determinations of expert insurance regulators in the fifty States. In addition, plaintiffs here are seeking far-reaching remedies – including punitive damages – that differ markedly from those available under the Texas and Florida insurance schemes. Under a proper understanding of the McCarran-Ferguson Act, and the Supreme Court's recent decision in *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 306 (1999), this lawsuit plainly "impairs" and "supersedes" state law in multiple respects. Accordingly, the district court should have dismissed it.

Moreover, any doubt about whether the continuation of this lawsuit would "impair" state insurance laws should, for reasons of federalism and consistent with the policies underlying the McCarran-Ferguson Act, be resolved in Allstate's favor. This Court should take this opportunity to recognize the special threats to state insurance schemes that are posed by putative national class actions of the kind involved here, as well as to adopt a strong presumption that such lawsuits ordinarily will be precluded by the McCarran-Ferguson Act.

ARGUMENT

THE CONTINUED MAINTENANCE OF THIS PUTATIVE NATIONWIDE CLASS ACTION IS BARRED BY THE MCCARRAN-FERGUSON ACT BECAUSE IT WOULD "INVALIDATE, IMPAIR, OR SUPERSEDE" MULTIPLE STATE INSURANCE LAWS

A. The McCarran-Ferguson Act Generally Prohibits Federal Laws That Do Not Specifically Relate To The Business Of Insurance From Being "Construed To Invalidate, Impair, Or Supersede" State Insurance Laws

Before 1944, the United States Supreme Court had "consistently held that the business of insurance was not commerce" and, as a consequence, the insurance industry was "largely immune from federal regulation." *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 306 (1999); see also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry."). In 1944, the Court abruptly changed course, ruling that a fire insurance company that conducted a substantial part of its transactions across state lines was engaged in interstate commerce – and subject to the Sherman Act. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). This decision "provoked widespread concern that the States would no longer be able to engage in * * * effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. In response, Congress "moved quickly" to "restore the supremacy of the States in the realm of insurance regulation" by enacting the McCarran-Ferguson Act in 1945. *Id.*; *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993).

Section 1 of the McCarran-Ferguson Act declares that "continued regulation * * * by the several States of the business of insurance *is in the public interest*." 15 U.S.C. § 1011 (emphasis added). In Section 2(a) of the Act, Congress went on to provide that the "business of insurance * * * shall be subject to the laws of the several States which relate to the regulation * * * of such business." 15 U.S.C. § 1012(a). Finally, in Section 2(b), whose meaning is directly at issue in this appeal, Congress stated:

> No Act of Congress shall be construed to *invalidate, impair, or supersede* any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance * * *.

15 U.S.C. § 1012(b) (emphasis added). As the Supreme Court has observed, Section 2(b) reflects a "congressional judgment" that "the protection of policyholders is the primary responsibility of the States." *Barry*, 438 U.S. at 551. See also *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946) ("Obviously, Congress' purpose was *broadly* to give support to the existing *and future* state systems for regulating * * * the business of insurance.") (emphasis added).

The Supreme Court has "interpreted the term 'business of insurance' in § 2(b) broadly to encompass '[t]he relationship between insurer and insured, the type of policy which could be issued, [and] its reliability, interpretation, and enforcement.'" *Barry*, 438 U.S. at 550-51 (quoting *SEC* v. *National Securities, Inc.*, 393 U.S. 453,

460 (1969)). "Certainly the fixing of rates is part of this business * * * ." *National Securities*, 393 U.S. 460. In fact, the "relation of insured to insurer and the spreading of risk" are among those "matters" that lie at the very "core of the McCarran-Ferguson Act's concern." *Barnett Bank* v. *Nelson*, 517 U.S. 25, 39 (1996).

This case, of course, involves precisely such matters. There is no dispute that all of the Texas and Florida laws identified by the Defendants-Appellants ("Allstate") as being affected by the maintenance of this lawsuit are aimed at regulating the "business of insurance" and thus protected by Section 2(b). Nor is there any dispute that the federal anti-discrimination laws underlying plaintiffs' claims do not "specifically relate[] to the business of insurance." The only question, therefore, is whether the continuation of this lawsuit would "invalidate, impair, or supersede" the relevant Texas and Florida provisions governing insurer pricing decisions.

