No. 97-303

In the Supreme Court of the United States

OCTOBER TERM, 1997

HUMANA INC., AND
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
PETITIONERS

v.

MARY FORSYTH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The McCarran-Ferguson Act states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." The question presented is whether the McCarran-Ferguson Act precludes a private party from bringing suit under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, to obtain a federal remedy of treble damages, 18 U.S.C. 1964(c) (Supp. II 1995), for a pattern of mail fraud allegedly perpetrated by a healthcare insurer, where state insurance law does not provide a treble damages remedy.

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INTEREST OF THE UNITED STATES

The United States prosecutes criminal activity in the insurance business under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, and other criminal statutes, and has obtained civil injunctions against such activity under 18 U.S.C. 1345. The United States also enforces the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and other civil rights statutes touching upon insurance practices. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae.

STATEMENT

1. Prior to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), it often had been assumed that "[i]ssuing a policy of insurance [wa]s not a transaction of commerce," *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869), and consequently that federal law did not apply to the business of insurance. *Department*

of Treasury v. *Fabe*, 508 U.S. 491, 499 (1993); *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538-539 (1978). In *South-Eastern Underwriters*, however, this Court held that an insurance company doing business across state lines was engaged in interstate commerce; it further held that, as a result, the Sherman Act applies to the business of insurance. 322 U.S. at 539-561.

That decision triggered concern about the extent to which federal law might pre-empt state insurance regulation. *St. Paul Fire & Marine*, 438 U.S. at 539. As the dissenting opinions in *South-Eastern Underwriters* explained, the Sherman Act itself would (under the Court's decision) pre-empt certain state insurance laws: The "statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act." 322 U.S. at 581 (Stone, C.J., dissenting); see *id.* at 586-587, 590-591, 595 (Jackson, J., dissenting). The dissenting opinions also raised the specter that, because the Court had held the sale of insurance to be interstate commerce, state regulation might be displaced entirely under the Court's dormant Commerce Clause jurisprudence. See *id.* at 581 (Stone, C.J., dissenting) ("The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail."); see also *id.* at 586-587 (Jackson, J., dissenting) (warning that the Commerce Clause has the effect of "restricting state power").

In response to those concerns, and to lend "support to the existing and future state systems for regulating and taxing the business of insurance," Congress in 1945 enacted the McCarran-Ferguson Act, 15 U.S.C. 1101 *et seq.* *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946). Section 1 of the Act, the Act's statement of policy, "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." 15 U.S.C. 1011. Sections 2 through 5 of the Act implement that policy, addressing each of the concerns raised in the *South-Eastern Underwriters* dissents. 15 U.S.C. 1012-1014.

In Section 2(a) of the Act, Congress put its imprimatur on state regulation of insurance, ensuring that Congress's failure to regulate interstate insurance transactions would not be construed under the dormant Commerce Clause as barring state regulation. "The business of insurance, and every person engaged therein," Section 2(a) declares, "shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. 1012(a). And to mitigate the immediate effect of the antitrust laws (and certain other specifically identified federal laws) on state regulatory regimes, Congress in Sections 2(b) and 3 imposed a partial moratorium on their application to the business of insurance for four years, and made them generally applicable thereafter only to the extent that the insurance business had not been regulated by the State. See 15 U.S.C. 1013(a) (Sherman Act, Clayton Act, Robinson-Patman Act, and FTCA "shall not apply to the business of insurance" until "June 30, 1948"); 15 U.S.C. 1012(b) (Sherman Act, Clayton Act, and FTCA "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law"); see also 15 U.S.C. 1013(b) (McCarran-Ferguson Act does not preclude antitrust actions with respect "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation").

Most pertinent here, in Section 2(b) Congress addressed the concern that other federal statutes—not yet enacted or not specifically identified in the McCarran-Ferguson Act—might be read to displace state insurance regulation

and taxation. To prevent that, Section 2(b) creates a special rule of statutory construction:

> 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.

15 U.S.C. 1012(b). The McCarran-Ferguson Act is thus designed to "remov[e] obstructions" to state insurance regulation and taxation "which might be thought to flow from [Congress's] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Prudential*, 328 U.S. at 429-430.

2. In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, as part of an effort to eradicate organized crime. See Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922. In relevant part, RICO makes it unlawful for "any person employed by or associated with any enterprise engaged in [or affecting] interstate or foreign commerce, to conduct or participate * * * in the conduct of the enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Racketeering activity includes "any act * * * 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 481 (1985); see 18 U.S.C. 1961(1)(A).

The United States may bring criminal charges or initiate civil proceedings against RICO violators. See 18 U.S.C. 1963 (criminal penalties), 1964(a) and (b) (civil proceedings by the Attorney General). In addition, RICO provides a private right of action under which "[a]ny person injured in his business or property by reason of a violation of" RICO may bring suit to recover "threefold" the damages sustained plus "the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 1964(c).

3. Respondents are certain beneficiaries of group health insurance policies issued by petitioner Humana Health Insurance of Nevada ("Humana Insurance"). Pet. App. 2a.[1] Under those policies, Humana Insurance was obligated to pay 80% of a beneficiary's hospital charges over and above a designated deductible amount; the beneficiary was to pay the remaining 20% as a co-payment. *Ibid.* Respondents allege that, beginning in 1985, petitioners perpetrated a massive fraud to shift payment obligations from themselves to policy beneficiaries.

