Nos. 91-1111 and 91-1128

In the Supreme Court of the United States

OCTOBER TERM, 1992

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HARTFORD FIRE INSURANCE CO., ET AL.,
AND
MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL.,

PETITIONERS
v.
STATE OF CALIFORNIA, ET AL., RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PETITIONERS IN NO. 91-1111

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QUESTIONS PRESENTED

1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

2. Whether agreements among primary insurers and reinsurers on standardized advisory insurance policy forms and terms of insurance coverage constitute a "boycott" outside the exemption of the McCarran-Ferguson Act.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This antitrust action originally was brought by the States of Alabama, Arizona, California, Massachusetts, Minnesota, New York, West Virginia, and Wisconsin. The litigation subsequently was joined by the States of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Washington, and by a number of private plaintiffs, 14 of which appealed from the district court's adverse decision and thus were parties in the court of appeals (Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos T/A Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto T/A R.J. Liberto, Inc.; P & J Casting Corp.; and Henry J. Rosenfeld).

The 32 defendants are: (1) four primary insurance companies: the Aetna Casualty and Surety Company; Allstate Insurance Co.; Hartford Fire Insurance Co.; and Insurance Company of North America and its corporate parent, CIGNA Corp.; (2) Insurance Services Office, Inc. ("ISO"), a licensed property-casualty rating and advisory organization whose participants include some 1400 insurance companies in the United States; (3) six domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; Prudential Reinsurance Company; and Winterthur Reinsurance Corp. of America; (4) the Reinsurance Association of America ("RAA"), an association of domestic reinsurers; (5) 17 foreign reinsurers, including two individuals: Merrett Underwriting Agency Management Limited; Three Quays Underwriting Management Limited; Janson Greene Management Limited; Edwards & Payne (Underwriting Agencies) Limited; C.J.W. (Underwriting

Agencies) Limited; Murray Lawrence & Partners; Oxford Syndicate Management Limited; D.P. Mann Underwriting Agency Limited; J. Brian Hose and Others, Ltd.; Union-America Insurance Co., Ltd.; CNA Re (U.K.) Ltd.; Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; Kemper Re (U.K.) Ltd.; Continental Reinsurance Co. (U.K.) Ltd.; Robin A.G. Jackson; and Peter N. Miller; and (6) one domestic and two foreign reinsurance brokers: Thomas A. Greene & Co., Inc.; Ballantyne, McKean & Sullivan, Ltd.; and R.K. Carvill & Co., Ltd.

Petitioners in No. 91-1111 are the above domestic primary insurance entities and their licensed rating organization, and the domestic reinsurance entities (including Thomas A. Greene & Co., the domestic reinsurance broker) and their trade association. Parent companies and subsidiaries (other than wholly owned subsidiaries) of petitioners are listed at Pet. App. 100a and, for Winterthur Reinsurance Corp. of America, at page iii of the petition for a writ of certiorari in No. 91-1131.*

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*The sole change in petitioners' Rule 29.1 statement since the filing of the petitions is as follows:

> Hartford Fire Insurance Company is a wholly owned subsidiary of ITT Hartford Group, Inc., which is a wholly owned subsidiary of ITT Corporation. Hartford Fire Insurance Company's subsidiaries that are not wholly owned are ADAPT, Inc., and Thoroughbred International Insurance Company.

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JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991. Pet. App. 89a-97a. The petition for a writ of certiorari in No. 91-1111 was filed on January 10, 1992, and was granted on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

A. The United States Insurance Industry

Review of the allegations of plaintiffs' complaints requires an understanding of the basic features of the business of insurance in the United States. Accordingly, before describing the particular facts of this case, we briefly summarize the overall structure and relevant characteristics of this industry.

1. *Primary Insurance, Reinsurance, And Standardized Insurance Forms*

Defendants in this case include domestic primary insurance companies and domestic reinsurers (petitioners herein) and foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146). A primary insurer sells insurance directly to policyholders (Cal. Cmplt. ¶4(j); Conn. Cmplt. ¶4(*o*)) and defines the risks it undertakes through the terms of the insurance policy.[1] Reinsurers provide "insurance for insurers" by contracting to indemnify a primary company for a portion of the risks it has insured. Cal. Cmplt. ¶4(*o*); Conn. Cmplt. ¶4(p). Primary insurers and reinsurers are uniquely "intertwined and interdependent." States' Unified Dist. Ct. Br. 7. A reinsurer shares the primary insurer's risks, and the liabilities of both reinsurer and primary insurer depend upon the terms of the primary policy. 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, PRINCIPLES OF REINSURANCE 87 (1990).

Distribution of risks through reinsurance is an integral part of the business of insurance. See Pet. App. 46a-47a. Reinsurance promotes the solvency of insurance companies, and so protects policyholders, by permitting insurers to spread their risk to guard against catastrophic losses. In addition, primary insurers do not have to maintain financial reserves for the portion of the risk they cede to reinsurers and thus can increase their capacity to write additional policies in order to compete in the sale of insurance. Cal. Cmplt. ¶34; Conn. Cmplt. ¶4(p).

To meet the reinsurance needs of domestic primary insurers, much reinsurance must be placed abroad. The general liability risks at issue in this case are reinsured in large part through Lloyd's of London and the London Company Market. Cal. Cmplt. ¶¶4(t, v), 30-31; Conn. Cmplt. ¶¶4(h, i), 40; Pet. App. 8a-9a, 35a-37a.

The ability of primary insurers to obtain reinsurance is facilitated by standardization of the policy forms upon which primary insurance is written. Primary insurers often share their risks with many reinsurers because of the limited capacity of individual reinsurers and the need to diversify sources of

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[1] The state complaints, which are tracked by the complaints of the private plaintiffs, fall into two groups typified by the pleadings of the attorneys general of California and Connecticut. Pet. App. 12a-13a. The California and Connecticut complaints are set out at J.A. 5-56 and J.A. 57-102.

coverage. Without standardized forms, every reinsurer would have to review the terms of each primary policy before committing to reinsure, causing intolerable delays and increased costs. See R. Keeton & A. Widiss, INSURANCE LAW 119 (1988) ("risk distribution on the scale that exists in a complex commercial society may only be feasible if insurance transactions employ standardized insurance policy terms").

Form standardization also enables the insurance industry to compile accurate data about risks and costs, which are used in state-supervised ratemaking proceedings to set premium rates that safeguard insurer solvency and provide reasonable prices for consumers. K. Abraham, INSURANCE LAW & REGULATION 31 (1990). Moreover, standardization protects consumers and their agents and brokers from facing an unintelligible array of insurance forms with coverage provisions that could not be compared, thus facilitating comparison-shopping for insurance on the basis of such factors as price, quality of service, and insurer reliability. *Id.* at 28, 29.

2. *General Liability Insurance; Occurrence And Claims-Made Coverages; And The Tort Liability Crisis*

General liability insurance indemnifies business and governmental entities against third-party claims for bodily injury or property damage. Most general liability insurance is written on standardized Commercial General Liability ("CGL") advisory policy forms developed by defendant Insurance Services Office, Inc. ("ISO"). ISO, whose participants include some 1400 domestic property and casualty insurers, is licensed or registered in all 50 states as a rating, rate service, or advisory organization. ISO develops standardized advisory forms that comply with state requirements for general liability and other types of insurance and files these forms with state insurance departments. Cal. Cmplt. ¶¶4(k), 38-39, 41, 44; Conn. Cmplt. ¶¶4(e), 47-50; Pet. App. 9a, 36a; Banfield Aff. ¶2.[2]

General liability insurance traditionally was written on "occurrence" policy forms. Simply put, an occurrence policy provides coverage for injuries or damage occurring while the policy is in force, regardless of when a claim is made. Occurrence policies thus have a "long tail"; claims for harms with an extended latency period, such as some pollution claims, may be submitted many years after the policy has expired. These long-tail risks often are unforeseeable when the occurrence policy is written and hence are not reflected in the underwriting decision or the premium charged. Moreover, unanticipated judicial interpretations of the scope of occurrence coverage may expand the risks insured long after a policy has expired. Cal. Cmplt. ¶4(a, b, h); Conn. Cmplt. ¶4(b, m); Banfield Aff. ¶6. "Claims-made" policies, by contrast, generally provide coverage for claims made during the policy period (or any extension of the claims-reporting period), even if the event giving rise to the claim occurred earlier. Even before 1984, claims-made policies were in common use for lines of insurance such as medical malpractice and other long-tail coverage. Cal. Cmplt. ¶4(c); Conn. Cmplt. ¶4(a); Banfield Aff. ¶6.

The activities of defendants challenged in this case followed developments in the tort liability system that adversely affected much of the casualty insurance industry in the early to mid-1980s. At that time, changing legal standards had expanded tort liability and created uncertainty about future tort liability costs. Banfield Aff. Exhs., J.A. 133, 142; U.S. Dep't of Justice, Tort Policy Working Group, *An Update on the Liability Crisis*

[2] In support of their motion for summary judgment, defendants submitted the uncontested affidavit of Carole Banfield, ISO's Senior Vice President of Government Relations, which describes the states' review of the forms at issue in this case. That affidavit and relevant excerpts from the exhibits are set out at J.A. 113-185.

53 (Mar. 1987) ("*1987 DOJ Report*"); U.S. Dep't of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* 2-3 (Feb. 1986) ("*1986 DOJ Report*"). In addition, both the number of tort claims filed and the amount of damages awarded had substantially increased. General liability insurance premiums did not reflect these unpredictable extensions of tort liability. *1986 DOJ Report* at 3.

Much of the cost of escalating tort liability was imposed on insurers through expansive and unforeseeable judicial interpretations of insurance coverage. Banfield Aff. Exhs., J.A. 133, 142-143; *1986 DOJ Report* at 51. For example, general liability policies traditionally covered claims for damage caused by "sudden and accidental" pollution. Some courts interpreted this provision to include gradual pollution incidents that insurers had intended to exclude. Banfield Aff. Exh., J.A. 171-172; *1986 DOJ Report* at 55. See, *e.g., American Motorists Ins. Co.* v. *General Host Corp*., 667 F. Supp. 1423, 1427-1430 (D. Kan. 1987) (criticizing conflicting cases).