B. The Supreme Court's Decision In *Humana* v. *Forsyth* Defines "Impair" As Frustrating Declared State Policies Or Interfering With A State's Administrative Regime

The meaning of the phrase "invalidate, impair, or supersede" was recently elucidated in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999). The case involved a suit brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), as well as under Nevada law against a group health insurer and the owner of a hospital. The plaintiffs alleged that the insurer, whose contracts with its policyholders called for it to pay 80% of all hospital charges over a certain

deductible, engaged in a scheme to obtain secret discounts for services offered by the hospital and fraudulently failed to disclose and pass on those discounts to its policy beneficiaries (so that the insurer ended up paying much less than 80% of the actual cost of the services). The plaintiffs alleged various fraud counts as predicate acts underlying their RICO claim and sought treble damages as a remedy.

The Supreme Court narrowly ruled that "RICO can be applied *in this case* in harmony with" Nevada's laws governing insurance. 525 U.S. at 303 (emphasis added). "The acts the policy beneficiaries identify as unlawful under RICO," the Court explained, "are also unlawful under Nevada law." *Id.* at 308. Thus, the Nevada Unfair Insurance Practices Act not only sets forth an "administrative scheme that prohibits various forms of insurance fraud and misrepresentation" but also authorizes a "private right of action" in the courts for policyholders injured by insurance fraud. *Id.* at 311-12. "Moreover," the Court emphasized, the Nevada statute "is not hermetically sealed; it does not exclude application of other state laws, statutory or decisional." *Id.* at 312. Specifically, Nevada *common law* imposes an independent duty on insurers to deal with their insureds fairly and in good faith, and it permits plaintiffs who bring suits for insurance bad faith to recover punitive damages awards that are exempt from the usual Nevada cap of three times compensatory damages. *Id.* at 313. "Accordingly, plaintiffs seeking relief under Nevada law may be eligible for damages exceeding the treble damages available under RICO." *Id.*

In addition to analyzing Nevada law and comparing it to RICO, the Court carefully parsed the text of Section 2(b) of the McCarran-Ferguson Act. "[O]rdinarily," the Court noted, the "term 'invalidate' * * * means to *render ineffective*, generally without providing a replacement rule or law." 525 U.S. at 307 (emphasis added; internal quotations omitted). "'[S]upersede,'" on the other hand, "ordinarily means to displace (and thus render ineffective) while providing a substitute rule." *Id.* (internal quotations omitted). "Under these standards," the Court reasoned, "RICO's application to the policy beneficiaries' complaint would neither 'invalidate' nor 'supersede' Nevada law." *Id.* at 308. Thus, the "key question" was "whether RICO's application to the scheme in which the [insurer and hospital] are alleged to have collaborated * * * would 'impair' Nevada's law." *Id.*

The Court next proceeded to examine, and reject, several definitions of "impairment" advanced by the parties and *amici*. First, it rejected the federal government's argument that "impairment" was interchangeable with, and thus added nothing to, the companion terms "invalidate" and "supersede." *Id.* Second, it rejected the argument that "impairment" occurs only where federal and state laws "directly conflict," so that insurers either cannot comply with both state and federal laws or "some portion" of a State's law is displaced or "preclu[ded] in certain contexts." *Id.* (internal quotations omitted). This "direct conflict" interpretation had been adopted by certain circuits in reliance on an analogy to preemption law. Third,

the Court rejected the insurer's contention that "impairment" occurs whenever either a federal law is applied to some aspect of the business of insurance that is *unregulated* under state law, or there is "*any* material variance" between federal law and the "substantive provisions, procedures, or remedies" available under "state insurance law." *Id.* (internal quotations omitted; emphasis added).

In rejecting all of these approaches, the Court explained:

> The dictionary definition of "impair" is "[t]o *weaken*, to *make worse*, to *lessen in power*, *diminish*, or *relax*, or *otherwise affect in an injurious manner*." Black's Law Dictionary 752 (6th ed.1990). The following formulation seems to us to capture that meaning and to construe, most sensibly, the text of § 2(b): When federal law does not directly conflict with state regulation, and when application of the federal law would *not frustrate any declared state policy* or *interfere with a State's administrative regime*, the McCarran-Ferguson Act does not preclude its application.