Respondents charge that Humana Insurance and Humana Sunrise Hospital (Sunrise Hospital) (an acute care facility in Nevada owned and operated by petitioner Humana, Inc.) entered into a secret arrangement under which Humana Insurance obtained discounts of between 40% and 96%. Pet. App. 2a-4a, 43a. According to respondents, the entire discount was credited toward Humana Insurance's 80% obligation. *Id.* at 3a-4a, 43a. Policy beneficiaries, in contrast, continued to be billed for co-payments as though Sunrise Hospital were charging the full, undiscounted rate. *Id.* at 3a-4a. As a result, those making co-payments were misled into paying far more than 20%—and Humana Insurance paid far less than 80%—of total charges. For example, Humana Insurance might receive an 89% discount on a hospital bill of $5,000, and thus receive a bill for just $550 (11% of $5,000). The co-payor, however, would pay 20% of the undiscounted rate of $5,000, or a total of $1,000. See Pet. App. 57a. Thus, of the $1,550 charged by Sunrise Hospital, $1,000 or nearly 65% would be paid by the policy beneficiary, while only $550

[1] The original plaintiffs included not only the beneficiaries of the insurance policies, but also their employers, who purchased the policies. Pet. App. 2a. The district court, however, granted summary judgment for petitioners with respect to the employer/purchaser RICO claims, *id.* at 21a, 86a-87a, 89a-90a, and the court of appeals affirmed, *id.* at 26a-28a, 30a. Respondents have not sought review of those decisions, and the claims of the employer/purchasers thus are not before this Court.

or just over 35% would be paid by Humana Insurance. *Ibid.* Under respondents' understanding of the co-payment provision, the beneficiary should have paid just 20% of total charges, or $310, and Humana Insurance should have paid 80% of total charges, or $1,240. *Ibid.*

4. Respondents brought suit in the United States District Court for the District of Nevada, seeking recovery under several causes of action, including RICO. Respondents charge that petitioners engaged in a pattern of racketeering activity consisting of mail, wire, radio, and television fraud, and that the frauds deceived respondents into making excessive co-payments. Pet. App. 20a-21a; J.A. 126-131.

The district court granted petitioners' motion for summary judgment on the RICO claims. Pet. App. 21a, 91a-96a. The McCarran-Ferguson Act, the district court ruled, precludes the application of a federal statute if (1) the statute does not "specifically relate" to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the State has enacted laws regulating the business of insurance, and (4) state law would be superseded, impaired, or invalidated by application of the federal statute. *Id.* at 91a-92a. After concluding that the first three factors were satisfied, the court noted that Nevada has a comprehensive scheme of insurance regulation, *id.* at 93a-94a, under which the Nevada Commissioner of Insurance has "exclusive jurisdiction in regulating the subject of trade practices in the business of insurance." Nev. Rev. Stat. § 686A.015 (1997) (quoted in Pet. App. 93a). Because RICO's private remedies, including its treble damages provision, far exceed state insurance law penalties for the same conduct, the court concluded that permitting policy beneficiaries such as respondents to seek relief under federal law would "invali-

date, impair, or supersede" Nevada law within the meaning of the McCarran-Ferguson Act. *Id.* at 95a.[2]

5. The court of appeals reversed in relevant part. Relying on its decision in *Merchants Home Delivery Service, Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), cert. denied, 516 U.S. 964 (1995), and in accord with the reasoning of decisions of the First, Fourth, Fifth, and Seventh Circuits, see pp. 22, 26, *infra*, the court of appeals rejected the notion that the existence of state regulation is, by itself, sufficient under the McCarran-Ferguson Act to preclude application of federal law. Instead, the court of appeals held that federal law does not "invalidate, impair, or supersede" state insurance law within the meaning of the Act unless federal law conflicts with state law. Pet. App. 24a-25a. Mere overlap in the coverage of Nevada insurance law and RICO, it held, "does not create a conflict between federal and state law" since neither law prohibits conduct that the other compels or permits. *Id.* at 25a. Accordingly, the court of appeals reversed and remanded in relevant part. *Ibid.*

SUMMARY OF ARGUMENT

A. When Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), it used the terms "invalidate, impair, or supersede [state] law" in the same sense as had the *South-Eastern Underwriters* dissents—to mean, in modern parlance, "to pre-empt." That was the prevailing legal understanding of those terms when the McCarran-Ferguson Act was passed, as evidenced by their use in this Court's cases, and by their use by Congress itself. Thus, far from creating a special rule to prevent the application of federal law with incidental effects on state insurance regulation, Section 2(b) of the McCarran-Ferguson

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[2] The district court also granted summary judgment on a number of other claims, none of which is before this Court.

Act, 15 U.S.C. 1012(b), is "a special federal anti-pre-emption rule, which provides that a federal statute will not pre-empt a state statute enacted 'for the purpose of regulating the business of insurance'—unless the federal statute 'specifically relates to the business of insurance.'" *Barnett Bank* v. *Nelson*, 517 U.S. 25, 27-28 (1996) (emphasis omitted). Because permitting respondents to seek treble damages under RICO neither precludes Nevada from enforcing its insurance laws nor impedes petitioners from obeying them, RICO's treble damages remedy does not pre-empt state law and does not "invalidate, impair, or supersede" it within the meaning of Section 2(b).

B. Petitioners' effort to construe the terms "invalidate, impair, or supersede" more broadly is inconsistent with the statutory text. In essence, they argue that providing a greater remedy under RICO "impairs" or "supersedes" state law by "'upset[ting] the balance' of regulation * * * that the states have carefully constructed." Alliance of Am. Insurers Br. at 26; see Pet. Br. 22-23. But Section 2(b) bars federal statutes from being construed to "invalidate, impair, or supersede" not merely laws "enacted * * * for the purpose of regulating the business of insurance," but also "any law * * * which imposes a fee or tax upon such business." 15 U.S.C. 1012(b). If federal law were to "invalidate, impair, or supersede" state insurance regulation merely because it imposes additional or greater liability for misconduct than does state law, then federal law presumably would also "invalidate, impair, or supersede" state insurance "fee[s] or tax[es]" within the meaning of Section 2(b) whenever it imposes additional or greater tax liability than does the State. Generally applicable federal fees and taxes, however, do not "invalidate, impair, or supersede" state insurance taxes and fees within the meaning of Section 2(b) where nothing precludes insurers from paying both. For the same reason, generally applicable federal sanctions for criminal misconduct, like those provided under RICO, do not "invali-

date, impair, or supersede" state insurance law within the meaning of Section 2(b) if insurers can comply with both.

In addition, petitioners' construction effectively would make state insurance law pre-empt the field of remedies for conduct that violates both state and federal law. But Congress knew how to give state law such a pre-emptive effect, and chose not to do so with respect to statutes such as RICO. Under the second sentence of Section 2(b), the Sherman Act and other specifically-identified statutes are "applicable to the business of insurance" only "*to the extent that* such business *is not regulated* by State Law." 15 U.S.C. 1012(b) (emphasis added). Congress did not make state law pre-empt the field with respect to statutes that, like RICO, were not specifically listed in the second sentence of Section 2(b).