These developments contributed to substantial underwriting losses for casualty insurers. To avoid further losses, insurers increased premiums for new general liability insurance to levels that reflected the actual risks assumed and declined to write certain coverages that threatened exposure to continued underwriting losses. *1986 DOJ Report* at 1-3, 14, 49, 55. Several federal government agencies investigated allegations that joint action by insurance companies, rather than the tort liability crisis and other economic factors, had caused the unavailability and unaffordability of insurance coverage during the 1980s. These agencies uniformly concluded that such claims had no merit.[3]

[3] See *To Repeal or Revise the McCarran-Ferguson Act: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 53-54 (1987) (statement of Charles F. Rule, Acting Assistant Attorney General, Antitrust

B. *The Complaints In This Case*

1. *Development Of The 1986 Forms And The States' Review*

In 1977, ISO began to review its 1973 CGL form, which was an occurrence form that covered "sudden and accidental" pollution and other general liability risks. Cal. Cmplt. ¶¶4(*l*), 52-53, 55; Conn. Cmplt. ¶¶4(*l*), 56-57, 59. In 1984, ISO proposed two new advisory forms—one an occurrence form and the other, as an alternative, a claims-made form. Cal. Cmplt. ¶56; Conn. Cmplt. ¶60; Pet. App. 36a-38a. Each proposed form maintained coverage for "sudden and accidental" pollution. Each form also provided that the insurer would continue to bear the legal costs of defending covered claims against the insured in addition to the stated limits of coverage. Finally, the proposed claims-made form covered claims made during the policy period for injury arising out of any prior occurrence; it did not contain a "retroactive date" provision excluding coverage of claims stemming from events occurring before the agreed date. Cal. Cmplt. ¶¶4(e-g), 53-54, 59-60; Conn. Cmplt. ¶¶4(c, n, q), 57-58, 63-64.

Division, Department of Justice) ("it seems highly probable that the property/casualty industry is in fact competitive, and that collusion is not responsible for the availability and affordability crisis in certain lines of insurance"); Letter from Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, to Jay Angoff, National Insurance Consumer Organization (Apr. 22, 1986) ("The Federal Trade Commission has within the last six months investigated similar charges concerning the pricing and availability of certain lines of property and casualty insurance. * * * I understand that the Commission has now closed the investigation because it was unable to find any evidence of collusion"); U.S. Dep't of Justice, Antitrust Division. "The Crisis in Property-Casualty Insurance," Appendix to *1987 DOJ Report* ("It has been asserted that a principal cause of the crisis has been concerted, anticompetitive actions by insurers to raise prices in certain lines of property-casualty insurance or even to refuse to write such insurance. Economic analysis of the relevant insurance markets, however, leads to the conclusion that such a scenario is implausible").

ISO submitted the proposed 1984 forms and four subsequent sets of revisions to the insurance departments in all 50 states. Thirty-five states and the National Association of Insurance Commissioners ("NAIC") held public hearings on the forms and received the views of all interested parties, including primary insurers, domestic and foreign reinsurers, insureds, the general public, and consumer advocates. State attorneys general also submitted their views as to the impact of the forms on competition and consumer welfare. In addition, state insurance departments held continuing discussions with ISO, raised numerous questions concerning the rationale for and consequences of the proposed forms, and requested additional information. Finally, the forms were widely discussed in the media and in open meetings within the insurance industry. Before the final revisions in 1986, the proposed ISO forms were rejected by a number of states. Pet. App. 37a-38a; Banfield Aff. ¶¶7, 9, 11-13, 16, & Exh. H; Defendants' State-by-State Appendix (¶4 of each state summary).[4]

As revised in response to the states' review and discussions within the industry, the final 1986 forms differed from the 1973 form in three respects relevant here: (1) the revised forms provided alternative occurrence and claims-made coverage options; (2) the forms excluded pollution-related losses but provided similar coverage through an optional "buy-back" endorsement as well as two separate specialized advisory policy forms for pollution risks; and (3) the claims-made form provided for a retroactive date includable by agreement between the insurer and the insured. Another change from the 1973 form, which was considered but not adopted, would have made the legal costs of defending a claim subject to the dollar limits of the policy. Banfield Aff. ¶¶10, 14-16, 21. As ultimately amended, both the occurrence and claims-made forms were approved

[4] The summary-judgment record contains defendants' State-by-State Appendix summarizing the states' insurance regulatory systems and forms-review processes. Excerpts from this appendix are set out at J.A.186-215.

by 42 states, including 16 of the 21 states relevant to this litigation.[5]

In reviewing ISO's revisions, state insurance regulators focused on precisely the same issues that underlie plaintiffs' claims here: the appropriate triggering event for coverage, the retroactive date provision, the separation of pollution coverage from the basic forms, and the inclusion of defense costs within policy limits. Banfield Aff. ¶¶8-11. In approving the proposed forms, state insurance commissioners determined that they were in the public interest. For instance, the Connecticut Insurance Commissioner concluded that "the insurance industry has fairly demonstrated a need for a Claims Made form of insurance, specifically in long tail types of commercial coverage." Banfield Aff.Exh., J.A.139. Similarly, the Illinois Insurance Commissioner concluded that "[t]his new policy form filing presents a new approach at a time when the market place is in desperate need of a tool to break the intolerable boom and bust cycle which has dominated liability markets for decades." *Id.*, J.A. 154. A number of state insurance commissioners specifically discussed the role of reinsurers during the development of the revised forms and the reinsurers' concerns about existing forms. *E.g.*, Banfield Aff. ¶16; Exhs., J.A. 133-134, 165, 174, 175, 177-178.

More than a year after the approved 1986 forms became effective, ISO discontinued its data-collection and risk-

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[5] Plaintiffs California and Colorado had no procedure for approving proposed forms, but had authority to disapprove forms and took no action to disapprove the CGL forms. Pet. App. 38a. Only plaintiffs Massachusetts and New Jersey declined to approve either of the 1986 CGL forms; in those states the 1973 form continued to be used, supplemented by state-approved endorsements that included limitations on pollution coverage identical to those in the 1986 forms. (Massachusetts in 1989 and New Jersey in 1990 approved the 1986 occurrence form.) Four other states**C**plaintiff New York, and Nebraska, Texas, and Vermont**C**disapproved the 1986 claims-made form but approved the 1986 occurrence form. *Ibid.*; Banfield Aff. ¶¶17, 19-20.

estimation support services for the superseded 1973 CGL form (except in the two states where neither of the new forms had been approved). Cal. Cmplt. ¶99; Conn. Cmplt. ¶¶102-103; Pet. App. 38a.

2. *Plaintiffs' Boycott Allegations*

Notwithstanding the conclusion of the federal government that the insurance crisis in the 1980s was not attributable to collusion among insurers (see page 5 & note 3, *supra*), the attorneys general of 19 states filed the present complaints in 1988 and 1989 alleging violations of Section 1 of the Sherman Act. These complaints asserted that defendant primary insurers and reinsurers engaged in conduct that amounted to acts of "boycott, coercion, or intimidation" outside the McCarran-Ferguson Act's antitrust immunity for the business of insurance.

Specifically, plaintiffs charged that defendant primary insurers opposed features of ISO's 1984 proposed advisory forms and sought, by enlisting the assistance of defendant domestic and foreign reinsurers, to have ISO eliminate occurrence coverage, pollution coverage, and retroactive coverage, and to include defense costs within coverage limits. The primary insurers and reinsurers were alleged to have stated that if general liability insurance were written on the proposed 1984 forms, defendant reinsurers would not reinsure it. As a result, ISO allegedly agreed with defendant primary insurers and reinsurers to withdraw the proposed 1984 forms, and to file in their place advisory forms that did not include retroactive or pollution coverage and to modify its forms further at some unspecified time in the future to include defense costs within policy limits. ISO also discontinued statistical support for the superseded 1973 form. Cal. Cmplt. ¶¶51-85, 97-100, 111-125, 129; Conn. Cmplt. ¶¶73-89, 101-104, 120-124.

In addition, plaintiffs charged that defendant foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) attempted to eliminate use of the occurrence policy and of the pollution coverage endorsement that were available under the 1986 CGL forms. To accomplish this objective, these foreign reinsurers allegedly agreed not to reinsure policies written by domestic primary insurers on the 1986 occurrence policy form or on forms without a pollution exclusion. Cal. Cmplt. ¶¶87-96, 106-110, 131-140, 146-150; Conn. Cmplt. ¶¶91-100, 110-114, 125-139.[6]

C. The Decisions Of The Courts Below

Accepting plaintiffs' factual allegations as true and taking all disputed facts and inferences in plaintiffs' favor (Pet. App. 35a), the district court dismissed the complaints. Judge Schwarzer held that the alleged activities of the defendants, including the foreign reinsurers, were entitled to McCarran immunity because they constituted the "business of insurance * * * regulated by State Law." *Id.* at 46a-50a. In the alternative, the court concluded that, even if the foreign reinsurers' activities were not subject to state regulation and hence not exempt from the federal antitrust laws, the domestic insurers and reinsurers would not lose their exemption as a result of their alleged "joint action with nonexempt entities." *Id.* at 47a n.13.

The district court further held that the complaints failed to allege a boycott within the exception to antitrust immunity

[6] As relief, plaintiffs sought to restructure the general liability insurance business. Cal. Cmplt. ¶¶157-186; Conn. Cmplt. ¶¶147-163. Notwithstanding state insurance departments' approval of the revised forms, plaintiffs requested that ISO be enjoined to re-issue the originally proposed 1984 forms amended by new provisions added by plaintiffs. Cal. Cmplt. ¶163. Furthermore, plaintiffs asked for stringent limits on communications between and among insurers and reinsurers (*id.* ¶¶159, 170-177) and urged major revisions in ISO's operation and governance, including prohibiting defendants "from participating on any board or committee of ISO for five years" (*id.* ¶166) and requiring ISO's Board of Directors to consist of a majority of "public-interest members as appointed by the Court." *Id.* ¶168; see also Conn. Cmplt. ¶154.

under the McCarran-Ferguson Act. Pet. App. 50a-58a. The court determined that, "[s]tripped of their pejorative allegations" (*id.* at 43a), plaintiffs' complaints "charge no more than an agreement to restrict coverage." *Id.* at 52a. Because "the McCarran Act leaves unprotected [only] conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant * * *, such as refusals to deal on any terms and exclusion from alternative sources" (*id.* at 57a), defendants' alleged "agreements relating to the terms on which the participants were willing to write insurance and reinsurance" (*id.* at 55a) did not constitute a boycott.

In reaching this conclusion, Judge Schwarzer noted that plaintiffs' complaints "represent their best effort" to make out a McCarran boycott. Pet. App. 84a. Before filing their complaints, plaintiffs had engaged in a two-year inquiry "with all the investigatory powers available to sovereign governments" (*ibid.*), and plaintiffs themselves have acknowledged that their complaints were based on "the most extensive multi-State antitrust investigation ever conducted." *Hearings on S. 1299 Before the Subcomm. on Antitrust of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 15 (1988) (statement of New York Attorney General Robert Abrams). The district court also afforded plaintiffs the opportunity to conduct any discovery relevant to defendants' pretrial motions. Pet. App. 58a, 83a-84a. Despite this, as Judge Schwarzer held, plaintiffs were unable to allege any facts raising a triable issue as to boycott. *Id.* at 57a.