525 U.S. at 309-10 (emphasis added). In support of that reading, the Court also cited *Shaw* v. *Delta Air Lines, Inc.,* 463 U.S. 85 (1983), and *SEC* v. *National Securities, Inc.,* 393 U.S. 453 (1969). See 525 U.S. at 310-11. It explained that *Shaw* "supports the view that to 'impair' a law is to *hinder its operation* or '*frustrate [a] goal*' of that law." *Id*. at 311 (emphasis added) (quoting *Shaw*, 463 U.S. at 102). Applying that broad definition of impairment, the Court concluded that there was "no frustration of state policy in *the RICO litigation at issue here*" (525 U.S. at 313 (emphasis added)), which sought to apply the same standard of conduct, in the same procedural setting

(a private lawsuit), as Nevada law would provide, and which sought a remedy that was less than what a Nevada court (or jury) could award.

C. Unlike the *Humana* Plaintiffs, The Plaintiffs In This Case Seek To Impose Substantive Requirements On Insurer Conduct, To Employ Procedural Mechanisms, And To Obtain Remedies That Are Vastly Different From Those Available Under State Insurance Law

This case differs markedly from *Humana* v. *Forsyth* in the degree to which the relevant federal and state laws diverge in their (1) substantive provisions, (2) procedural characteristics, and (3) remedies.

1. In contrast to *Humana*, there is no showing here that "[t]he acts the policy beneficiaries identify as unlawful under [federal law] are *also unlawful* under" the pertinent state laws. 525 U.S. at 308 (emphasis added). The plaintiffs' fraud-based RICO claims in *Humana* prohibited exactly the same conduct that was forbidden under Nevada law, but neither Florida nor Texas law currently forbids Allstate's use of credit scoring as one of many rating variables employed in the company's risk assessment and pricing decisions. The most plaintiffs can say is that regulators in those States are looking into the practice of credit scoring, but have not yet concluded their inquiries. See Allstate Br. 13-14.[2]

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[2] Moreover, it is important to note that this lawsuit is a putative nationwide class action that, if certified, would seek to challenge the use of credit scoring by Allstate *in all fifty States*. As the *amicus* brief submitted by the Alliance of American Insurers *et al.* demonstrates, insurance regulators in States other than Florida and

2. Unlike those in *Humana*, the *procedural* characteristics of this federal lawsuit are dramatically different from – and indeed inconsistent with – the procedural schemes in place in the relevant States. Most obviously, Texas and Florida *do not even permit a private right of action* through which policyholders may bring suits against insurers alleging unfair discrimination in pricing or challenging other ratemaking issues. As Allstate demonstrates (Br. 5-7, 26-30), such claims are *precluded* by Texas and Florida law, which sets forth an exclusive system of public administrative redress for aggrieved policyholders and forbids judicial interference with effective rates (including through use of the filed-rate doctrine). The decision by Texas and Florida to limit the role of courts in this way also necessarily means that the actuarial and policy judgments made by state regulators cannot be second-guessed by *lay juries* in private civil litigation. Here, in contrast, the plaintiffs have asked for a jury trial on their federal claims.[3]

Texas have taken divergent approaches to the issue of credit scoring. Some States have *approved* the use of credit scoring in certain circumstances by insurers engaged in writing homeowners' and auto insurance policies. Others, like Texas and Florida, are actively examining the issue and may well conclude that credit scoring is permitted, even desirable, under state law.

[3] The state administrative schemes in Florida and Texas also do not allow for anything resembling a class action. Because they are narrowly concerned with conduct within their respective States, insurance regulators in Florida and Texas are able to focus their attention on specific pricing practices and their compatibility with state law and policy without considering the pricing practices in other jurisdictions

In *Humana*, in contrast, the procedural features of plaintiffs' RICO lawsuit (which was not a class action) and Nevada law were virtually identical. As the Supreme Court took pains to point out, under Nevada law the available administrative remedies are *not* exclusive. On the contrary, fraud claims by policyholders in Nevada are enforceable through private rights of action. And, because policyholders who bring fraud claims against insurers under Nevada common law are entitled to request a jury trial (see *Albert H. Wohlers & Co.* v. *Bartgis*, 114 Nev. 1249 (1999) (affirming jury verdict against insurer in bad faith action)), there was no argument in *Humana* that the determination of the plaintiffs' RICO claims by a *federal jury* would impair the State's mechanisms for regulating insurers by substituting an entirely different type of decisionmaker at the federal level.[4]

(as the jury would need to do here if this case were certified as a nationwide class action). In this respect as well, the procedural aspects of this putative federal class action are vastly different from the procedures available under state law.