C. The ordinary and sensible presumption is that a federal law of general applicability such as RICO applies uniformly to all persons whose conduct falls within the statutory proscription. The rule of statutory construction prescribed by the McCarran-Ferguson Act should not be distorted to create disuniformities in the application of other Acts of Congress absent a showing that the particular disuniformity is required to prevent a state insurance law from actually being "invalidat[ed], impair[ed], or supersede[d]." No such showing can be made here. Indeed, such a showing could not be made even under an unduly expansive interpretation of those terms. Nevada state law permits private actions for fraud and deceit in the insurance context, and permits recovery of punitive damages that may well exceed the amount that could be recovered under RICO. Since private actions in Nevada's own courts co-exist with its system of insurance regulation, there is no reason why RICO actions in federal courts cannot co-exist with that system as well.

ARGUMENT

THE McCARRAN-FERGUSON ACT DOES NOT PRECLUDE INJURED PERSONS FROM SEEKING A FEDERAL REMEDY FOR A PATTERN OF CRIMINAL MAIL FRAUD PERPETRATED BY A MEDICAL INSURER

"[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Department of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993). The meaning of a statute, however, is not discerned by examining "a single sentence or member of a sentence" in isolation, but rather by "look[ing] to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotation marks omitted); see *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context.").

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in relevant part:

> 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.

Because RICO does not "specifically relat[e] to the business of insurance," the issue in this case is the meaning of the phrase "invalidate, impair, or supersede [state] law."

Relying on dictionary definitions, petitioners would give the terms "invalidate," "impair," and "supersede" a broad construction so as to bar federal remedies that have some (unspecified) modicum of effect on the business of insurance. But petitioners make no effort to determine the legal source from which the terms "invalidate, impair, or supersede" in Section 2(b) were drawn. Nor do they examine how those

terms were used and understood by lawmakers and the courts when the McCarran-Ferguson Act was enacted. As a result, they overlook the most natural understanding of the phrase "to invalidate, impair, or supersede [state] law"—that it means, in modern parlance, "to pre-empt state law."

Thus, the McCarran-Ferguson Act does not declare that federal statutes shall not be construed as affecting the business of insurance or its regulation. Instead, it declares that general federal statutes should not be construed as *pre-empting* state insurance laws. As this Court has explained, Section 2(b) is "a special federal anti-pre-emption rule, which provides that a federal statute will *not* pre-empt a state statute enacted 'for the purpose of regulating the business of insurance'—unless the federal statute 'specifically relates to the business of insurance.'" *Barnett Bank* v. *Nelson*, 517 U.S. 25, 27-28 (1996) (emphasis omitted). Because permitting respondents to pursue the federal remedies provided under RICO would not pre-empt Nevada's insurance laws—Nevada remains free to enforce state law norms, and nothing precludes petitioners from obeying them—RICO does not "invalidate, impair, or supersede" state insurance law within the meaning of Section 2(b).

A. Federal Law Invalidates, Impairs, or Supersedes State Law Only If It Pre-Empts State Law

1. Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that the issuance of insurance is interstate commerce and that, as a result, the practices of insurers are subject to scrutiny under federal legislation, including the Sherman Act. 322 U.S. at 539-561; see pp. 1-2, *supra*. The "decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *St. Paul Fire & Marine*, 438 U.S. at 539. As the dissenting opinions in *South-Eastern Under-*

writers noted, under the Court's holding, the Sherman Act would pre-empt the insurance laws of several States: The "statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act," Chief Justice Stone explained, "and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act." 322 U.S. at 581 (dissenting opinion). Moreover, according to the dissenting opinions, the *South-Eastern Underwriters* decision might have made the Court's dormant Commerce Clause cases applicable to the subject of insurance, thereby precluding state taxation and regulation altogether. See *ibid.* (Stone, C.J., dissenting) ("The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored."); see also *id.* at 586-587 (Jackson, J., dissenting) (warning that Commerce Clause has effect of "restricting state power").

Congress responded with the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, which declares that no federal statute "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance" unless the federal statute specifically relates to insurance. 15 U.S.C. 1012(b). Congress, however, did not choose the words "invalidate, impair, or supersede" at random. Those words had a familiar usage in this Court's decisions, and they were so utilized in the dissenting opinions in *South-Eastern Underwriters* in particular. Those opinions did not use the terms "invalidate," "impair," and "supersede" to describe mere indirect effects on state law, or the proclivity of litigants to rely on federal rather than state remedies. Instead, they used those terms to mean, in modern parlance, "pre-empt."

Indeed, the term "invalidate" apparently was drawn from Chief Justice Stone's dissent, which warned that many state statutes "will be *invalidated* by the [*South-Eastern Underwriters*] decision as in conflict with the Sherman Act." 322 U.S. at 581 (emphasis added); see also *id.* at 562 (opinion of

the Court) (rejecting as "exaggerated" the "argument that the Sherman Act necessarily invalidates many state laws"). And the terms "impair" and "supersede" appear to have been drawn from Justice Jackson's dissenting opinion, which likewise used them to mean "pre-empt." Under the Supremacy Clause, Justice Jackson explained, Congress's exercise of its Commerce Clause powers "*impairs* state regulation only in so far as it actually conflicts with the federal regulation." 322 U.S. at 587 (emphasis added); see also *ibid.* (urging an alternative rationale that "would leave the basis of state regulation unimpaired"). And, Justice Jackson further warned, "if the present trend" toward increasing the scope of what constitutes interstate commerce—over which "congressional power to regulate prevails over that of the states"—continues, "federal regulation eventually will *supersede* that of the states." *Id.* at 586 (emphasis added).