The Ninth Circuit reversed. Pet. App. 1a-32a. It did not dispute that the district court had "accepted all the facts alleged by the plaintiffs" (*id.* at 14a) and had viewed "plaintiffs' allegations * * * as true." *Id.* at 17a. In addition, it agreed with the district court that all the challenged conduct involved the "business of insurance" (*id.* at 18a) and that the domestic primary insurance and domestic reinsurance entities "are subject to regulation by the states." *Id.* at 20a. Nevertheless, the court of appeals overturned the district court's legal conclusion that the McCarran Act required dismissal of the complaints.

First, the court of appeals held that the domestic insurer and reinsurer defendants "lost" their McCarran immunity "when they conspired with the foreign defendants" because the foreign reinsurers were not regulated by the states. Pet. App. 20a. According to the court, the controlling rule of law under the McCarran Act is that "[m]embership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable." *Ibid.* Thus—even though petitioners, as regulated domestic insurance entities, were "prima facie immune" under the Act (*ibid.*), and even though foreign reinsurers were part of the "business of insurance" (*id.* at 18a)—petitioners forfeited their antitrust exemption by allegedly engaging in collective insurance activities with foreign reinsurers.

Second, the court of appeals held that plaintiffs had alleged a "boycott" within the exception to McCarran's antitrust immunity. The defendant primary insurers allegedly had "enlisted the reinsurers to * * * use their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." Pet. App. 22a, 24a. In the court's view, this alleged conduct amounted to "much more" than the protected activity of "confer[ring] and agree[ing] on the terms on which insurance would be offered." *Id.* at 21a.

SUMMARY OF ARGUMENT

I. The court of appeals held that the domestic insurance defendants (petitioners herein) forfeited their otherwise applicable immunity under the McCarran Act because they participated in the state-regulated business of insurance with "nonexempt" foreign reinsurers. Pet. App. 20a. Contrary to the Ninth Circuit's focus on each entity's regulated status, the plain language of the Act provides immunity for the "business of insurance * * * regulated by State Law." 15 U.S.C. § 1012(b).

As this Court has recognized, the statute "refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.'" *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 459 (1969) (emphasis added by Court).

The legislative history of the Act demonstrates that Congress understood the critical and customary role of foreign reinsurers in the business of insurance in the United States and clearly intended that domestic insurers and foreign reinsurers would be able to engage in joint activities exempt from antitrust challenge. The decision below frustrates the congressional scheme by denying immunity whenever, as commonly and necessarily occurs, domestic insurance entities engage in discussions and agreements with foreign reinsurers on terms and conditions of insurance.

The Solicitor General and leading commentators agree that the Ninth Circuit's forfeiture ruling is plainly wrong. If allowed to stand, it would eviscerate McCarran immunity and threaten essential and economically beneficial practices that have long been followed by insurance companies and accepted by state regulators.

II. The district court correctly held that plaintiffs' allegations failed to state a claim under the "boycott" exception to McCarran immunity. As Judge Schwarzer explained, the McCarran Act permits insurers and reinsurers to discuss and agree upon the terms and conditions on which they will engage in the business of insurance. Only conduct that is more broadly anti-competitive than such agreements—such as absolute refusals to deal, or discriminatory activities designed to exclude competitors or customers from the market—can constitute a boycott that falls outside the Act's safe harbor.

This rule finds compelling support in the precedents of this Court and the legislative history of the McCarran Act. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the Court recognized that such agreements do not constitute a

McCarran Act boycott; rather, a boycott requires conduct that restricts competition in ways that go beyond terms and conditions of insurance, such as the alleged elimination in *Barry* itself of *all* competition through a collective refusal by all participants in the market to deal on any terms. Congress similarly understood that agreements among insurers and reinsurers on terms of insurance are at the heart of the state-regulated business of insurance and therefore are broadly protected from the federal antitrust laws; a boycott, by contrast, excludes competitors from doing business even on the agreed-upon terms and thus forecloses competition in respects other than insurance terms, such as service. The type of anti-competitive conduct embraced by the boycott exception is illustrated by *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which provided the context for the McCarran Act and involved a classic cartel that excluded competitors from the market through a complete refusal to deal and coercive enforcement mechanisms.

Under this rule, as the district court concluded, plaintiffs' allegations of a boycott are insufficient as a matter of law. Stripped of their pejorative characterizations and legal conclusions, plaintiffs' complaints simply allege that defendant primary insurers and reinsurers (1) met, debated, and collectively agreed upon the terms of insurance they would offer and (2) then acted in accordance with their agreements. Despite their extensive pre-complaint investigation and the opportunity to take discovery in the district court, plaintiffs have made no allegation of fact that does not reduce to an agreement on terms and conditions of insurance. Significantly, because plaintiffs do not allege that defendant reinsurers were unwilling to do business on the same terms with both non-defendant primary insurers (the alleged targets of the boycott) and co-defendant primary insurers, there is no contention in this case that defendants engaged in a refusal to deal on any terms and no contention that the alleged targets were excluded from the market or discriminated against.

The court of appeals sought to avoid the controlling rule of law by asserting that defendants were "charged with much more" than conferring and agreeing on terms of insurance. Pet. App. 21a. In no instance cited by the court, however, did the alleged action involve anything but the making or implementation of protected agreements. Instead of analyzing plaintiffs' allegations of *fact*, the court erroneously accepted their derogatory rhetoric and conclusory legal labels. As a result, the court of appeals has improperly allowed plaintiffs to use the federal antitrust laws to circumvent the state system of insurance regulation in an effort to impose insurance terms and practices different from those the state regulators have approved.

ARGUMENT

I. DOMESTIC INSURERS AND REINSURERS DO NOT FORFEIT THEIR McCARRAN-FERGUSON IMMUNITY BY PARTICIPATING WITH FOREIGN REINSURERS IN THE BUSINESS OF INSURANCE

In an unprecedented ruling with devastating impact on the insurance industry, the court of appeals held that the domestic insurance defendants, even though otherwise entitled to antitrust immunity under the McCarran-Ferguson Act, automatically lost that immunity when they allegedly engaged in joint activity with foreign reinsurers to establish terms and conditions of insurance. In a single paragraph devoid of analysis, the court of appeals invented a new rule of law under the McCarran Act that "[m]embership of an exempt entity in a conspiracy with nonexempt entities" forfeits the exempt entity's antitrust immunity. Pet. App. 20a.

The United States agrees with us that the Ninth Circuit's forfeiture ruling is plainly wrong. As the Solicitor General advised this Court in the government's brief as *amicus curiae* at the petition stage, "contrary to the court of appeals' conclusion, the mere fact that an 'exempt entity' (*i.e.*, a domestic insurance company) acts in concert with a 'nonexempt entit[y]' such as a foreign reinsurer does not automatically cause the exempt entity to 'forfeit [] [its] antitrust exemption.'" U.S. Pet. Br. 8. The language and legislative history of the McCarran Act unmistakably confirm this fundamental error in the decision below.

A. The Court Of Appeals' Forfeiture Ruling Is Inconsistent With The Plain Language Of The McCarran Act

"[T]he starting point in a case involving construction of the McCarran-Ferguson Act * * * is the language of the statute itself." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979). The McCarran Act provides an exemption from the federal antitrust laws for "the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. 1012(b). That language is straightforward and unambiguous. As this Court stated in *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 459 (1969), the Act's "language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'" (emphasis added by Court). See J. von Kalinowski, *Ninth Circuit Reinstates Massive Insurance Antitrust Litigation Involving Reinsurance*, ANTITRUST REPORT 1, 5 (Aug. 1991) ("[T]he correct analysis does not focus narrowly on the players. The proper question to decide is whether the exempt entities are still engaged in the business of insurance. The relevant players are but one part of this determination").

1. *Business of Insurance*. There is no dispute that reinsurance falls squarely within the "ordinary understanding" of the phrase "business of insurance." *Royal Drug*, 440 U.S. at 211. The Ninth Circuit so held (Pet. App. 18a), the United States concurs (U.S. Pet. Br. 8 n.6), and the plaintiffs have not argued to the contrary either in the court of appeals or in this Court. Reinsurance — "insurance for insurers" (Cal. Cmplt.

¶4(*o*))**C**has all the elements of risk underwriting and risk spreading that have been identified by this Court as characteristic of the business of insurance. *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). Moreover, reinsurance plays a central role in the insurance business: primary insurers depend upon reinsurance to spread their risk of catastrophic loss (Cal. Cmplt. ¶34), and agreements between primary insurers and reinsurers on terms of primary insurance facilitate the placement of reinsurance. See page 2, *supra*.

Furthermore, agreements with foreign reinsurers are as much an integral part of the business of insurance in the United States as agreements with domestic reinsurers. Because "[t]here is not enough capital or capacity in any one country," reinsurance "is, of necessity, a highly international business." Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 FORUM 1038, 1045 (1981). In 1988, fully 38% of United States insurance risks, totaling $8.4 billion, were ceded to foreign reinsurers. General Accounting Office, *Insurance Regulation: State Reinsurance Oversight Increased, but Problems Remain* 10, 41 (1990). As plaintiffs recognize, foreign reinsurers, particularly those in London and Europe, provide a substantial portion of reinsurance for domestic general liability risks. Cal. Cmplt. ¶30.

2. *State Regulation*. The second requirement for McCarran immunity**C**that the activity that is the "business of insurance" be "regulated by State Law"**C**equally is satisfied here. The alleged agreements among domestic insurers and domestic and foreign reinsurers affect the terms and conditions of primary insurance offered in this country, which indisputably are subject to the plenary regulatory authority of the states. States thus can review and limit or disapprove any term of any insurance form that they determine to be the product of anti-competitive practices or otherwise not in the public interest. That unquestioned authority — which the states exercised in this

case (see page 7, *supra*) — is sufficient to satisfy the state-regulation element of the McCarran Act.[7]

Beyond that, the states enjoy even broader regulatory power over the activities plaintiffs challenge here. The very premise of plaintiffs' complaints is that alleged agreements between domestic primary insurers and domestic and foreign reinsurers have market effects in the United States. In this circumstance, as the district court pointed out (Pet. App. 49a & n.17), state insurance departments have wide authority under state insurance and unfair practices laws to regulate not only standardized policy forms but also unfair insurance practices by primary insurers or reinsurers that restrain competition within the state. See *National Sec.*, 393 U.S. at 459-460; *FTC* v. *National Casualty Co.*, 357 U.S. 560, 564-565 (1958) (state regulation is sufficient under McCarran if a state "has enacted prohibitory legislation which proscribes unfair insurance [practices] and authorizes enforcement through a scheme of administrative supervision"); Defendants' State-by-State Appendix (¶¶1 & 2 of each state summary). Indeed, plaintiffs have recognized as much by including in their complaints state unfair insurance practices claims against both the domestic and foreign defendants. See Cal. Cmplt. ¶¶153-154.