[4] Jury verdicts for damages have just as much a regulatory effect as do state statutes or filed rates. "'[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Cipollone* v. *Liggett Group Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see also *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

3. Finally, the far-reaching *remedies* plaintiffs seek to obtain in this case bear little resemblance to the remedies available to policyholders under the exclusive Texas and Florida administrative schemes. As Allstate notes (Br. 3-7 & nn.8-9, 11, 13), insurance regulators in Texas and Florida are empowered to issue administrative orders directing an insurer to return the premium to a policyholder or otherwise to make restitution, to cease and desist from certain practices, to levy administrative fines, and even to suspend an insurer's license. In this lawsuit, in contrast, plaintiffs are seeking far greater remedies: "extraordinary equitable * * * relief" – presumably nationwide in scope – including a preliminary injunction, "rescission" or "reformation" of existing insurance contracts, and an order "attaching, impounding or imposing a constructive trust upon * * * the proceeds of Allstate's' ill-gotten funds." ER 21. *Significantly, plaintiffs are also seeking punitive damages*. See *id*. at 16-17, 19-21; see also *id*. at 21 (also requesting "reasonable attorneys' fees, expert witness fees, and other costs" as well as "declaratory * * * relief"). In *Humana*, in contrast, the plaintiffs were seeking only the remedy of treble damages;[5] and Nevada

[5] At the time *Humana* was litigated in the Ninth Circuit (as today), that court had long taken the position that injunctive relief is *not* available in a private civil action brought under RICO. See *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). Compare *National Organization for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001) (disagreeing with *Wollersheim* and creating an intercircuit conflict), cert. granted, 122 S. Ct. 1604 (2002). Accordingly, the only relief sought by the plaintiffs in *Humana* under RICO

law authorized recovery of uncapped *punitive* damages far in excess of treble damages.[6] Thus, the divergence in remedies in this case is also far greater than it was in *Humana*.

D. The Maintenance Of Plaintiffs' Disparate-Impact Claims Would In Multiple Respects "Invalidate, Impair, Or Supersede" State Insurance Laws

1. Allstate contends that, if plaintiffs are allowed to press their disparate-impact claims challenging the use of credit scoring in pricing decisions under the federal anti-discrimination laws, state insurance law will be "invalidated, impaired, or superseded" in multiple ways. Specifically, Allstate demonstrates that the continued maintenance of this lawsuit would frustrate and interfere with comprehensive Texas and Florida regulatory regimes governing insurance pricing by (1) requiring federal judges to supplant or second-guess expert state regulators who are charged by state law with the exclusive responsibility for making the complex, technical, and policy-laden judgments about pricing issues (Allstate Br. 11-26); (2) interfering with and supplanting ongoing investigations by state regulators into the specific issue of credit scoring (*id.* at 13-14); (3) disrupting state procedural

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was treble damages.

[6] Indeed, in *Albert A. Wohlers & Co.*, the Nevada Supreme Court recently approved a punitive damages award that was more than thirteen times as large as the compensatory damages award. See 114 Nev. at 1268-69.

schemes by allowing a private right of action to proceed even though the Texas and Florida schemes foreclose resort by policyholders to judicial fora through private rights of action (*id*. at 26-30); (4) effectively removing the responsibility for regulatory review of pricing issues from dedicated state administrative fora (*id*. at 30- 32); and (5) impairing the ability of state regulators to maintain uniformity, ensure the adequacy of rates, and retain sensible pricing structures (*id*. at 32-36).

The Chamber fully agrees with this analysis. Both singly and in combination, these features of Texas and Florida law are substantially impaired by the maintenance of plaintiffs' federal claims. As the Supreme Court made clear in *Humana*, "impairment" under the McCarran-Ferguson Act occurs when federal law has the practical effect of either "'weaken[ing],'" or "'lessen[ing] in power,'" or "'diminish[ing],'" or "'relax[ing],'" or "'otherwise affect[ing] in an injurious manner,'" the operation of state insurance laws. 525 U.S. at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed.1990)). In this case (unlike *Humana*) it cannot be said that "application of the federal law would *not frustrate any declared state policy* or *interfere with a State's administrative regime*." *Id.* at 310 (emphasis added); see also *id*. at 311 (suggesting that impairment occurs where federal law "frustrates a goal" of state law) (citing *Shaw*, 463 U.S. at 102). And there certainly will be a "lessening in power" of state insurance regulators if federal judges and juries are allowed to

reexamine or usurp ratemaking decisions. Indeed, certain of the inconsistencies between federal and state law identified by Allstate – such as the invocation of a private right of action in this case – go well beyond impairment, and qualify as examples of federal law's "invalidating" or "supersed[ing]" state law.