The dissenting opinions' use of the terms "invalidate, impair, or supersede" to mean "pre-empt" was consistent with then-prevailing legal usage. When the McCarran-Ferguson Act was passed, the word "invalidate" meant (as it does today) to "render of no force or effect." *Webster's New International Dictionary* 1135 (1917). Consistent with that definition, this Court regularly used the phrase "invalidate * * * law" to describe pre-emption, declaring that, if a state law is in irreconcilable conflict with or repugnant to federal law (whether statutory or constitutional), it is "invalid" or "invalidated" thereby. See, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 69 n.23 (1941) ("In the only case of this type in which there was an outstanding treaty provision in conflict with the state law, this Court held the state law invalid."); *Todok* v. *Union State Bank*, 281 U.S. 449, 456 (1930) ("[T]he treaty did not invalidate the provisions of the Nebraska statute."); *Carpenters & Joiners Union* v. *Ritter's Café*, 315 U.S. 722, 734 (1942) (Reed, J., dissenting) ("legislation forbidding picketing * * * was invalidated" as "unconstitutional"); *Carter* v. *Virginia*, 321 U.S. 131, 139 (1944) (Black, J., concurring)

("This Court could invalidate the Virginia regulations, but only the Congress could devise and substitute effective regulations to take their place.").[3] Petitioners concede that the term "invalidate" is best read as meaning "pre-empt." Pet. Br. 20 (the term "invalidate" can "be equated with 'preempt' and limited to * * * conflict between state and federal law").

Likewise, while the term "impair" by itself generally means "to diminish in quantity, value, excellence, or strength," *Webster's*, *supra*, at 1077, "or otherwise affect in an injurious manner," *Black's Law Dictionary* 921 (3d ed. 1933), the phrase to "impair [a] law" long has been uniquely associated with conflict pre-emption. The phrase connotes partial pre-emption, *i.e.*, the displacement of some portion of a statute or its preclusion in certain contexts. Justice Jackson used the phrase precisely in that manner in his *South-Eastern Underwriters* dissent: When Congress exercises its Commerce Clause powers, he explained, "it impairs state regulation only in so far as it actually conflicts with the federal regulation." 322 U.S. at 587. And, at the time the McCarran-Ferguson Act was passed, this Court used the phrase "impair * * * law" in that sense as well. See, *e.g.*, *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 357 (1945) (state construction of local law "cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority" for certain types of claims); *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378 (1930) ("[T]he powers conferred by [the statute] on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them."); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as

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[3] See also *Parker* v. *Brown*, 317 U.S. 341, 361 (1943); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 446 (1939) (Black, J., dissenting).

not to override state laws or to impair rights arising under them.").[4] Indeed, at least one pre-McCarran-Ferguson Act statute used the phrase "impair * * * law" to convey precisely that meaning, and this Court interpreted the statute as declaring that federal law should not pre-empt state regulation. *Rice* v. *Board of Trade*, 331 U.S. 247, 255 (1947) (section providing that federal statute shall not "be construed to impair any [applicable] State law" shows that "Congress did not preclude state regulation," and "serves the function of preventing supersedure * * * where state and federal law overlap"); see also *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 101-102 (1983) ("pre-emption" of cause of action and forum through which federal rights are enforced "impair[s]" or "modif[ies]" federal law).[5]

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[4] See also *New York, N.H. & H.R.R.* v. *State of New York*, 165 U.S. 628, 631 (1897) ("[T]he mere grant to congress of the power to regulate commerce with foreign nations and among the states did not * * * impair the authority of the states to establish * * * regulations."); *Peck* v. *Jenness*, 48 U.S. 612, 614 (1849) (state law liens "not to be annulled, destroyed, or impaired under the proceedings in bankruptcy"); *Corfield* v. *Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230) (Congress's power over interstate commerce does not "impair the right of the state governments to legislate.").

[5] With respect to laws, "impair" also has been used to mean to "conflict" sufficiently as to warrant pre-emption under the Supremacy Clause. See *Parker* v. *Brown*, 317 U.S. 341, 368 (1943) (state regulation valid because it "does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution"); *Stone* v. *Interstate Natural Gas Co.*, 103 F.2d 544, 550 (5th Cir. 1939). As demonstrated above, however, Congress used the word "impair" in the McCarran-Ferguson Act in the same sense that Justice Jackson used it in *South-Eastern Underwriters, i.e.*, to mean "pre-empt" in part. See also n.12, *infra*. In any event, even if Congress used the term "impair" to mean "conflict" in such a manner as to warrant pre-emption, it would not alter the conclusion that federal law "invalidate[s], impair[s], or supersede[s]" state insurance law within the meaning of Section 2(b) only if the two directly conflict. See *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 509 (1989) (State law "conflicts with federal law" where "it is impossible to comply with both" or "state law stands as an obstacle to the accomplishment and execution of congressional objec-

The term "supersede" has a similar pedigree. In accordance with its accepted definition—to "displace, or set aside, and put another in place of; to supplant," *Webster's*, *supra*, at 2082—this Court consistently used the term "supersede" in the context of state-federal relations to mean "pre-empt," particularly where federal law not only bars reliance on state law, but also provides a federal rule to operate in its place. See, *e.g.*, *Illinois Commerce Comm'n* v. *Thomson*, 318 U.S. 675, 682 (1943) ("[T]he Interstate Commerce Commission * * * has power to supersede an intrastate rate by prescribing in its stead a new rate."); *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 359 (1943) ("Respondent however insists the Act has not superseded, but has merely modified its common law contractual right."); *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (as the "federal system of alien registration" already had been "held to supersede a state system of registration," the Court is "more ready to conclude that a federal act in a field that touched international relations superseded state regulation than * * * where a State [regulates] local matters"); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944) ("The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees."); *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 152 (1944) ("[W]e think Congress did not intend * * * to supersede the power of a state regulatory commission, exercising comprehensive control."); *District of Columbia* v. *Pace*, 320 U.S. 698, 703 (1944) ("This general rule * * * would hardly supersede a special statutory measure.").[6]

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tives."); *N.A.A.C.P.* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295-297 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

[6] Petitioners are incorrect to assert (Pet. Br. 17) that so construing Section 2(b) renders the terms "impair" and "supersede" mere surplusage. To the contrary, each word in the phrase "invalidate, impair, or supersede" has a slightly different connotation, and only collectively do

Because the *South-Eastern Underwriters* dissents used the terms "invalidate," "impair" and "supersede" law to convey the notion of pre-emption—and because that was the prevailing legal usage at the time—it is most natural to read the McCarran-Ferguson Act (which was specifically addressed to that decision) as using those terms in the same sense. Where Congress borrows legal terms from a particular source, it borrows their meaning as well. *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (common-law terms construed consistent with their common-law meaning); *Moskal* v. *United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("[W]hen a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs. * * * [A]s Justice Frankfurter more poetically put it: '[I]f a word is obviously transplanted from another legal source * * * it brings its soil with it.'"); see also *United States* v. *Wells*, 519 U.S. 482 (1997).[7]

