No. _____

In The
Supreme Court of the United States

CONTINUING CARE RISK RETENTION GROUP, INC.,

Petitioner,

v.

JACOB BENSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Arizona's anti-arbitration garnishment statute A.R.S. § 12-1584, which itself violates the Federal Arbitration Act, reverse preempt the Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 et seq. as to divest foreign risk retention groups operating in Arizona of their contractually bargained for right to arbitration as a means of resolving insurance coverage disputes?

PARTIES TO THE PROCEEDINGS

Petitioner Continuing Care Risk Retention Group, Inc. was the appellant in the proceedings immediately below and the garnishee and real-party-in interest in the underlying action.

Casa de Capri Enterprises, LLC was the defendant and judgment debtor in the underlying action.

Respondents Jacob Benson, Joseph Benson, Deborah Benson and Kaden Benson, a minor, were appellees in the proceedings immediately below and the plaintiffs and judgment creditors in the underlying action.

RULE 29.6 STATEMENT

Petitioner Continuing Care Risk Retention Group, Inc., is a Vermont corporation. There is no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the follow proceedings in the Arizona Superior Court for the County of Maricopa, Arizona Supreme Court; United States District Court for the District of Arizona, and United States Court of Appeals for the Ninth Circuit:

> *Benson, et al. v. Casa de Capri Enterprises, LLC*, No.: CV2012-097432 (Az. Super. Ct.) judgment entered December 1, 2017;

STATEMENT OF RELATED PROCEEDINGS
—Continued

Benson, et al. v. Casa de Capri Enterprises, LLC, No.: CV-18-00006-PHX-DWL (D.Arz.) order entered July 30, 2019; order entered November 4, 2022;

Benson, et al. v. Casa de Capri Enterprises, LLC, No.: CV-20-0331-CQ (Ariz.) opinion entered January 20, 2022;

Benson, et al. v. Casa de Capri Enterprises, LLC, No.: No.: 19-16686 (9th Cir.) opinion entered March 17, 2022; and

Benson, et al. v. Casa de Capri Enterprises, LLC, No.: No.: 22-16829 (9th Cir.) opinion entered November 20, 2023.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

A. Origins of the Case 5

B. Relevant Procedural History 7

REASONS FOR GRANTING THE WRIT 13

A. Legal Background of the LRRA 15

1. Through the LRRA, Congress intended to make liability insurance more affordable by exempting "foreign" RRGs from most state laws "governing the insurance business" 15

2. With enumerated exceptions, the LRRA exempts foreign RRGs from state laws and regulations governing an insurer's "business of insurance" 18

TABLE OF CONTENTS—Continued

Page

3. Through the LRRA, Congress intended to make liability insurance more affordable by exempting "foreign" RRGs from most state laws governing an insurer's "business of insurance" 20

4. State statutes regulating foreign RRGs are designed to remain within boundaries set by the LRRA 22

B. The LRRA works in tandem with the Mccarran-Ferguson act to clarify insurance regulation 24

C. Under the McCarran-Ferguson Act and the LRRA, only state laws applying to the "insurance business" of a foreign RRG are preempted 25

D. The Arizona garnishment statute, as applied to a foreign RRG, is preempted because it regulates an RRG's "business of insurance" by regulating the RRG's policy provisions 27

1. Overriding an arbitration term impacts an insurer's "transferring or spreading [of] a policyholders' risk" ... 29

2. Overriding an arbitration term affects an "integral part of the policy relationship between the insurer and the insured" 31

TABLE OF CONTENTS—Continued

Page

3. Managing the sensitive legal, ethical, privacy, and reputational interests of professional liability matters is "limited to entities within the insurance industry" 32

4. Conclusion: Overriding an arbitration term regulates an insurer's "business of insurance" and is thereby preempted as applied to a foreign RRG 34

E. The highly specific terms of Section 3902(b) further define the general language of Section 3902(a)(4) 35

F. The District Court failed to address how the LRRA preempts the *Benson I* ruling in addition to the underlying garnishment statute 38

CONCLUSION 43

APPENDIX

Opinion in the United States Court of Appeals for the Ninth Circuit (November 20, 2023) ..... App. 1

Order Denying Appellant's Petition for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit (December 29, 2023) ..... App. 5

District Court Order Denying Renewed Motion to Compel Arbitration (November 4, 2022) ..... App. 7

TABLE OF CONTENTS—Continued

Page

Order and Amended Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit (*Benson I*) (March 17, 2022) ... App. 36

Opinion of the Supreme Court of Arizona on Certified Questions (January 20, 2022) ..... App. 43

Order of the United States Court of Appeals for the Ninth Circuit Certifying Two Questions to the Arizona Supreme Court (*Benson I*) (November 23, 2020) ..... App. 53

District Court Order Granting Renewed Motion to Compel Arbitration and Dismissing the Case (July 30, 2019) ..... App. 64

15 U.S.C. § 3902 ..... App. 90

9 U.S.C. § 4 ..... App. 97

9 U.S.C. § 2 ..... App. 99

Arizona Revised Statute § 12-1584 ..... App. 100

TABLE OF AUTHORITIES

Page

CASES

Allied Prof'ls Ins. Co. v. Anglesey, 952 F.3d 1131 (9th Cir. 2020).....14, 19, 21