2. This impairment of state insurance laws is exacerbated, in our view, by the vast difference between the *procedural mechanisms invoked* and *remedies sought* in this putative nationwide class action and the administrative scheme and remedies prescribed by Texas and Florida law. The Supreme Court's decision in *Humana* makes clear that federal law may "impair" state law even if it seeks to enforce an identical substantive norm of conduct. Otherwise, there would have been no need for the Court to discuss the procedural mechanisms and remedies provided by RICO or to compare them with Nevada law; the Court's analysis could have ended with its conclusion that both Nevada statutory and common law, and the fraud-based counts underlying plaintiffs' RICO suit, forbid insurer fraud.

As explained above, the procedural mechanisms applicable to this federal lawsuit – and the remedies sought by plaintiffs – differ substantially from the procedures and remedies available to aggrieved policyholders under Texas and Florida insurance laws. Under the law of those States, there is no private right of action to pursue claims such as those raised here; the state scheme of administrative

remedies is exclusive; and the filed-rate doctrine forbids collateral challenges to insurance rates and prices reflected in regulatory filings unless and until those rates are reopened or changed by insurance regulators. Taken together, these provisions embody a strong policy against judicial or jury interference with pricing issues, which remain the exclusive province of state insurance regulators.

The fact that the federal decisionmaker in this case is fundamentally different in nature, moreover, only increases the risk of impairment of state pricing standards. Take, for example, the simple case where the substantive standard imposed by state law is identical to that enforced under federal law. There is no guarantee that a federal jury will interpret the standard in the same manner as would a state insurance commissioner. That is especially true where, as here, the substantive standard is general and open-ended (such as a prohibition on "unfair" price discrimination).

The remedies sought in this lawsuit are also markedly different from those permitted under the Texas and Florida insurance schemes. Perhaps most notably, the plaintiffs here are requesting punitive damages – a remedy that is unavailable to policyholders who bring complaints about unfair or discriminatory rates in those States. That alone should count as an impairment within the meaning of the McCarran-Ferguson Act.

3. The National Association of Insurance Commissioners ("NAIC"), which represents the state insurance commissioners, has specifically agreed with Allstate's position on the McCarran-Ferguson issue before this Court. In a case also involving the Fair Housing Act, NAIC stated unequivocally that "the availability of the 'disparate impact' approach invalidates, impairs, or supersedes state insurance laws and cannot be applied to [a property insurer] under the McCarran-Ferguson Act." Motion for Leave and Brief of NAIC As Friend of the Court In Support of The Petition For A Writ Of Certiorari, *Nationwide Mutual Ins. Co.* v. *Cisneros*, No. 95-714, at 9 (U.S.) (filed Jan. 2, 1996) ("NAIC Mot. & *Amicus* Br.").[7]

According to NAIC, application of a disparate-impact theory of liability "invalidates, impairs, or supersedes" state insurance law in at least two ways. First, it "makes impossible the operation of state laws establishing the insurers' right to use rationally based, neutral risk selection techniques." NAIC Mot. 2; see also NAIC *Amicus* Br. 2 (threat of disparate-impact liability under federal law "prevents Ohio [pricing] laws from operating"). As NAIC correctly noted, "the ability of insurers to

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[7] NAIC is a "a nonprofit, unincorporated association whose members are the principal regulatory officials of the fifty States, the District of Columbia, territories and insular possessions of the United States." NAIC Mot. 1-2. A copy of the NAIC motion and brief (which were printed together) is being included as an addendum to the *amicus* brief submitted in this case by the Alliance of American Insurers *et al.*

engage in risk selection is the very essence of the business of insurance." NAIC Mot. 3. Moreover,

> [t]he ability of an insurer to engage in proper risk selection is a key aspect of an insurer's financial soundness. An insurer that fails to use appropriate risk selection techniques will soon find itself in financial trouble, to the detriment of policyholders and claimants relying on the insurance coverage. This is due to adverse selection, in which insureds obtain coverage at too favorable a rate for the risk they represent. Since the insurer has not collected adequate premiums for these risks, claims soon exceed money available to pay claims, leading to insolvency of the insurer.