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they encompass the concept of pre-emption. The term "invalidate" means to render ineffective, generally without providing a replacement rule or law. See *Carter*, 321 U.S. at 139 (Black, J., concurring) ("This Court could invalidate the Virginia regulations, but only the Congress could devise and substitute effective regulations to take their place."). The term "supersede" means to displace (and thus render ineffective) while providing a substitute rule. See *Webster's*, *supra*, at 2082; *Illinois Commerce Comm'n*, 318 U.S. at 682 (The ICC "has power to supersede an intrastate rate by prescribing in its stead a new rate."). And the term "impair" is associated with partial pre-emption that displaces a state scheme only in certain contexts or respects. See 322 U.S. at 587 (Jackson, J., dissenting) (federal statute "impairs state regulation only in so far as it actually conflicts with the federal regulation"). In any event, to the extent the meanings of the terms overlap, the rule that each word must be construed to have meaning and effect does not apply to instances of lawyerly iteration. See *Moskal* v. *United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting) ("Nor should [the superfluity principle] be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted.").

[7] It is not significant that Congress did not use the term "pre-empt." That term did not in 1945 have its current breadth of meaning or widespread use; none of the opinions in *South-Eastern Underwriters* used it. Our research indicates that "pre-empt" was not used in this Court's cases to mean displacement of state law until 1917, when Justice Brandeis used

Thus, as this Court has recognized, Section 2(b) is "a special federal anti-pre-emption rule, which provides that a federal statute will not pre-empt a state statute enacted 'for the purpose of regulating the business of insurance'—unless the federal statute 'specifically relates to the business of insurance.'" *Barnett Bank*, 517 U.S. at 27-28 (emphasis omitted); see *id.* at 30 (referring to "the McCarran-Ferguson Act's special anti-pre-emption rule"); *Fabe*, 508 U.S. at 496-497 (referring to 15 U.S.C. 1012 as "the anti-pre-emption provisions of the McCarran-Ferguson Act"); *Fabe*, 508 U.S. at 515 (Kennedy, J., dissenting) ("The first clause of §1012(b) * * * provides that state laws enacted for the purpose of regulating the business of insurance are saved from pre-emption."); *id.* at 510 (Kennedy, J., dissenting) ("[T]he McCarran-Ferguson Act * * * provides an exemption from pre-emption for certain state laws."). That is also precisely how Senator Ferguson—whose name the Act bears—char-

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the phrase "pre-empt[] the whole field" in dissent in *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 169; the majority, however, used the word "supersede," *id.* at 148 ("[S]tate laws covering the same field are necessarily superseded."). The term pre-empt appears occasionally in cases from the late 1930s and early 1940s, but appears confined to the concept of "field pre-emption." See, *e.g.*, *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 260 (1937) ("act of Congress" had not "preëmpted the ground occupied by the local act and superseded it"); *Faitoute Co.* v. *Asbury Park*, 316 U.S. 502, 507 (1942) (rejecting argument that a particular "field of lawmaking has been preempted"); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 237 (1947) (Congress had not moved "into these fields" and "pre-empted" them). We have found no indication that the Court began using the word "pre-empt" to describe what we now call conflict pre-emption and express pre-emption until the mid 1950s, see, *e.g.*, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955) (although the "areas that have been pre-empted * * * are not" easily delineated, "[o]bvious conflict, actual or potential, leads to easy judicial exclusion of state action"); *San Diego Unions* v. *Garmon*, 359 U.S. 236, 240 (1959) (similar), or the specific labels "express pre-emption" and "conflict pre-emption" until 1973 and 1989, see *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 636 (1973) ("express pre-emption section"); *Northwest Cent. Pipeline* v. *State Corp. Comm'n*, 489 U.S. 493, 515 (1989) ("conflict pre-emption analysis").

acterized Section 2(b). The Act, Senator Ferguson explained, "provides that no Federal legislation relating to interstate commerce shall by implication *repeal* any existing State law unless such act of Congress specifically so provides." 91 Cong. Rec. 483 (1945) (emphasis added).[8]

2. The express declaration of purpose contained in Section 1 of the McCarran-Ferguson Act, 15 U.S.C. 1011, confirms that Section 2(b) is best read as an anti-pre-emption provision that prevents "repeal" of state insurance laws. Section 1 of the Act does not say that Congress seeks to avoid having any effect on the insurance business. Instead, it declares that the States should not be foreclosed from imposing their own regulations: "[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. 1011. And it asserts that federal enactments should not be read as precluding the States from doing so, absent an expressed intent to the contrary: "[S]ilence 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." 15 U.S.C. 1011. Nothing in the Act's declaration of purpose evidences an intent to deprive federal law of its usual force and effect where federal law does not "prevent continued state regulation" and state and federal law can co-exist.

The Act's historical origin and purpose point in the same direction. The McCarran-Ferguson Act was designed to address the specific concerns that arose from the *South-*

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[8] That is how Senator Ferguson's colleagues understood the provision as well. 91 Cong. Rec. 485 (1945) (describing the bill as declaring that "No act of Congress shall ever presume to invalidate a State law on the subject of insurance") (Sen. Taft); *id.* at 486 ("The section before us provides that no act of Congress shall be construed to invalidate a State law unless the act of Congress specifically states that the State law is in conflict with the Federal act and is designed to override it.") (Sen. Revercomb); *id.* at 1090 ("The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible.") (Rep. Gwynne).