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[7] McCarran-Ferguson immunity for the business of insurance does not turn on a federal court's assessment of the adequacy or effectiveness of the state regulation. See, *e.g.*, *FTC* v. *National Casualty Co.*, 357 U.S. 560, 564 (1958); *Ohio AFL-CIO* v. *Insurance Rating Bd.*, 451 F.2d 1178, 1184 (6th Cir. 1971); Brief for the United States as Amicus Curiae at 26-27 n.15, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) (No. 77-952) ("state regulation of the business [of insurance] need not be affirmative or effective to supplant the federal antitrust laws [under the McCarran Act]"); Brief for the United States as Amicus Curiae at 27 n.37, *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982) (No. 81-389) ("[t]he requirement that a state must regulate the particular conduct at issue in order to bring it within the [McCarran Act] exemption does not require the courts to determine whether the state's regulatory power is effectively exercised").

Because McCarran immunity depends upon "the activity at issue" rather than the nature of the entities involved (U.S. Pet. Br. 8), both the domestic defendants and the foreign reinsurer defendants were entitled to immunity in this case. The court of appeals simply ignored the statutory language when it focused on the regulated status of defendants rather than on the regulated insurance business in which they engaged.[8]

B. The Court Of Appeals' Forfeiture Ruling Is Irreconcilable With The History And Policies Of The McCarran Act And Would Nullify The Statutory Exemption

The Ninth Circuit's construction of the McCarran Act not only disregards the words of the statute but also frustrates Congress's manifest purpose to protect state regulation of insurance from federal interference. 15 U.S.C. '' 1011, 1012. In formulating the McCarran antitrust exemption, Congress recognized that reinsurance is a vital part of the business of insurance, that insurers and reinsurers must agree on the terms of primary insurance, and that foreign reinsurers play a critical role in the United States insurance market. Against that legislative background, the court of appeals' interpretation would nullify the McCarran Act by removing the immunity whenever, as routinely and necessarily occurs, foreign reinsurers participate in the business of insurance.

Congress explicitly recognized that reinsurance is "a very essential phase of the [insurance] business." 90 Cong. Rec. 6528

[8] While we believe that the activities of *all* of the defendants, foreign and domestic, are entitled to McCarran immunity, the Ninth Circuit's forfeiture ruling is particularly indefensible as applied to domestic insurance entities. The court of appeals did not dispute that the domestic defendants were engaged in the business of insurance and that their activities were regulated by the states. Accordingly, they fall squarely within the McCarran exemption.

(1944) (statement of Rep. Miller).[9] Representative Hancock, for example, noted that "effective reinsurance is necessary if the companies are to serve the public." Senate Comm. on the Judiciary, *Committee Print on S. 1362—Insurance* (pt. 1), 78th Cong., 1st Sess. 5 (1943) ("*Committee Print*"). Congress also realized that reinsurance requires advance agreement between insurer and reinsurer over the terms of primary insurance. See, *e.g., ibid.* (without "advance agreement" as to "forms of coverage and rates," every "reinsurance transaction would involve negotiations between the insurer and all of its reinsurers, with resulting delay and expense which would make impossible the expeditious insurance of large risks"); 90 Cong. Rec. 6527 (1944) (statement of Rep. Miller) (if "companies are not going to be permitted to get together and agree on rates, forms, and the establishment of rating bureaus * * * [h]ow could there be reinsurance?"; without "uniform rates and forms, how could such reinsurance be placed?"). Congress understood that

> [u]niformity, and knowledge in advance of what rates and policies will be, is desirable for the public, and is necessary in the functioning of insurance companies and organizations. *This is particularly true in the case of reinsurance * * *. No company could safely agree in advance to reinsure, unless it knew what the terms of its obligation would be* and the consideration therefor. Lack of agreement in advance would therefore be detrimental to public service by insuring companies.

H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943) (emphasis added).

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9 The origins of the McCarran Act were explored in detail in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 547 n.20 (1978); *id.* at 559-564 (Stewart & Rehnquist, JJ., dissenting). In interpreting the Act, this Court has relied upon legislative history relating to each of the bills proposed in the course of the statute's evolution. See, *e.g., Royal Drug*, 440 U.S. at 217-224.

In addition, Congress recognized that foreign insurers played a major role in the reinsurance of United States risks. For instance, Senator O'Mahoney noted that many reinsurance companies had their headquarters in Europe and that "[t] here is a close association * * * between the American insurance companies and the British insurance companies * * * [.] They sit down together and make rules and regulations, forms, and rates." *Joint Hearing Before Subcomms. of the Committees on the Judiciary on S. 1362, et al.*, 78th Cong., 1st Sess. 265, 269 (1943) ("*Joint Hearing*"). See also *id.* at 521 (testimony of Prof. Heuber), 502 (testimony of Oswald Ryan).

The court of appeals' forfeiture ruling thus strips immunity from agreements between primary insurers and reinsurers that Congress recognized as prevalent and necessary within the industry. Indeed, according to plaintiffs, the Ninth Circuit's forfeiture holding means that "common" agreements between primary insurers and reinsurers about the rates the primaries will charge—which the legislative history unmistakably shows to be within the McCarran exemption**C**are subject to antitrust attack. N.Y. State Bar Ass'n, ANTITRUST LAW SEC. SYMPOSIUM 108-109 (Jan. 28, 1992) (address by George Sampson, N.Y. Chief of Antitrust Enforcement). Furthermore, this is, in plaintiffs' view, only "one example" of a "quite typical" way in which established industry practices violate the antitrust laws. *Ibid.* To accept plaintiffs' interpretation would "frustrat[e] * * * [t]he congressional purpose" and "lead to bizarre results." *United States* v. *Brown*, 333 U.S. 18, 26 (1948).

Nor is the court of appeals' forfeiture ruling confined to agreements with foreign reinsurers. By the court's reasoning, a domestic insurance company would lose its McCarran exemption if it discussed and agreed upon terms and conditions of insurance with any of a host of other so-called "non-exempt" entities**C**including consumer groups, corporate risk managers, and policyholder representatives**C**whose activities are not regulated directly by the state. The decision below thus jeopardizes the heretofore unexceptionable and beneficial efforts of ISO and insurance companies to take account of the views of consumers and other interested parties in conducting the business of insurance.

The court of appeals' forfeiture ruling also upsets the McCarran Act's federalism policies by interfering with state laws that expressly authorize insurers to act together with "non-exempt" entities. A number of states, including several that are plaintiffs in this action, provide that insurance companies may "act in concert with each other *and with others*," including representatives of policyholders, in developing insurance forms and rates. See Defendants' State-by-State Appendix, J.A. 187, 191, 201, 214, 215 (emphasis added). The decision below frustrates this state-authorized process of cooperation.

For these reasons, the Ninth Circuit's ruling, if permitted to stand, would wreak havoc within the insurance industry—a fact that plaintiffs do little to disguise.[10] To retain McCarran immunity in the face of the decision below, insurers would have to abandon well-established, economically essential, and state-sanctioned participation by foreign reinsurers in forms development and other areas vital to the supply of reinsurance. The court of appeals simply "lost sight" of the language and purposes of the McCarran Act and thereby "contravened the statutory exemption." Note, *McCarran-Ferguson Immunity*, 105 HARV. L. REV. 1414, 1417, 1418 (1992). This Court should reject a construction of the Act that would bring about such a

[10] See, *e.g.*, Kriz, *Insurers in Their Sights*, 1988 NAT'L J. 2595, 2598 (quoting former Massachusetts Attorney General James M. Shannon's statement that the purpose of this suit is to "'restructure the [insurance] industry'"). Indeed, plaintiffs have recognized that the forfeiture ruling extends well beyond the boycott exception: "'[T]he shield is down on everything the companies did. All their activities, not just boycotting, have become available for antitrust screening.'" Weber, *Reversal of Fortune*, INS. REV. Sept. 1991, at 7, 8, quoting California Deputy Attorney General Thomas Greene.

"radical reworking of [the] law." *Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990).

C. The Justifications For The Forfeiture Ruling Advanced By The Court Of Appeals And Plaintiffs Are Without Merit

Neither the court of appeals nor plaintiffs have offered any plausible justification for the forfeiture ruling. The Ninth Circuit principally rested its forfeiture holding on a snippet quoted out of context from *Royal Drug* (Pet. App. 20a) to the effect that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." 440 U.S. at 231. The issue in *Royal Drug*, however, was whether a primary insurer's agreements with pharmacies that were "wholly outside the insurance industry" (*ibid.*) constituted "the business of insurance"—an element of the McCarran exemption that the court below conceded was satisfied here. Pet. App. 18a. Furthermore, as this Court subsequently explained in *Pireno*—a case that the court of appeals completely ignored—"the involvement of [non-insurance] parties * * * [is] not dispositive" of McCarran immunity but merely constitutes "part of the inquiry." 458 U.S. at 133. In fact, *Pireno* explicitly held that challenged activities are "*not [to] be denied the [McCarran] exemption solely because they involve parties outside the insurance industry.*" *Ibid.* (emphasis added). Thus, to the extent that *Royal Drug* and *Pireno* are relevant here, they flatly contradict the Ninth Circuit's forfeiture ruling.

For their part, plaintiffs rely (Br. in Opp. 13 & n.14) on cases interpreting antitrust immunities outside the McCarran context, such as the Capper-Volstead Act immunity for "[p]ersons engaged in the production of agricultural products" (7 U.S.C. § 291) and the Clayton Act exemption for "labor * * * organizations" and their "individual members." 15 U.S.C. § 17. As this quoted language indicates, those statutory schemes define immunity by reference to a specified person or entity. The McCarran Act, by contrast, "refers not to the persons or companies" entitled to antitrust immunity, but to the state-regulated "*business* of insurance." *National Sec.*, 393 U.S. at 459.