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).....14

Attorneys Liab. Protection Soc'y, Inc. v. Ingaldsen Fitzgerald, P.C., 838 F.3d 976 (9th Cir. 2016).....13

Benson v. Casa De Capri Enters., LLC, 252 Ariz. 303 (2022).....1, 40

Benson v. Casa de Capri Enters., LLC, 502 P.3d 461 (Ariz. 2022).....10, 11, 37

Benson v. Casa de Capri Enters., LLC, 980 F.3d 1328 (9th Cir. 2020).....1, 40

Benson v. Casa de Capri Enters., LLC, No. 19-16686 2022 WL 822126 (9th Cir., Mar. 17, 2022).....1, 11

Bulova Watch Co. v. United States, 365 U.S. 753 (1961).....36

Employers Ins. of Wausau v. Albert D. Seeno Const. Co., 945 F.2d 284 (1991).....31

Farmers Ins. Co. of Ariz. v. Vagnozzi, 138 Ariz. 443 (1983).....32

In Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).....27, 29, 30

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010).....28, 30

Kastigar v. United States, 406 U.S. 441 (1972).....42

TABLE OF AUTHORITIES—Continued

Page

Kepner v. W. Fire Ins. Co., 109 Ariz. 329 (1973) 41

Lifewatch Servs., Inc. v. Highmark, Inc., No. 21-1142, 2021 WL 5492811 (3d Cir. 2021).....28, 31

Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012).....14

Mora v. Lancet Indem. Risk Retention Group, Inc., No.-PX 16-960, 2017 WL 818718 (D. Md. Mar. 1, 2017).....22

Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146 (2001).....32, 33

R.C. Wegman Const. Co. v. Admiral Ins. Co., 629 F.3d 724 (7th Cir. 2011).....29, 32

Reis v. OOIDA Risk Retention Group, Inc., 303 Ga. 659 (2018) 21, 22

Sandoval v. Chenoweth, 102 Ariz. 241 (1967).....41

SEC v. Nat'l Sec. Inc., 393 U.S. 453 (1969).....31

Soyoola v. Oceanus Ins. Co., 986 F.Supp.2d 695 (S.D. W.Va. 2013) 21

Speece v. Allied Prof'ls Ins. Co., 289 Neb. 75 (2014).....21, 25-27

Swanco Ins. Company-Arizona v. Hager, 879 F.2d 353 (8th Cir. 1989).....16, 17, 20

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).....27-28, 30, 32-33

United States v. Borden Co., 308 U.S. 188 (1939) 36

TABLE OF AUTHORITIES—Continued

Page

Wadsworth v. Allied Prof'ls Ins. Co., 748 F.3d 100 (2d Cir. 2014) 19-26, 34-35

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 15

STATUTES

Ariz. Rev. Stat. § 12-1584 ..... 2, 11, 12, 14, 34, 37-38

Ariz. Rev. Stat. § 20-2402 24

Ariz. Rev. Stat. § 20-2403 24

N.Y. Ins. Law § 5904 23

9 U.S.C. § 1, et seq. 2

15 U.S.C. § 1011 ..... 24, 27

15 U.S.C. § 1012 25

15 U.S.C. § 1012(b) 25

15 U.S.C. §§ 3901-3906 ..... 15, 16

15 U.S.C. §§ 3901 et seq. 2, 4

15 U.S.C. § 3902(a)(1)(A)-(I) 19, 23

15 U.S.C. § 3902(d)-(h) 19

15 U.S.C. § 3902 ..... 18, 25

15 U.S.C. § 3902(a) 19

15 U.S.C. § 3902(a)(1) 4, 13, 23

15 U.S.C. § 3902(a)(4) 34-37

15 U.S.C. § 3902(b) 15, 19, 34, 35, 37, 42

15 U.S.C. § 3902(b)(3) 35

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. § 3905(a) 19

15 U.S.C. § 3905(c) 19

15 U.S.C. § 3905(d) 19

28 U.S.C. § 1254(1) 2

OTHER AUTHORITIES

H.R. Rep. No. 865, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303 ("1986 House Report") 18

H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981) ("1981 House Report") 16

PETITION FOR A WRIT OF CERTIORARI

Continuing Care Risk Retention Group, Inc. respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals affirming the district court's order denying arbitration (Appx. 1) is unpublished but reported at 2023 WL 8014350.

The order of the district court denying, on remand from *Benson I*, arbitration in contravention of the Liability Risk Retention Act of 1986 (Appx. 5) is unpublished but reported at 639 F.Supp.3d 912.

The order and amended memorandum opinion in the United States Court of Appeals for the Ninth Circuit (*Benson I*) reversing and remanding to the district court its earlier order compelling arbitration (Appx. 36) is unpublished but reported at 2022 WL 822126.

The opinion of the Arizona Supreme Court on two questions certified to it by the United States Court of Appeals for the Ninth Circuit in *Benson I*, (Appx. 43) is published and reported at 252 Arz. 303.