Eastern Underwriters decision. *St. Paul Fire & Marine*, 438 U.S. at 538; *Fabe*, 508 U.S. at 499. That decision was considered problematic not because federal law might impose *additional* duties—or taxes or burdens—supplementing state law. Rather, many feared that federal law, and the Commerce Clause, might be read to *supplant* or *pre-empt* state taxation and regulation, as evidenced by the *South-Eastern Underwriters* dissents, see pp. 11-13, *supra*, and the petitions for rehearing filed by the defendants and the States.[9] By declaring that federal law will not be construed as pre-empting state law, Section 2(b) responds directly to those concerns, "remov[ing] [the] obstructions [to continued state regulation and taxation] which might be thought to flow from [Congress's] own power, whether dormant or exercised, except as otherwise expressly provided." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429-430 (1946); see *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955) ("[T]he McCarran Act * * * was designed to assure that existing state power to regulate insurance would continue."); *FTC* v. *Traveler's Health Ass'n*, 362 U.S. 293, 299 (1960) (similar). Indeed, given that each provision in the McCarran-Ferguson Act is framed as a response to concerns raised by the *South-Eastern Underwriters* dissents,[10] it

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[9] Petition for Rehearing at 7, *South-Eastern Underwriters*, *supra* ("[T]he effect of the decision is not only to call into question state statutes which are inconsistent with the Sherman Act, but also to place all existing state regulation of insurance in jeopardy."); Petition of the State of New York in Support of Motion for Rehearing at 1 ("This Court's decision that insurance is commerce creates problems without foreseeable limit concerning the effect of Federal statutes and concerning the extent to which State regulations are now permissible.").

[10] In response to the concern that the Commerce Clause might be read as precluding state regulation of insurance entirely, see pp. 2, 12, *supra*, Section 2(a) of the Act delegates the national power over interstate insurance to the States. 15 U.S.C. 1012(a). To address the immediate effect of the antitrust laws (and other specifically identified statutes) on state law, see 322 U.S. at 581 (Stone, C.J., dissenting); pp. 2, 12-13, *supra*, Congress declared a partial moratorium on their application to the busi-

would be implausible to conclude that the Act sought to rectify an alleged problem—the creation of supplementary federal remedies rather than pre-emptive laws—that neither the Members of this Court nor the litigants identified.

3. Because Section 2(b) effectively deprives many federal laws of potentially pre-emptive effect on state insurance law, it forecloses most arguments that state law is precluded by federal norms. It also forecloses application of federal law (not addressed to insurance) that would irreconcilably conflict with state law, *i.e.*, that would necessarily have the effect of "pre-empting" or "repealing" state insurance law. Thus, in *Fabe*, 508 U.S. at 502, this Court found "a direct conflict between [federal law] and [state] law" where the two provided different priority rules for the distribution of insurer assets, and applying one rule would necessarily preclude the other. As the Court observed:

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to *conflicting* federal statutes unless a federal statute specifically requires otherwise.

Id. at 507 (emphasis added); see also *Barnett Bank*, 517 U.S. at 42 (where general "federal statutes with potentially pre-emptive effect * * * *conflict* with state [insurance] law" then "the McCarran-Ferguson Act's anti-pre-emption rule will apply") (emphasis added).

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ness of insurance for four years, and limited their applicability thereafter. See p. 3, *supra*; 15 U.S.C. 1013(a) and (b); 15 U.S.C. 1012(b). Finally, to address the possibility that state law might be pre-empted by other, unidentified, federal statutes, see n.9, *supra*, Congress declared that no federal statute should be read to pre-empt—or, in the language of those times, to "invalidate, impair, or supersede"—state insurance law absent a clear indication that Congress so intended. 15 U.S.C. 1012(b).

Consequently, the First, Fifth, Seventh, and Ninth Circuits were correct to conclude that, absent a direct conflict between state and federal law—such that federal law would not supplement but rather would "pre-empt" or "repeal" state insurance law—applying federal law to insurance-related conduct does not "invalidate, impair, or supersede" state law within the meaning of the Act. See *Villafane-Neriz* v. *FDIC*, 75 F.3d 727, 736 (1st Cir. 1996); *United States* v. *Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994); *N.A.A.C.P.* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993); *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1491-1492 (9th Cir. 1995), cert. denied, 516 U.S. 964 (1995); see also *Sabo* v. *Metropolitan Life Ins. Co.*, 137 F.3d 185, 193 (3d Cir. 1998) (First, Seventh and Ninth Circuits "look[] to a direct conflict in the substantive provisions of the federal and state statutes at issue"), petition for cert. pending, No. 98-2. Simply put, if federal law neither precludes application of state insurance law nor impedes compliance therewith, it neither pre-empts state law nor "invalidate[s], impair[s], or supersede[s]" that law within the meaning of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

4. Judged by these standards, it is clear that permitting the victims of a pattern of criminal mail fraud to pursue a treble damages remedy under RICO does not "invalidate, impair, or supersede" Nevada insurance law. Petitioners do not allege that RICO prohibits conduct that Nevada law compels. Nor do they identify a Nevada law that will be rendered unenforceable in whole or in part. To the contrary, they concede (as they must) that Nevada law bars the conduct at issue in this case just as surely as federal law. Because the dictates of federal and state law do not conflict, and because nothing precludes petitioners from complying with both, Section 2(b) does not bar respondents from seeking a treble damages remedy under federal law. As Judge Easterbrook observed, anyone asserting that the McCarran-

Ferguson Act precludes reliance on federal law "needs to show that the [federal law] conflicts with state law. Duplication is not conflict." *American Family*, 978 F.2d at 295.

For similar reasons, this case cannot be meaningfully distinguished from *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). There, the Securities and Exchange Commission sought to bar, under the federal securities laws, the merger of two insurance companies even though state insurance regulators had approved it. The question before the Court there, as here, was "whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation." 393 U.S. at 462. Although respondent there argued "that any attempt to interfere with a merger approved by state insurance officials would 'invalidate, impair, or supersede' the state insurance laws," the Court rejected that argument:

> Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so. * * * The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders. * * * In these circumstances, we simply cannot see the conflict."

Id. at 463. The same reasoning applies here with even greater force. If applying federal law to bar a transaction *approved* by state law does not "invalidate, impair, or supersede" state law within the meaning of the Act, it follows *a fortiori* that providing a federal remedy for conduct that is similarly *prohibited* by state law does not either.