Plaintiffs also resort (Br. in Opp. 13) to the maxim of statutory construction that exemptions from the antitrust laws should be "narrowly construed." However, canons of construction cannot defeat the clearly expressed intention of Congress. See, *e.g., Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989). Furthermore, because the dominant purpose of the McCarran Act is to provide immunity from the federal antitrust laws for the business of insurance, it is the exceptions to the immunity, not the immunity itself, that should be narrowly applied. See, *e.g., Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989) (exceptions to a general statute are to be "read * * * narrowly in order to preserve the primary operation of the provision"); *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

As the Solicitor General has explained (see U.S. Pet. Br. 7-9), none of the asserted justifications for the court of appeals' forfeiture ruling can withstand analysis. The judgment of the court of appeals on the forfeiture issue should be reversed.[11]

[11] Because plaintiffs alleged no boycott in count seven of the California complaint or count six of the Connecticut complaint (see Pet. App. 25a, 41a-42a), the Ninth Circuit's judgment as to those counts rests entirely on the forfeiture ruling and thus cannot survive reversal of that holding.

II. PLAINTIFFS' ALLEGATIONS, WHICH SHOW ONLY THE FORMATION AND IMPLEMENTATION OF AGREEMENTS AMONG INSURERS AND REINSURERS ON TERMS AND CONDITIONS OF INSURANCE, DO NOT ESTABLISH A "BOYCOTT" OUTSIDE THE ANTITRUST EXEMPTION OF THE McCARRAN-FERGUSON ACT

The McCarran Act's antitrust exemption for the state-regulated business of insurance is inapplicable to acts of "boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). The second question presented in this case is whether the facts alleged in plaintiffs' complaints establish a "boycott" outside the McCarran exemption.

As described in detail below (see pages 37-41, *infra*), plaintiffs' lengthy complaints may be distilled to the following allegations. First, they allege that defendant primary insurers "enlisted" defendant reinsurers in an effort to cause ISO to change its 1984 proposed advisory forms. Plaintiffs then allege that, based on meetings and discussions among the defendant primary insurers and reinsurers, the reinsurers stated that they would not reinsure certain of the risks covered by the proposed forms, thereby "coercing" ISO into amending the forms. In addition, it is alleged that after the states approved the revised ISO forms in 1986, defendant foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) agreed to decline to issue reinsurance for coverages included in some of the forms. Finally, once the 1986 forms had been approved, ISO discontinued its statistical support services for the superseded 1973 form. All of this, plaintiffs contend, amounted to a boycott by inhibiting the ability of non-defendant primary insurers (the alleged targets of the boycott) to provide insurance that offered different coverage terms.

On this record, the district court correctly rejected plaintiffs' boycott claim. Relying on this Court's decision in *St.*

Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978), the court recognized that "[t]he purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage." Pet. App. 56a. In distinguishing between such "lawful joint action" and a "prohibited boycott" (*id.* at 53a), Judge Schwarzer explained that "[w]hat the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant * * *, such as refusals to deal on any terms and exclusion from alternative sources." *Id.* at 57a. Nor do permissible agreements become impermissible boycotts simply because they are implemented in practice or have economic consequences in the marketplace; to hold otherwise "would effectually nullify the McCarran Act." *Ibid.*

Applying that standard, the district court concluded that plaintiffs failed to allege facts that, if proved, would constitute a McCarran boycott. As Judge Schwarzer observed, "plaintiffs here charge no more than an agreement to restrict coverage" (Pet. App. 52a) by collectively determining "the terms on which the participants were willing to write insurance and reinsurance." *Id.* at 55a. Beyond this alleged agreement, "[t]here is no charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others." *Ibid.* Thus, plaintiffs' boycott "allegations are limited to collective refusals to do business except upon terms acceptable to defendants" and do "not even * * * suggest[] that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market." *Id.* at 56a. Because plaintiffs' "[c]onclusory allegations" (*id.* at 57a) of a boycott could not cure the legal defect in their theory, and because plaintiffs could not allege "facts which raise a triable issue as to boycott" despite their "lengthy [pre-complaint] investigations" and "the opportunity * * * to conduct relevant discovery" (*id.* at

57a-58a), the court held that the boycott exception to McCarran immunity was inapplicable.

In reversing the district court's ruling, the court of appeals gave lip service to the "incontestable" principle that McCarran immunity protects agreements "on the terms on which insurance would be offered." Pet. App. 21a. But the Ninth Circuit's decision drains that principle of all practical significance. In purporting to find "much more" *(ibid.)* here than an agreement, the court of appeals improperly accorded decisive effect not to any *facts* asserted in the complaints but to plaintiffs' pejorative characterizations and conclusory allegations of a boycott. Plaintiffs' factual allegations show nothing more than the formation and implementation of agreements among insurers and reinsurers over the coverage they were willing to provide.

The court of appeals' boycott ruling cannot be reconciled with the decisions of this Court or the intention of Congress. As this Court recognized in *Barry*, an agreement on terms and conditions of insurance is protected joint activity and does not give rise to a boycott. McCarran's legislative history confirms that Congress intended a broad safe harbor for such agreements and that the boycott exception was intended to reach the type of absolute exclusionary conduct represented by *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). To correct the Ninth Circuit's misunderstanding of the controlling boycott standard, this Court should make clear that the agreements alleged in this case are at the core of the statute's protection and, as a matter of law, do not constitute a "boycott."

A. An Agreement On Terms And Conditions Of Insurance Is Not A Boycott

Although the McCarran Act refers to "boycott," it nowhere defines that term. However, if one point emerges with clarity from this Court's decision in *Barry*, the legislative history of the Act, and the seminal case of *South-Eastern Underwriters*, it is that an agreement among insurance entities on coverage or rates of insurance is protected joint activity rather than a boycott. As the Solicitor General acknowledges, "an agreement among insurers 'on the terms on which insurance would be offered,' without more, is not a McCarran-Ferguson boycott." U.S. Pet. Br. 13.

1. *This Court's Decision In Barry Establishes That An Agreement On Terms And Conditions Of Insurance Is Protected Joint Activity And Not An Unprotected Boycott*

Barry involved an alleged conspiracy among the only four insurance companies that wrote medical malpractice insurance in Rhode Island. St. Paul, the largest of the insurers, declined to renew malpractice coverage that had been issued on an occurrence basis and announced that it would write only claims-made policies. The other three companies, acting in furtherance of the conspiracy, then "refused to accept applications for any type of insurance" from medical providers insured by St. Paul. The object of the conspiracy was "to restrict St. Paul's policyholders to 'claims made' coverage by compelling them to 'purchase medical malpractice insurance from one insurer only, to wit * * * St. Paul.'" 438 U.S. at 535. On this record, the Court held that a boycott under the McCarran Act was adequately pleaded by the allegations of a collective refusal by the three insurance companies to do any business with policyholders of St. Paul.

Although the Court "assumed * * * that Congress intended [McCarran's boycott] language to be read in light of" the "body of decisions interpreting the Sherman Act" (438 U.S. at 541), it acknowledged that those "decisions reflect a marked lack of uniformity in defining the term" and indeed that "'boycotts are not a unitary phenomenon.'" *Id.* at 543. Furthermore, the Court recognized that "words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored."' *Id.* at

545-546. Accordingly, the Court concluded that "[w]e * * * must consider whether Congress intended to attach a special meaning to the word 'boycott' in [the McCarran Act]." *Id.* at 546.

This Court recognized that an agreement among insurers on terms and conditions of insurance, even if it could be characterized as a boycott under the Sherman Act, is not a McCarran boycott. As the Court explained, not "all concerted activity violative of the Sherman Act comes within" the boycott exception. 438 U.S. at 555. That acknowledgment addressed the concern of the dissenting Justices that an expansive reading of "boycott," affording it "the same scope it has in Sherman Act case law, * * * would plainly devour the broad antitrust immunity bestowed by" the McCarran Act. *Id.* at 559 (Stewart & Rehnquist, JJ., dissenting). As the dissent explained (*Id.* at 559 n.6):

> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i.e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (*i.e.*, coercion). Yet state-sanctioned price fixing immunized by ' 2(b) [of the McCarran Act] was plainly not intended to fall within the § 3(b) exception [for boycotts, coercion, or intimidation].

In response, the majority stressed that the term "boycott" in the McCarran Act is not "coextensive with the prohibitions of the Sherman Act" and in particular that joint insurance agreements setting rates or terms, "*in the absence of any additional enforcement activity, [are not to be] treated * * * as 'a boycott.'" Id.* at 545 n.18 (emphasis added).

Notwithstanding this analysis, the Court in *Barry* concluded that the alleged conduct of the defendant insurance companies came within the boycott exception. Like the court of appeals in *Barry* (see 438 U.S. at 540) and both the plaintiffs[12] and the United States as *amicus curiae* in support of plaintiffs in that case,[13] this Court emphasized that the case did not involve an alleged agreement on terms or rates of insurance. Instead, the co-conspirators absolutely refused to deal on *any* terms with St. Paul's existing policyholders in order to eliminate all alternative sources of supply and thus compel those policyholders to obtain insurance only from St. Paul. See, *e.g., id.* at 544 ("St. Paul induced its competitors to refuse to deal *on any terms* with its customers"), 552 ("The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal *on any terms* with the policyholders of the fourth. * * * St. Paul obtained the agreement of the other * * * [defendants] to refuse to sell *any* insurance to its policyholders"), 553 ("[t]he agreement binding [defendants] erected a barrier between St. Paul's customers and *any* alternative source of the desired coverage"), 554 n.26 (referring to the "concerted refusal to deal *on any terms* with St. Paul's policyholders") (emphases added).

The defendants' absolute refusal to deal in *Barry* was a boycott because, by eliminating competition on matters other than terms and conditions of insurance, it was much more broadly anti-competitive than an agreement on terms would have been. As the Court explained, the co-conspirators' "refus-[al] to deal on any terms with [St. Paul's] customers * * * did *not simply fix rates or terms of coverage; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage*." 438 U.S. at 544 (emphasis added). By thus

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[12] See Respondents' Br. 43 ("The complaint in this case alleges that three of petitioners engaged in a concerted refusal to sell respondent physicians *any* malpractice insurance on *any* terms. That is a traditional boycott**C***i.e.*, a complete refusal to deal").

[13] See U.S. Am. Br. 23 ("The charge was not just a refusal to deal except on certain terms, but a refusal to deal at all. Such a blanket refusal to deal is a classic example of a boycott").

"effectively foreclosing all possibility of competition anywhere in the relevant market," the defendants' "concerted refusal to deal went *well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service*." *Id.* at 553 (emphasis added). A McCarran boycott accordingly existed because the co-conspirators' complete refusal to do business with St. Paul's policyholders eliminated all competition among the insurance companies.