NAIC Mot. at 2; accord Allstate Br. 12-13 (explaining why "[i]nefficient risk discrimination is both economically and socially undesirable"). See generally S. HARRINGTON & G. NEIHAUS, RISK MANAGEMENT AND INSURANCE 119-21 (1999) (discussing redistributive and behavioral effects of restrictions on risk classifications). The allowance of disparate-impact claims "stop[s] insurers * * * from engaging in risk selection necessary to insurer solvency" – in contravention of "the best interests of policyholders and claimants" alike. NAIC Br. 2.

Beyond that, NAIC explains that the application of a disparate-impact test in this setting threatens "the equitable allocation" of those risks that are "rejected by the voluntary market" as too great. NAIC Br. 2. In "[v]irtually every state," this goal of equitable allocation is accomplished through use of a "Fair Access to Insurance Requirements (FAIR)" plan. *Id.* at 8; see also *id.* (explaining that FAIR plans "are

designed to make basic property insurance available to applicants rejected by the voluntary insurance market so that risks which present a greater risk of loss my be allocated equitably among insurers").

"Under the 'disparate impact' theory," however, "this system is destroyed because risks cannot be rejected by the voluntary insurance market based on rational, neutral underwriting guidelines," such as credit scoring or other such factors. NAIC Br. 9. Moreover, to the extent that disparate-impact liability for credit scoring is sought to be imposed on a single insurance company (as in this litigation), the dynamics identified by NAIC would create additional distortions in FAIR plans (by causing the targeted insurer to accept insureds it would otherwise reject and then, in turn, to receive a higher share of the rejected applicants under the FAIR plan because of the resultant larger market share).

4. In holding that the maintenance of plaintiffs' lawsuit is *not* barred by the McCarran-Ferguson Act, the district court did not offer a careful assessment of Allstate's theories of impairment. Nor, for that matter, did it provide any analysis of the Supreme Court's decision in *Humana* v. *Forsyth* or its ramifications for this case. Instead, the district court relied largely on three opinions by courts of appeals that it believed undercut Allstate's position: *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993); *Nationwide Mut. Ins. Co.*

v. *Cisneros*, 52 F.3d 1351 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996); and *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), cert. denied, 122 S. Ct. 1608 (2002). But two of those cases antedate the Supreme Court's decision in *Humana* and rely on an interpretation of the McCarran-Ferguson Act that was expressly rejected by the Supreme Court. See page 8-9, *supra*. Specifically, both *NAACP* v. *American Family Mut. Ins. Co.* and *Nationwide Mut. Ins. Co.* v. *Cisneros* endorse an unduly limited reading of "impair" under which only instances of actual conflict between federal and state law trigger the McCarran-Ferguson bar. See *NAACP*, 978 F.2d at 295-96 (relying on "inverse preemption" interpretation requiring actual conflict between state and federal law); *Nationwide*, 52 F.3d at 1363 (same; citing and quoting *NAACP*'s reliance on theory of "inverse preemption"). Although the Eleventh Circuit's decision in *Moore* includes a discussion of *Humana*, it also relies on the Seventh Circuit's decision in *NAACP* without recognizing that the rationale of that case did not survive *Humana*. The district court in this case likewise failed to recognize that point. See also Allstate Br. 23-24 & n.56 (explaining limited scope of issues actually resolved by the courts in *NAACP* and *Nationwide*).

Nor is this all. The district court brushed aside Allstate's reliance on the absence of (indeed, the prohibition on) private rights of action under Texas and Florida law by observing that other courts had refused to find impairment "even

though the state statutes prohibiting discrimination in insurance provide no private right of action." ER 163. What cases did the district court cite for that proposition? None other than *Nationwide* and *NAACP*. But, again, those decisions applied an unduly restrictive definition of "impair" under which only a direct conflict between state and federal law would trigger the McCarran-Ferguson Act's prohibition. Moreover, the Supreme Court in *Humana* went out of its way, in rejecting the insurer's McCarran-Ferguson arguments, to emphasize that both Nevada law and RICO *included* private rights of action and that the Nevada insurance regulatory scheme "is not hermetically sealed." *Humana*, 525 U.S. at 312. Further, the Court expressly relied on the existence of private rights of action in Nevada as a basis for rejecting a theory of impairment advanced by one of the *amici*. See *id.* at 312 n.10. In summarily dismissing the significance of the absence of private rights of action in Texas and Florida, the district court completely overlooked these aspects of *Humana*.