B. Petitioners' Construction Of Section 2(b) Is Inconsistent With The Statutory Text, Structure, And Purpose

1. Ignoring the fact that Section 2(b) is most naturally read as a "special anti-pre-emption provision," *Barnett*

Bank, 517 U.S. at 27; *Fabe*, 508 U.S. at 496-497, petitioners and their amici argue that Section 2(b) precludes private parties from relying on federal remedies that have a non-"trivial" effect on the business of insurance or its regulation. Pet. Br. 24. Congress, they assert, "intended to withdraw * * * from the field absent an express congressional statement to the contrary." Pet. Br. 10; see Alliance of Am. Insurers Br. at 12-13, 14-15; Consumer Credit Ins. Ass'n Br. at 7-9. That argument, however, is contrary to statutory text. The Act does not declare that "No Act of Congress shall apply to the business of insurance unless such Act specifically relates thereto." It declares that general federal statutes shall not be construed to "invalidate, impair, or supersede" state insurance laws. 15 U.S.C. 1012(b).[11]

Petitioners accordingly attempt to give the terms "invalidate, impair, or supersede" an over-broad construction. While conceding that the term "invalidate" can "be equated with 'pre-empt' and limited to * * * conflict[s] between state and federal law," Pet. Br. 20, petitioners rely on dictionary definitions to argue that the words "impair" and "supersede" can be read more broadly, *id.* at 20-21. But Congress did not randomly pluck the terms "impair" and "supersede" from the pages of a dictionary. It used those terms in light of their specific connotation, as reflected in this Court's cases and the *South-Eastern Underwriters* dissents. See pp.

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[11] The floor statement of Representative Gwynne on which petitioners repeatedly rely for the proposition that Congress sought to remove itself from the field entirely, Pet. Br. 14 n.9, 18 n.10, cannot be reconciled with Section 2(b)'s text. Indeed, Representative Gwynne himself recognized that Section 2(b) did not render federal law inoperative as a general matter, but rather did so *only* in cases of conflict. 91 Cong. Rec. 1090 (1945) ("The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible."). Besides, it is settled law that the McCarran-Ferguson Act did not return the law to its pre-*South-Eastern Underwriters* state. *Fabe*, 508 U.S. at 507; *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 220 (1979).

12-17, *supra*. Those sources show that to "supersede" or to "impair," when used in the phrase to "impair [state] law" or to "supersede [state] law," means to "pre-empt." *Ibid.* Any other construction would be at odds with the Act's express purpose and historical context. See pp. 19-21, *supra*.[12]

2. Petitioners' over-broad theory of "impairment" and "supersession" conflicts with the Act's text in two additional ways. Following the reasoning of the Sixth and Eighth Circuits (rather than that of the First, Fifth, Seventh, and Ninth), petitioners and their amici argue that providing a greater remedy under RICO than under state law "impairs" or "supersedes" state law by "'upset[ting] the balance' of regulation * * * that the states have carefully constructed." Alliance of Am. Insurers Br. at 26; see Pet. Br. 22-23; *Doe* v. *Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1306-1307 (8th Cir. 1997); *Kenty* v. *Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996). In essence, they argue, state law should be viewed as pre-empting the field of remedies for insurance-related fraud. See Pet. Br. 23-24 (relying on analogy to *Garmon* pre-emption); Alliance of Am. Insurers Br. at 27-28.

Congress knew how to give state law such a broad pre-emptive effect, and expressly did so with respect to the Sherman Act and certain other specifically-listed federal statutes, but did not do so with respect to unlisted statutes such as RICO. See pp. 3, 9, *supra*; see also *FTC* v. *National*

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[12] Even if "impair * * * law" could be given a more expansive meaning than pre-empt, the fact that "invalidate" and "supersede" so clearly connote pre-emption make it appropriate to interpret "impair" in that sense as well. "The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given a related meaning." *Dole* v. *United Steelworkers*, 494 U.S. 26, 35 (1989) (internal quotation marks omitted)). In any event, the most plausible alternative legal meaning for the phrase to "impair * * * law" is to affect in such an injurious manner as to warrant pre-emption under the doctrine of conflict pre-emption. See n.5, *supra*. That construction would lead to the same result we urge here. *Ibid.*

Cas. Co., 357 U.S. 560, 564 (1958). Nor did Congress declare that federal law in general should be inapplicable whenever the States have regulated. Those omissions are presumed to be deliberate, see *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991), and in fact were, see 91 Cong. Rec. 486-488 (1945). Consequently, those seeking to avoid the application of federal law generally cannot argue simply that the State has regulated the field. Instead, as the Fourth Circuit has explained, they must "point[] to a law enacted by [the State] which would be 'impaired,'" invalidated, or superseded. "The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired, or superseded." *Mackey* v. *Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984).

Moreover, Section 2(b) bars federal statutes from being construed to "invalidate, impair, or supersede" not only "any law enacted * * * for the purpose of regulating the business of insurance," but also "any law * * * which imposes a fee or tax upon such business." 15 U.S.C. 1012(b). If federal law were to "invalidate, impair, or supersede" state insurance regulation merely because it imposes additional or greater liability for misconduct than does state law, then federal law presumably also would "invalidate, impair, or supersede" state insurance "fee[s] or tax[es]" within the meaning of Section 2(b) whenever it imposes additional fees or greater tax liability than does the State. Generally applicable federal taxes and fees may alter the amount that States can collect from insurers; and no less than statutory liability for misconduct, they may "upset the balance" of tax or fee burdens imposed on insurers by state law. But, under our established federal system of dual taxation, generally applicable federal fees and taxes do not "invalidate, impair, or supersede" state insurance taxes and fees within the meaning of Section 2(b) where nothing precludes insurers from paying both. For the same reason, generally applicable federal sanctions for criminal misconduct, like those pro-

vided under RICO, do not "invalidate, impair, or supersede" state insurance regulations within the meaning of Section 2(b) so long as insurers can comply with both. See *Ratzlaff* v. *United States*, 510 U.S. 135, 143 (1994) (single phrase in statute cannot be given two different meanings); *Cohen* v. *De La Cruz*, 118 S. Ct. 1212, 1217 (1998) ("[E]quivalent words have equivalent meaning when repeated in the same statute.").