> "[E]ven where prices are rigidly fixed, the members of a cartel will be able to compete with each other with respect to product quality unless a homogeneous product is involved. Indeed, even if the product is homogeneous there will be room for *rivalry in such matters as promptness in filling orders and the provision of ancillary services*. An effective division of markets, by contrast, might *substantially wash out all opportunity for rivalry.*"

Id. at 553 n.25 (quoting L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 224- 225 (1977)) (emphasis added).

It was in the setting of this careful analysis that the Court observed, in a passage heavily relied upon by the Ninth Circuit (Pet. App. 22a) and plaintiffs (Br. in Opp. 10), that "[t]he enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." 438 U.S. at 544-545. Taken in context, however, this reference cannot be read to suggest that a boycott claim under the McCarran Act is made out by allegations of joint agreements to offer insurance and reinsurance only on prescribed terms and conditions; that reading would be squarely inconsistent with the Court's recognition that such agreements are not boycotts. Rather, the Court's opinion clearly indicates that the concept of an "agreement not to trade" refers to an *absolute* refusal to deal that eliminates competition on matters beyond terms and conditions of insurance. Thus, the above-quoted sentence was immediately preceded by the Court's statement that the defendants "did not simply fix rates or terms of coverage" but rather "refuse[d] to deal on any terms with [St. Paul's] customers." *Id.* at 544. Likewise, in later summarizing its ruling, the Court reiterated that the alleged boycott involved a total refusal to deal on any terms (*id.* at 552):

> The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders.

The opinion therefore makes clear that the "common understanding of a boycott" on which the finding of a boycott was predicated cannot be divorced from the alleged refusal to "deal on any terms" or "to sell any insurance."

Barry establishes a framework of analysis that is directly applicable to the present case: an agreement among insurers on terms and conditions of insurance does *not* constitute a boycott within the meaning of the McCarran Act. This principle protects insurance activity that is at the heart of the Act and is necessary to effectuate the congressional scheme. Only when an agreement is accompanied by other anti-competitive conduct such as an absolute refusal to deal on any terms, or discriminatory activity that excludes competitors or customers from the market does an alleged antitrust violation fall outside the protection of the statutory safe harbor.[14]

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[14] Lest our argument be misapprehended, we do not intend—and we do not believe that this Court intended—that a refusal to deal on any terms be an

2. *The Legislative History Of The McCarran Act And The* SEUA *Case Demonstrate That Congress Created Broad Antitrust Immunity For Agreements On Terms And Conditions Of Insurance*

a. *The legislative history*. The legislative history of the McCarran Act shows a congressional purpose to provide broad and comprehensive immunity for agreements on terms of insurance. The Act was a response to the Sherman Act prosecution in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) ("*SEUA*"), which held for the first time that insurance was subject to Congress's power under the Commerce Clause.

The McCarran Act reflected Congress's concern that application of the competitive policies of the Sherman Act would lead to "chaos in the insurance business" by prohibiting the "cooperation and accord" between insurers that "is required for best protecting the public interest." H.R. Rep. No. 873, at 6. The long experience of the states in regulating insurance had demonstrated that "the method of doing business which is required by the antitrust laws is not the method which is best suited to the special nature of the insurance business." 89 Cong. Rec. 10661 (1943) (statement of Rep. Miller). On the contrary, it was well understood that insurance "is unique" and "is something quite different from the ordinary commercial

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invariable or talismanic element of a boycott. Instead, it is a probative factor that is indicative of conduct that is more drastically restrictive of competition than a joint agreement on terms and conditions of insurance. Thus, for example, if co-conspirators "offered" to deal with boycott targets but only on terms that were unfairly discriminatory, that might fall outside the safe harbor for agreements even though the anti-competitive conduct nominally involved an "offer" to deal rather than a formal refusal to deal at all. But where (as here, see pages 38-39, *infra*) the defendants are willing to do business on the *same terms* with alleged boycott targets and co-defendants alike, no boycott exists.

transaction"; "if the business of insurance is to be conducted to meet the needs and requirements of all businesses and all persons," "[u]niformity, as to rates, forms of policies and the like * * * is necessary" and "promotes competition rather than restrains it." H.R. Rep. No. 873, at 7, 8, 9. See also *id.* at 10; 90 Cong. Rec. 6535 (1944) (statement of Rep. Gwynne).[15]

Congress understood that a wide range of agreements among insurers on terms and conditions of insurance was essential to achieving the necessary uniformity and was an integral element of the business of insurance. To permit such cooperative arrangements notwithstanding the prohibitions of the Sherman Act, Congress enacted general antitrust immunity for joint agreements on the terms and conditions on which insurance would be offered. See, *e.g.*, H.R. Rep. No. 873, at 7 ("insurance * * * requires cooperation and accord forbidden by Federal antitrust laws"); *Committee Print* at 5 (statement of Rep. Hancock) ("the public interest in insurance lies in encouraging cooperative action, and of necessity it tends to uniformity and the maintenance of uniformity in rates and forms of coverage"); 90 Cong. Rec. 6536 (1944) (statement of Rep. Howell) ("[t]he states * * * long ago determined that methods of cooperation and joint action were preferable for this * * * unique type of business," and "[u]niformity as to rates, forms of policies, terms, and conditions * * * is only possible as a result of joint action and cooperation"). Such agreements and all activities "necessary and incidental" thereto were thus exempted from the reach of the Sherman Act. S. Rep. No. 1112 (pt. 2),

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[15] In particular, Congress recognized that uniformity promotes insurer solvency, facilitates the placement of reinsurance, and furthers accuracy and reliability in industry data compilation and actuarial projections. See, *e.g.*, H.R. Rep. No. 873, at 9 ("agreement in advance" on policies" is "necessary" for the placement of reinsurance); 91 Cong. Rec. 1481 (1945) (statement of Sen. Ferguson) (uniformity serves to keep insurers "sound and solvent"); 90 Cong. Rec. 6526 (1944) (statement of Rep.Walter) ("uniformity in * * * forms of coverage" promotes "the solvency of the insurer" and "accurate determination * * * of relative hazards and averages").

78th Cong., 2d Sess. 6 (1944) (minority views) (recommendations of the NAIC, whose views "are particularly significant * * * because the Act ultimately passed was basedi n large part on the NAIC bill" (*Royal Drug*, 440 U.S. at 221)). In particular, as explained above (see pages 19-20, *supra*), Congress recognized that cooperation and joint agreements between primary insurers and reinsurers over the terms of the primary policy were standard and essential practices in the business of insurance.

In adopting the McCarran antitrust exemption, Congress full well realized that "boycott, coercion, and intimidation are not co-extensive with the offenses described in the Sherman Act." 91 Cong. Rec. 1487 (1945) (statement of Sen. Pepper). Rather, the boycott exception to the statutory safe harbor was designed to prevent companies from collectively excluding or discriminating against competitors or customers. As Representative Celler explained in reconciling the general antitrust immunity with the limited boycott exception, insurance companies were to be allowed "to come together and confer and arrange for rates, *but all companies should be permitted entrance to such a conference*. * * * There must be no boycott, no coercions, no economic sanctions." 90 Cong. Rec. 6560 (1944) (emphasis added). By ensuring access for all competitors wishing to participate in the business of insurance, Congress intended the boycott provision to safeguard competition on matters other than terms and conditions of insurance, such as service. See H.R. Rep. No. 873, at 9 (given "[u]niformity in rates and the like * * * [, t]he real competition in insurance is competition in service"); *Joint Hearing* at 304 (statement of Edward Williams, President of the Insurance Executives Association) ("There is competition in many phases. * * * Competition in service, competition in agents, competition in many ways. * * * [Although] competition in rates has been established * * * not to be in the interest of the public," many "other kinds of competition" exist). As discussed above, it was the elimination of these other forms of competition through an absolute refusal to deal that gave rise to the existence of a boycott in *Barry*.

b. *The* SEUA *case*. The limited contours of the "boycott" exception are further illuminated by this Court's decision in *SEUA*. Congress passed the McCarran Act in the context of *SEUA*, and the critical statutory phrase "boycott, coercion, or intimidation" was taken directly from this Court's opinion (322 U.S. at 535, 562). See *Barry*, 438 U.S. at 561 (Stewart & Rehnquist, JJ., dissenting). Accordingly, the boycott exception is properly construed against the background of *SEUA*.

SEUA involved a classic cartel designed to exclude non-member companies from the market. S.E.U.A. members, who controlled 90% of the relevant market in fire insurance, conspired "to compel persons who needed insurance to buy only from S.E.U.A. members." 322 U.S. at 535. Thus, the object of the conspiracy was to exclude all non-member insurers from participating in this business. To that end, non-members were "cut off" from reinsurance and completely deprived of the "opportunity to reinsure their risks." *Ibid.* In addition, "independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent the members of S.E.U.A.," and insurance customers "who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage" by S.E.U.A. members. *Id.* at 535-536. S.E.U.A. members also engaged in unfair trade practices by "disparag[ing]" non-S.E.U.A. companies. *Id.* at 535. Finally, the conspiracy was "effectively policed" by a network of S.E.U.A. bureaus and boards. *Id.* at 536.

It was these actions and enforcement mechanisms that the Court characterized as a "combination[] of insurance companies to coerce, intimidate, and boycott competitors." 322 U.S. at 562. S.E.U.A.'s attempt to drive non-S.E.U.A. members from the market through an absolute refusal to deal with them on any terms —

combined with the use of bureaus and boards to enforce compliance with the conspiracy—constituted precisely the sort of unjustified anti-competitive conduct that Congress intended to fall within the narrow boycott exception to the general antitrust immunity provided for other types of joint activities that were part of the business of insurance.

The indictment in *SEUA* also alleged that S.E.U.A. members had agreed to fix the premiums charged for fire insurance. See 322 U.S. at 534. Significantly, however, the Court did *not* describe that agreement on rates as part of the alleged boycott. *Id.* at 535 ("[t]he conspirators *not only* fixed premium rates and agents' commissions, *but employed boycotts together with other types of coercion and intimidation"*) (emphasis added). See also U.S. Br. 12 n.1 (No. 354 (O.T. 1943)) (defendants' proffered "justification [for the fixing of rates] would not extend to the boycotts, coercion, or other monopolistic tactics described in Count 2 of the indictment"); *Joint Hearing* at 636 (statement of Attorney General Biddle) (*SEUA* "was not merely a price-fixing case, but involved very serious boycotting"). This distinction between a rate-fixing agreement and a boycott makes clear that the Court in *SEUA*—and Congress in adopting the McCarran Act—understood that an agreement on rates or terms of insurance was not a boycott.