Again citing *NAACP*, the district court also deemed it significant that neither Texas nor Florida has "requir[ed]" insurers to use "the challenged credit scoring system," or "condon[ed] this practice," or "committ[ed] to insurers all decisions about credit-scoring," or determined yet that "this credit-scoring system does not violate state law." ER 163. "[A]lthough investigations regarding the effect of credit scoring on insurance may be ongoing" in those States, the district court reasoned, "no official

of Texas or Florida has appeared to argue that a federal remedy under Section 1981, Section 1982 or the Fair Housing Act would frustrate any state policy." ER 164 (citing *NAACP*). This analysis is flawed at every turn. As an initial matter, the applicability of the McCarran-Ferguson Act is not dependent on whether a busy state insurance commissioner elects to appear in private litigation. While such direct participation may help to dispel any doubt that might exist concerning whether the "purposes" underlying state insurance law would be frustrated by the application of federal law, it would not relieve the courts of the duty (under *Humana*) to examine the respective provisions of the relevant state and federal laws and evaluate the practical impact of allowing the federal lawsuit to proceed. In any event, as explained above, NAIC (which represents the state insurance commissioners) has made its view on this subject quite clear in another forum, the U.S. Supreme Court.

Equally mistaken is the district court's suggestion that there is no "impairment" of state insurance law so long as state regulators have not yet reached a decision concerning the legality or desirability of a particular practice under state law. That argument puts the cart before the horse. Unless and until a state regulator has declared that a credit scoring is *unlawful*, it cannot be said (as it could with plaintiffs' fraud-based RICO claims in *Humana*) that the substantive requirements plaintiffs seek to impose in this case under federal law are identical to those that state law

imposes. For all we know, Texas and Florida may end up concluding that credit scoring is perfectly lawful. If they do, then there would be not only an impairment but also an irreconcilable conflict between state law and the premise of this lawsuit.

Apart from demonstrating that an insurer practice in not being left unregulated at the state level, the existence of an ongoing investigation ought to be regarded as a factor *in favor of* (not against) finding that McCarran-Ferguson bars a federal lawsuit. At a minimum, the pendency of a state investigation into the underlying conduct destroys any argument that there is no impairment because there is no difference in the state and federal substantive requirements.

E. Principles Of Federalism Require That Any Doubt About Whether The Maintenance Of Plaintiffs' Disparate-Impact Claims Would "Impair" State Insurance Laws Must Be Resolved In Allstate's Favor

Although the impairment of state law caused by the continued maintenance of this lawsuit is clear, if the Court has any doubt on that score it should resolve the doubt in Allstate's favor. Such an approach is fully consistent with basic principles of federalism as well as the policies underlying the McCarran-Ferguson Act.

"Federal statutes impinging upon important state interests 'cannot * * * be construed without regard to the implications of our dual system of government.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) (quoting Frankfurter*, Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539-40 (1947)).

Congress's authority to impose its will on the States is an "extraordinary power in our federalist system" (*Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)); and, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). The Supreme Court has applied this interpretive principle in a wide array of cases involving federal statutes touching on areas of traditional state authority. See, *e.g.*, *Vermont Agency of Natural Resources* v. *United States*, 529 U.S. 765, 787 (2000); *Gregory*, 501 U.S. at 460; *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *Bass*, 404 U.S. at 349. As the history behind the enactment of the McCarran-Ferguson Act shows (see pages 4-5, *supra*), the "business of insurance" is an area of traditional state authority. Indeed, it is an area over which States traditionally had *exclusive* regulatory authority.

The McCarran-Ferguson Act itself confirms the appropriateness of resolving any doubt on the issue of impairment in Allstate's favor. The very purpose of that statute was to protect and preserve the traditional prerogatives of the States to regulate the business of insurance. Toward that end, the Act requires Congress to make a clear statement if it wishes to intrude on this area of traditional state expertise. That principle should apply with no less force when it is unclear whether a federal law in fact has the practical effect of "invalidat[ing], impair[ing], or supersed[ing]"

a state law enacted for the purpose of regulating the insurance business. Accordingly, any doubt about whether the continuation of this lawsuit would "impair" Texas and Florida insurance law under the standards set forth in *Humana* should be resolved in Allstate's favor.