3. Finally, the construction of "impairs" and "supersedes" proposed by petitioners and their amici is undermined by its vagueness. Under petitioners' construction, federal courts—rather than asking whether federal law would effectively pre-empt or repeal a state statute—must engage in indeterminate speculation about the effect federal remedies might have on a "balance" of policies inferred from an overall state scheme. It is difficult to judge what effects, if any, federal law has on state regulation; it is not possible to articulate an objective test to determine when the effects would be sufficient (or, as petitioners put it (Br. at 24), non-"trivial" enough) to warrant displacement of federal law; and inferring the policies underlying state law—or the intent of the state legislature with respect to pre-emption—is hazardous at best.[13] Petitioners here thus ask the Court to draw the dubious inference that, because Nevada did not provide for treble damages under its own insurance laws, permitting such a recovery under federal law would offend an unarticulated state policy.[14] It is highly unlikely that Congress would

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[13] Thus, the Sixth Circuit has decided that permitting jury trials, attorney's fees awards, and punitive damages awards under the Fair Housing Act does not impair Ohio insurance law, *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351 (1995), cert. denied, 516 U.S. 1140 (1996), but that RICO's treble damages and attorney's fees provision does, *Kenty*, 92 F.3d at 392. In doing so, it has not articulated a legal standard that could not be utilized to reach the opposite conclusions.

[14] To the extent petitioners or their amici rely on the preamble to Nevada's insurance laws, see, *e.g.*, Consumer Credit Ins. Ass'n Br. at 10, their submission is unpersuasive. The preamble is addressed to the pro-

have directed federal courts to embark on such a perilous undertaking without offering any guidance. In any event, the Act does not ask courts to look at state policy; it requires them to determine whether applying a federal statute would "invalidate, impair, or supersede any [state] *law*." 15 U.S.C. 1012(b) (emphasis added). Because petitioners cannot identify a Nevada *law* that would suffer such a fate, permitting respondents to seek treble damages under RICO does not offend the rule of construction provided by Section 2(b).

C. RICO Does Not Invalidate, Impair, or Supersede Nevada Insurance Law Under Any Construction Of Those Terms

Even if to "impair" or "supersede" a law were incorrectly construed to mean "undermine" to some (unspecified) degree, or to render "unnecessary" or "superfluous," RICO does not have such an effect.

1. Contrary to the protestations of petitioners and their amici, Pet. Br. 20-21; Consumer Credit Ass'n Br. at 12-13, RICO does not supersede state law by rendering it "superfluous." Even if respondents may proceed under RICO, Nevada officials will continue to regulate the insurance industry under their own system of law, not based on federal norms. Likewise, the victims of insurance fraud will not abandon state remedies in favor of federal law. RICO reaches only a small subset of the conduct covered by state insurance laws; its greater remedies may be invoked only in exceptional cases where the elements of a RICO violation can be proved—cases in which the defendant has not merely committed a tort or regulatory violation, but has demonstrated extreme culpability by conducting an "enterprise"

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vision of the McCarran-Ferguson Act that renders the antitrust laws and other specifically-identified federal laws inapplicable in part if the State has regulated the insurance business, see pp. 3, 9, 25-26, *supra*. It has no bearing on whether a federal law would "invalidate, impair, or supersede" state law within the meaning of Section 2(b).

through a "pattern" of indictable criminal activity. 18 U.S.C. 1961, 1962.

Nor does RICO "impair" state law in any meaningful sense. Because the alleged conduct barred by RICO in this case is also prohibited by Nevada's insurance laws, RICO at most enhances vindication of state policy norms. State regulators sometimes work with federal prosecutors or seek redress under RICO themselves.[15] Moreover, RICO does not, by "increasing the probability that a state norm will be vindicated (or augmenting the damages assessed in the event of violation)," conflict with a state policy "that remedies should be limited or rare," *American Family*, 978 F.2d at 295; see Pet. Br. 23-24, or that administrative enforcement is preferred, see *Doe*, 107 F.3d at 1306-1307. No such policies are expressed with the requisite clarity (particularly with respect to a pattern of criminal conduct that could constitute a RICO violation), and no representative of the State appears before this Court so to claim.

Besides, Nevada's own law permits common-law actions for fraud and deceit in the insurance context—allowing for punitive awards that may far exceed actual damages in instances of malicious and oppressive misconduct—and expressly allows private rights of actions based on violations of its insurance laws. *Pioneer Chlor Alkali Co.* v. *National Union Fire Ins. Co.*, 863 F. Supp. 1237, 1243 (D. Nev. 1994); Nev. Rev. Stat. § 686A.310.2 (1997). Because those causes of action can "coexist" with the State's administrative enforcement of its insurance regulations, "even though the same conduct may be covered by both," there is "no reason why a

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[15] See, *e.g.*, *United States* v. *Employee Ins. Servs.*, Civ. No. 1-93-CV-181 (N.D. Ga., filed Jan. 27, 1989) (injunctive action brought with cooperation of state regulators); *Schacht* v. *Brown*, 711 F.2d 1343 (7th Cir.) (suit by Acting Director of Insurance of the State of Illinois as liquidator of insolvent insurer), cert. denied, 464 U.S. 1002 (1983); *Kaiser* v. *Stewart*, 965 F. Supp. 684 (E.D. Pa. 1997) (similar suit); *North Carolina* v. *Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746 (E.D.N.C. 1988) (similar suit).

federal private right of action" under RICO "cannot coexist with" Nevada insurance law as well. *Sabo*, 137 F.3d at 195.[16]

* * * * *

The ordinary and eminently sensible presumption is that a federal law of general applicability such as RICO applies uniformly to all persons whose conduct falls within the statutory proscription. Under our system of equal justice under law, this is true regardless of the particular factual context or the particular State in which the conduct occurs, so long as Congress acts within its constitutional powers. The rule of statutory construction prescribed by the McCarran-Ferguson Act should not be distorted to create disuniformities in the application of other Acts of Congress—whether they be employment, safety, environmental, or civil rights laws, or prohibitions on criminal conduct—in the absence of a showing that the particular disuniformity is required to prevent a "state law regulating the business of insurance" from actually being "invalidate[d], impair[ed], or supersede[d]." Because no such showing has been made here—RICO's treble damages provision neither pre-empts nor effects a repeal of Nevada law—no disuniformity in the application of federal law is warranted or authorized under Section 2(b).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[16] As we explained in our amicus brief at the petition stage (at pp. 17-19), even if the McCarran-Ferguson Act precluded private parties from seeking treble damages—and it does not—neither civil nor criminal actions brought by the United States would be barred. To the contrary, the courts of appeals unanimously agree that government actions would remain permissible because the United States does not seek to remedy private harm, but to vindicate its sovereign interest in ensuring that the federal mails and other means of communication are not put to improper use; the United States need not rely on state law remedies to vindicate its sovereign interests.

Respectfully submitted.

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