In sum, the boycott in *SEUA* involved an *absolute* refusal to deal and, as in *Barry*, was designed broadly to eliminate *all* competition among insurers, not just competition over terms and conditions of insurance. That conduct bears no resemblance to the allegations in this case. Unlike the boycott in *SEUA*, there is no claim here that defendants sought to deny anyone equal access to insurance or reinsurance, nor is there any claim that defendants maintained any mechanism to "police" their agreements. There is, in short, nothing to support the court of appeals' unexplained statement that "the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." Pet. App. 23a.

What plaintiffs' complaints *do* allege are agreements as to the terms and conditions on which insurance and reinsurance would be offered to *everyone*—conduct akin to the alleged agreement to set rates in *SEUA* that was considered *not* to be a boycott. As the history of the McCarran Act and this Court's decision in *Barry* confirm, a McCarran "boycott" is not established by such agreements, which do not exclude competitors from the business of insurance but simply specify the terms on which the participants are willing to do business.

B. Plaintiffs' Complaints Allege Nothing More Than Agreements On Terms And Conditions Of Insurance And Thus Do Not State A Boycott Claim

1. *The District Court Correctly Held That Plaintiffs' Allegations Involve Only The Formation And Implementation Of Agreements On Terms And Conditions Of Insurance*

For the reasons discussed above, a non-discriminatory agreement among insurers and reinsurers on the terms and conditions on which they will offer insurance cannot, as a matter of law, be deemed a boycott. The district court was right in concluding that plaintiffs have alleged nothing more than agreements over terms of insurance here.

As shown by their own statement in this Court (Br. in Opp. 2-5), plaintiffs' factual allegations, stripped of conclusory verbiage, assert only that (1) primary insurers "met with" reinsurers and "collectively" agreed upon the terms of insurance and reinsurance they would underwrite**C***e.g.*, whether the advisory policy forms would be claims-made or occurrence forms, and whether the forms would cover pollution risks**C**and then communicated their positions to ISO; and (2) certain defendants agreed upon the terms of reinsurance that would be offered in the market, and ISO discontinued statistical support for its superseded forms. Plaintiffs' briefs in the lower courts similarly make clear that this is the sum and substance of their boycott claim. For example, their reply brief on appeal (at 3) stated directly and unambiguously that

> the complaints allege a unified course of conduct composed of three analytically distinct but interdependent agreements. These are:
>
> 1. An agreement to create narrower terms of coverage;
> 2. An agreement to refuse to offer older, broader terms of coverage; and
> 3. An agreement to enforce agreement (2), above, on the rest of the market by (a) withdrawing reinsurance support for the older, broader terms of coverage; and (b) withdrawing ISO support services for the older, broader terms of coverage.

The first two sets of allegations, by plaintiffs' own characterization, involve protected agreements on the terms and conditions on which insurance would (and, conversely, would not) be offered. Likewise, the third set of allegations simply asserts that defendants conducted their business operations in accordance with those protected agreements.

Plaintiffs' entire boycott case therefore reduces to the contention that defendants agreed on terms and conditions of insurance and then adhered to their agreements in the market. Notably, nowhere in plaintiffs' boycott allegations is it asserted that defendant reinsurers absolutely refused to deal on any terms with the non-defendant primary insurers that were the "targets" of the alleged boycott or otherwise sought to exclude them from the market. The alleged agreements concerned the terms on which each of the defendants was willing to engage in the business of insurance, and plaintiffs make no claim that any defendant reinsurer refused to deal with the boycott "targets" on those terms or discriminated against them by offering less favorable terms than were provided to the co-defendant primary insurers. Defendant reinsurers thus treated co-defendant primary insurers and "target" primary insurers exactly alike; reinsurance was equally available to both.

The Ninth Circuit did not take a different view of the *facts* alleged in the complaints. As summarized by the court of appeals, plaintiffs' critical allegations are that the defendant primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands" and that "the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." Pet. App. 22a, 24a.[16]

[16] For present purposes the court of appeals' description may be taken as an accurate summary of plaintiffs' allegations. Plaintiffs' complaints, although prolix and disjointed, allege that (1) defendant primary insurers "enlisted" domestic and foreign reinsurers and others "to formulate a joint strategy" to change the 1984 proposed ISO forms (Cal. Cmplt. ¶¶ 64, 68, 73; Conn. Cmplt. ¶¶ 68, 72, 77); (2) defendants "met" and, after the primary insurers "communicated" to the reinsurers their objections to the proposed forms, "agreed" on a "coordinated effort" to obtain the desired changes through a "plan[]" and "announce[ments]" by the reinsurers that they would not write reinsurance on the proposed ISO forms (Cal. Cmplt. ¶¶64-68, 70-71, 80-82; Conn. Cmplt. ¶¶68-75, 84-86); (3) following ISO's changes in the proposed forms, defendant foreign reinsurers continued to make "public and private pronouncements" and entered into "joint agreements" that they would not write reinsurance for occurrence policies or pollution coverage (Cal. Cmplt. ¶¶87-95; Conn. Cmplt. ¶¶91-99); and (4) in 1987, following the states' approval of the revised ISO forms, ISO "withdrew its 'support'" of the superseded 1973 form by discontinuing data collection and actuarial services for the old form (Cal. Cmplt. ¶¶97-99; Conn. Cmplt. ¶¶101-103). Thus, although words like "boycott" and "coercion" are liberally interspersed throughout the complaints, these conclusory legal labels are unsupported by any allegations of *fact*.

As explained above (see pages 1-2, 32-34, *supra*), these allegations involve precisely the kind of discussions and agreements that Congress recognized are essential to the business of insurance and fall within the very heart of the McCarran immunity. Historically, and of necessity, primary insurers and reinsurers confer and agree upon the terms of primary insurance for which reinsurers are willing to issue reinsurance. Because reinsurers assume a portion of the primary insurer's risk, the coverage of the primary policy is of immediate and legitimate concern to reinsurers. Thus, they are not "strangers to the * * * dispute." *Barry*, 438 U.S. at 552. And because the placement of reinsurance typically involves a number of reinsurers, standardized primary insurance forms acceptable to large groups of reinsurers are vital to the efficient operation of the insurance market.

Against that background, the legal insufficiency of plaintiffs' allegations becomes evident. Nothing in plaintiffs' complaints or briefs suggests that the alleged "enlist[ment]" of reinsurers was anything but an agreement among defendant primary insurers and reinsurers based on the business judgment and economic self-interest of each company as to acceptable terms and conditions of insurance. Similarly, plaintiffs have pleaded no facts suggesting that the alleged effort to "compel" and "coerc[e]" ISO to amend its proposed forms was anything more than the direct consequence of the asserted agreement among defendant insurers and reinsurers that they would not underwrite coverage on those terms. It is hardly surprising, and surely not a ground for finding a boycott, that ISO modified a proposed standardized advisory form that defendant primary insurers and reinsurers opposed and would not use in their businesses.

By the same token, plaintiffs have presented no allegation of fact indicating that the asserted "coercion" of non-defendant primary insurers to use the claims-made form was anything other than the effect in the market of the determination by the foreign reinsurers (petitioners in Nos. 91-1128 and 91-1146) not to write reinsurance for certain primary coverages. Finally, the alleged discontinuance of statistical support services for the superseded and obsolete 1973 CGL forms (which services were in fact maintained in the two states where the 1986 forms were not approved) was, as the district court observed (Pet. App. 55a n.20), "on its face reasonable conduct that one would expect in the normal course of business" and was merely incidental to the implementation of the state-approved 1986 CGL forms. Nothing in the boycott exception requires ISO to take affirmative steps to facilitate the use of multiple insurance forms in the marketplace, which would be contrary to the uniformity of forms that the McCarran Act was designed to foster under the aegis of state supervision. See pages 32-34, *supra*.

In these circumstances, the district court correctly rejected plaintiffs' argument that a protected joint agreement can be transformed into an unprotected boycott by the fact that the agreement is actually implemented in practice. As the court explained (Pet. App. 56a-57a):

> The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine coverage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development process to the risk of antitrust liability for using the product of that process would effectually nullify the McCarran Act.

The court thus recognized the common-sense principle that a joint agreement cannot be separated from its practical effects, noting that the alleged agreement here did not become a boycott simply because it assertedly had adverse economic consequences for competitors of defendant primary insurers. *Id.* at 57a. Other courts have reached the same conclusion. See, *e.g., Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 275 (D.C. Cir. 1977) ("economic pressure" on competitors to accede to an agreement does not constitute "the degree of coercive enforcement activity required to convert mere cooperation or concert of action into 'boycott, coercion, or intimidation'"), vacated in light of *Royal Drug*, 440 U.S. 942 (1979); *Ocean State Physicians Health Plan* v. *Blue Cross*, 883 F.2d 1101, 1109 n.9 (1st Cir. 1989) (the boycott exception does not "include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). In line with these authorities, the Solicitor General agrees that a protected "agreement does not become a non-immune boycott merely because it has some effect on other insurers." U.S. Pet. Br. 13.

The district court also understood that the controlling boycott standard cannot be defeated by artful pleading. Judge Schwarzer properly held that a boycott claim could not be based on "[c]onclusory allegations" (Pet. App. 57a) that were "just semantics. * * * [Plaintiffs] try to enlarge on that [alleged agreement not to offer certain coverage] by dressing it up in pejorative language which doesn't seem to add anything to the fundamental allegations in this case." 9/15/89 Tr. 7-8. This Court has cautioned that "in a case of this magnitude, a district court must retain the power to insist upon some specificity of pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983). And it is settled law in the lower federal courts that boilerplate assertions and legal conclusions are not sufficient to require that a case—especially an enormous antitrust case—proceed past a motion to dismiss.[17] Despite the states' extensive

[17] See, *e.g., Pennsylvania* v. *PepsiCo, Inc.*, 836 F.2d 173, 182-183 (3d Cir. 1988) (emphasis omitted) (because "litigation today is too expensive a process to waste time on fanciful claims," a plaintiff "may not evade the requirements of proper pleading 'by merely alleging a bare legal conclusion'" and instead "must plead the essential facts of a * * * group boycott"; "[a]lthough dressed in the pejorative appellation 'group boycott,'

precomplaint investigation and the availability of discovery in the trial court, plaintiffs failed to substantiate their boycott claim with any supporting facts.