F. This Court Should Make Clear That Nationwide Class Actions Targeting Some Aspect Of The "Business Of Insurance" Regulated By The States Are Presumptively Barred By The McCarran-Ferguson Act

Although the plaintiffs in this case are six individual policyholders, they seek to represent a nationwide class of "non-Caucasion" Allstate policyholders. This aspect of plaintiffs' case is highly relevant to the McCarran-Ferguson analysis. If the case is allowed to proceed and is certified as a class action, it would have the effect of vesting regulatory authority over an important aspect of "the business of insurance" in all fifty States in the hands of a single federal judge (and a single lay jury). The potential for interference with and impairment of state prerogatives would then be greatly magnified. Given the differences in the various state insurance schemes, it is difficult to imagine how a nationwide class action such as this could *not* trench on the law of at least some jurisdictions. See note 2, *supra*. Put differently, the odds of interference with state insurance law are high in any nationwide class action targeting some aspect of the business of insurance traditionally regulated by the States.

The fact that the plaintiffs' lawsuit challenges state ratemaking authority only worsens the problem. The process of rate-making is "essentially a legislative function." *Colorado Interstate Gas Co.* v. *FERC*, 324 U.S. 581 (1945). For example, "allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Id.* at 589. Moreover, ratemaking (or the evaluation of pricing practices) often involves the consideration, and balancing, of a multitude of complicated factors, many of which require either specialized knowledge, policy judgment, or both. Courts, as institutions, "are scarcely equipped" to make initial determinations concerning "rate structures and practices." *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366 (1994).

If a nationwide class action were certified here, a single federal court would be required, in evaluating claims of disparate impact, to wade through oceans of actuarial and statistical data in assessing whether credit scoring has a disparate impact on plaintiffs, whether the practice is consistent with business necessity in any of the States where it is allegedly used by Allstate and, if so, whether there is a "less disparate" alternative under the divergent pricing systems in place in the fifty States. Not only would that task be enormous, burdensome, and ill suited to the federal judiciary (not to mention juries), but it would also, by its very nature, deflect the decisionmaker's attention from the careful, state-specific focus that expert regulators

would necessarily take in each of the States. That, too, ought to count as an impairment of the state regime.

Such lawsuits, it should be added, would also give rise to severe practical difficulties in administering the McCarran-Ferguson Act – particularly where, as here, insurance regulators across the country are actively conducting investigations into a particular pricing practice. During the pendency of this lawsuit, as individual States decide to *approve* the use of credit scoring, Allstate will be able to renew its McCarran-Ferguson objections to the inclusion of policyholders from those States; any class that would be certified, moreover, would need to be modified to exclude such policyholders. This is a recipe for chaos. Precisely to avoid such uncertainty, federal courts often employ the doctrines of abstention and primary jurisdiction to ensure that state administrative processes run their course before federal courts get involved. But here, in the context of the McCarran-Ferguson Act, an equally effective tool of judicial administration would be to apply a strong presumption that putative nationwide class actions of this kind are barred.

That presumption makes perfect sense. The odds of impairment of state prerogatives are magnified fifty times in the case of a nationwide class action. Texas and Florida are not the only jurisdictions that do not provide a private right of action to policyholders who wish to challenge pricing decisions. They are not the only

States that have exclusive administrative schemes. For these reasons and others, it is almost a foregone conclusion that a nationwide class action will cause a serious impairment of state insurance law. When one adds the fact that these sprawling lawsuits often request a jury trial and seek remedies (such as punitive damages) that are unavailable under state law, the presumption we propose is strongly grounded in experience. For all of these reasons, the Court should adopt a strong presumption that putative nationwide class actions challenging some aspect of the business of insurance – and in particular pricing or ratemaking decisions – are barred by the McCarran-Ferguson Act.

CONCLUSION

The district court's order should be reversed and remanded with instructions to dismiss the complaint.

Dated: September 18, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to this Court's Rule 32.2 and 32.3, I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7).

1. Exclusive of the parts of the brief exempted by this Court's Rule 32.2, the brief contains 6968 words.

2 The brief was prepared in proportionately spaced typeface using the Word Perfect 10 word processing system in the Times New Roman font, with 14 point letters.

3. I understand that a material misrepresentation in completing this certificate, or a circumvention of the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.2, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Dated: September 18, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2002, I caused copies of the foregoing Brief for the Chamber of Commerce of the United States as *Amicus Curiae*, on both paper and on computer-readable disk, to be served by first-class mail, postage prepaid, on each of the following:

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