2. *The Court Of Appeals Erred In Concluding That Plaintiffs' Allegations Involve "Much More" Than Agreements On Terms And Conditions Of Insurance*

The court of appeals misconceived the controlling boycott standard by ignoring the requirement that a McCarran Act boycott must involve conduct more broadly restrictive of competition than an agreement on rates and terms of insurance, such as an absolute refusal to deal on any terms or discriminatory activity that excludes competitors or customers. Instead, it held (Pet. App. 23a) that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms."

The problem with the court's approach is that it "effective[ly] prohibit [s] * * * any horizontal agreement among insurance competitors" and thus "deprives McCarran-Ferguson immunity of any practical effect." Note, 105 HARV. L. REV. at 1417, 1418. For example, the Ninth Circuit's view (shared by plaintiffs, see Br. in Opp. 10-11 & n.9) that a so-called "conditional refusal to deal" is a boycott within the meaning

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the specific conduct complained of in this case, stripped of name-calling or label-pasting, is nothing more than conduct expressly permitted by [law]"); *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) ("[T]he complaint does not state a claim under the federal antitrust laws, even though it uses antitrust language * * *. The heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressures on the federal courts, counsel against [discovery and trial] if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint. * * * And the pleader will not be allowed to evade this requirement by attaching a bare legal conclusion to the facts that he narrates").

of the McCarran Act would prohibit joint agreements to provide insurance only on specified terms. Such a result would be flatly contrary to *Barry*, *SEUA*, and McCarran's legislative history (see pages 27-37, *supra*) and would allow the narrow boycott exception to "swallow" the broad McCarran immunity for agreements on terms and conditions of insurance. *In re Workers' Compensation Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989). As Judge McGowan has explained:

> Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since the construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that * * * something in the way of enforcement activity would be required to make out a claim of "boycott, coercion or intimidation" within the meaning of the Act.

Proctor, 561 F.2d at 274. Because defendants here "were actually agreeing on coverage issues," the Ninth Circuit's decision "has broadened 'boycott' to encompass activities which concern the terms and conditions of insurance." von Kalinowski, ANTITRUST REPORT at 5.

The court of appeals sought to justify its boycott holding by asserting that defendants were "charged with much more" than "confer[ring] and agree[ing]" on terms of insurance (Pet. App. 21a):

> [Defendants] are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks.

It is apparent, for the reasons previously discussed (see pages 37-43, *supra*), that these allegations do not support the court of appeals' "much more" conclusion. In each instance cited by the Ninth Circuit, the alleged action amounted to *nothing* more than the formation and implementation of non-discriminatory agreements as to the risks that defendant insurers and reinsurers were willing to cover.[18] Nowhere, it should be emphasized, have plaintiffs alleged any form of "coercion" or "compulsion" other than the natural effect in the market of these agreements. That such agreements among insurance companies are described with derogatory rhetoric does not transform them from protected joint activity into unprotected boycotts. See Note, 105 HARV. L. REV. at 1419 (the Ninth Circuit "neglected a functional scrutiny of boycotts in favor of conclusory labels").

In addition to lacking any factual support in this record, the Ninth Circuit's "much more" approach fails to provide necessary guidance for the insurance industry and antitrust enforcement officials, imposes serious burdens on the federal judicial system, and threatens to eviscerate the core purposes of the McCarran-Ferguson Act. First, the court of appeals' opinion provides *no* meaningful standards to distinguish protected joint activities from unprotected boycotts. See von Kalinowski, ANTITRUST REPORT at 5 ("[t]he Ninth Circuit failed to

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[18] Indeed, our petition for certiorari (at 24-25) challenged plaintiffs to support the court of appeals' assertion that this case involves "much more" than such agreements, but they were unable to do so despite their extensive pre-complaint investigation. Br. in Opp. 2-5.

meaningfully articulate guidance on how to distinguish between agreements on coverage and terms and other understandings"); see also *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-1915 (1992) (discussing advantages of "safe harbors" and "bright-line rules"). All those affected by the boycott issue—insurance companies, state insurance regulators, government antitrust enforcers, and private plaintiffs—have a pressing need for a legal rule that can be readily understood and followed. However, the court's nebulous "much more" ruling, devoid of objective criteria, leaves them completely in the dark on the critically important and recurring issue of the dividing line between permissible joint activity and impermissible boycotts.

The special nature of insurance underscores the acute need for clear rules here. The Court has recognized that insurance companies have a "vital" interest in being able to rely upon "governing legal rules" to structure their operations to accommodate risks over long periods of time. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-247 (1978). The boycott question presented in this case implicates the most basic operations of the business of insurance: what are insurers permitted to do in formulating and implementing agreements on terms of insurance? A legal test that furnishes only an uncertain answer to that question is a prescription for confusion and diminished efficiency as insurers are deterred by concerns that beneficial and long-accepted practices might someday be found to involve "much more" than protected agreements under the Ninth Circuit's amorphous decision.

Second, the court of appeals' "much more" boycott test fails to furnish a workable standard for weeding out antitrust claims against insurers that do not belong in federal court. The onus of massive antitrust litigation on defendants (as well as on the already overcrowded federal court system) is well known. See, *e.g., Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344-345 (1979). At the same time, the Sherman Act's generous remedies of treble damages and attorneys' fees provide a powerful incentive for plaintiffs to bring unmeritorious litigation. As this Court has recognized in a related context:

> [E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial *so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.*

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) (emphasis added).

As *Blue Chip Stamps* suggests, it is vital for district courts to be able to identify and dispose of unwarranted claims prior to trial. See also *Associated General Contractors*, 459 U.S. at 528 n.17 ("[h]ad the District Court required [plaintiff] to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged"); *Reiter*, 442 U.S. at 345 ("[d]istrict courts must be especially alert to identify frivolous claims" and must "exercise sound discretion and use the tools available"); U.S. Pet. Br. 7 n.3 (commending Judge Schwarzer's "efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial"). In recent years this Court increasingly has stressed the propriety and importance of such pre-trial dispositions. See, *e.g., Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). To permit resolution by pre-trial motion, however, the governing legal standard must be reasonably clear. The Ninth Circuit's "much more" approach is utterly incapable of practical application to dismiss groundless boycott claims before trial.

Third, and of perhaps greatest concern, the court of appeals' lax interpretation of the boycott exception seriously impairs the McCarran Act's federalism policy of protecting state regulation of insurance from federal antitrust interference.

In response to a tort crisis that unforeseeably expanded the scope of covered risks and adversely affected the economic viability of existing policies, defendants, it is alleged, agreed upon revisions to the ISO standardized advisory forms. The proposed revisions were "the subject of widespread debate and controversy in the insurance industry" (Pet. App. 37a), and state insurance departments carried out a review process of unprecedented thoroughness in which the entire spectrum of views on the proposed forms**C**including those of state attorneys general**C**were exhaustively aired. See pages 6-7, *supra;* Banfield Aff. ¶¶8-20. Based on this extensive two-year review process, the proposed forms were subject to major modifications on four occasions to respond to the concerns of state regulators. In the end, the overwhelming majority of states approved the revised forms as being in the public interest, and new policies written on those forms began to be issued in the states (and *only* in the states) that granted such approval. See pages 7-8, *supra*.

In the face of plaintiffs' unsuccessful attempt to defeat the revised forms before state insurance commissioners, the Ninth Circuit has allowed them to launch a collateral attack in federal court on the development and implementation of the approved forms, thereby circumventing the state regulatory process simply through resort to artful antitrust pleading. The state attorneys general have correctly described the suit as "'a nuclear attack on the insurance industry'"[19] for the avowed purpose of "'restructur[ing] the industry.'"[20] Plaintiffs seek nothing less than a

[19] Adler, *Drawing Battle Lines: Activists Declare War on Insurers,* BUS. INS., Aug. 8, 1988, at 1, quoting former West Virginia Attorney General Charles G. Brown.

[20] Kriz, 1988 NAT'L J. at 2598, quoting former Massachusetts Attorney General James M. Shannon.

reformation of insurers' "'routine business practices'"[21] and have requested sweeping relief (see pages 9-10 note 6, *supra*) that would "'shake the insurance industry to its foundations.'"[22] Plaintiffs' unvarnished attempt to have a federal court impose insurance forms and practices radically different from those approved by state insurance regulators—based on the expressed view of the attorneys general that "'[s]tate [insurance] regulation is clearly lousy'"[23] represents a frontal assault on the McCarran Act.[24] The boycott exception cannot rationally be construed to sanction such a direct nullification of the core policies of the Act.[25]

The overarching purpose of the McCarran Act was to "free[] the insurance business of antitrust rules that would reduce it to a shambles." R. Posner & F. Easterbrook, ANTITRUST 1046 (2d ed. 1981); see pages 32-33, *supra*. The Act was designed to entrust oversight of the insurance industry to expert and politically accountable state insurance regulators rather than to lay juries applying generalized Sherman Act principles.[26] The allegations in this case fall squarely within the

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[21] Stansky, *Massive Insurance Suit Alive and Well*, CONN. L. TRIB., June 24, 1999, at 17, quoting New Jersey Deputy Attorney General Laurel Price (emphasis added).

[22] *Ibid.*

[23] Adler, BUS. INS. at 77, quoting former West Virginia Attorney General Charles G. Brown.

[24] Indeed, the state attorneys general brought this litigation without the concurrence (or in many instances even the knowledge) of their state insurance commissioners. See Bradford, *Antitrust Suits a Political Ploy: Ex-Regulators*, Bus. Ins., Apr. 11, 1988, at 1.

[25] In contrast to the agreement at issue in *Barry*—which did not set terms and conditions of insurance but rather allocated customers among the defendant insurers (see 438 U.S. at 553-554)—the terms here were intensively scrutinized by state regulators. See pages 6-8, *supra*; see also Note, 105 HARV. L. REV. at 1419.

[26] As a leading commentator has pointed out, a lax interpretation of the boycott standard under *Barry* would loose "[a]n avalanche of cases" in federal court and would be "seized upon quickly in an attempt to use federal courts to regulate the

zone of activities traditionally regulated by state insurance departments. Plaintiffs' revolutionary interpretation of the boycott exception would swallow the basic rule of antitrust immunity and, by transforming protected joint agreements into unprotected boycotts, would result in precisely the "shambles" that Congress intended to prevent.

CONCLUSION

The judgment of the court of appeals should be reversed.

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insurance business." Kimball & Heaney, *Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1, 46-47 & n.171.

Respectfully submitted.

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STATUTORY APPENDIX

1. The Sherman Act, 15 U.S.C. §§ 1 *et seq*., provides in pertinent part:

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, provides in pertinent part:

> § 1011. Declaration of policy
>
> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948
>
> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

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

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

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

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