The order of the United States Court of Appeals for the Ninth Circuit in *Benson I* certifying two questions to the Arizona Supreme Court (Appx. 53) is published and reported at 980 F.3d 1328.

The order of district court granting Continuing Care Risk Retention Group, Inc.'s Renewed Motion to Compel Arbitration (Appx. 64) is unpublished but reported at 2019 WL 3430159.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Memorandum Opinion affirming the district court's order denying arbitration on November 20, 2023. (Appx. 1) Petitioner timely filed a Petition For Rehearing En Banc to the Ninth Circuit which was denied on December 29, 2023 (Appx. 5), making the instant petition due on or before March 28, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of the Liability Risk Retention Act of 1986, 15 U.S.C. § 3901 et seq., and the Federal Arbitration Act, 9.U.S.C. § 1, et seq., are reproduced in petitioners' appendix at Appx. 90 and Appx. 97, respectively.

Arizona Revised Statute § 12-1584 states,

> A. In a garnishment of monies or indebtedness, if the answer shows that the garnishee was indebted to the judgment

debtor at the time of service of the writ, and no objection to the writ or answer is timely filed, on application by the judgment creditor the court shall enter judgment on the writ against the garnishee for the amount of the nonexempt monies of the judgment debtor owed or held by the garnishee at the time of service of the writ.

B. If a timely objection is filed the court, after hearing evidence and argument, shall determine whether the writ is valid against the judgment debtor, what amount is presently due and owing on the underlying judgment and what amount of nonexempt monies, if any, the garnishee was holding for or owed to the judgment debtor at the time the writ was served, and the court shall enter judgment on the writ against the garnishee for that amount or enter an order discharging the garnishee if no nonexempt monies are determined owing.

C. The judgment creditor shall deliver a copy of the judgment on the writ against the garnishee to the garnishee and the judgment debtor, and on receipt of a copy of the judgment entered by the court the garnishee shall immediately transfer the adjudged nonexempt monies to the judgment creditor.

D. A judgment pursuant to subsection A or B shall not be for more than the amount

of the outstanding balance of the underlying judgment, including accrued interest and costs and attorney fees, if awarded.

E. The court, sitting without a jury, shall decide all issues of fact and law.

STATEMENT OF THE CASE

The Liability Risk Retention Act of 1986 ("LRRA") (15 U.S.C. §§ 3901, et seq.) leaves regulation of risk retention groups ("RRGs"), including their loss control and claims administration procedures, to the state where the RRG is chartered, and broadly preempts any non-chartering state law, rule, regulation, or order to the extent that such law, rule, regulation, or order would make unlawful, or regulate, directly or indirectly, the operation of a risk retention group. 15 U.S.C. § 3902(a)(1).

Arbitration is a key component of the loss control and claims administration procedures of any insurance carrier, including RRGs like petitioner Continuing Care Risk Retention Group ("CCRRG"). Nothing could more quintessentially involve the business of insurance than how it is determined if a claim is covered under a specific policy.

The decision by this panel of the Ninth Circuit represents the first time any Circuit Court of Appeals has held that an RRG cannot enforce the terms of its own policy because of a non-domiciliary state law

prohibiting the use of arbitration. The decision below not only ignores that the determination of coverage is in fact a necessary precursor to any garnishment of the policy's benefits, but also disregards decades of Supreme Court authority that prohibits states from discriminating against arbitration or barring its use in the resolution of a particular type of claim. Left to stand, the decision below would radically reshape the LRRA and create a split of authority among the Circuit Courts of Appeal and within the Ninth Circuit itself. Moreover, the decision would call into question dozens of Supreme Court decisions on the Federal Arbitration Act and its preemptive effect over contrary state laws.

A. Origins of the Case

Jacob Benson is a disabled vulnerable adult who received skilled nursing care at a now-defunct facility run by Casa de Capri Enterprises, LLC ("Capri"). In December 2012, Benson and other family members (collectively the "Bensons") brought a negligence action against Capri in Maricopa County Superior Court.

At the time, Capri had a "Claims Paid & Reported Liability" insurance policy ("Policy") issued by petitioner—garnishee CCRRG. Pursuant to the terms of the Policy, CCRRG assumed Capri's defense of the Bensons' lawsuit.

Capri and CCRRG had also previously entered into a Subscription Agreement ("Subscription Agreement") in September 2009 containing, among other

provisions, an arbitration provision, which was incorporated into the Policy.

The Subscription Agreement and the CCRRG Policy issued to Capri, govern the terms of the relationship between CCRRG and Capri (and now the Bensons). The Subscription Agreement, at Section 21 states:

> a. Any dispute or controversy arising under, out of, in connection with or in relation to this Agreement shall be submitted to, and determined and settled by, arbitration in Sonoma County, California. . . .
>
> b. This provision shall constitute a written Agreement to submit to arbitration and shall be binding on the parties whether or not any of the parties are current CCRRG Members, were terminated voluntarily or involuntarily from CCRRG Membership under any provision of this Agreement, have transferred Membership. . . . The parties agree that any such award shall also be final and binding in a direct action against CCRRG by any judgment creditor of a CCRRG Member.

(emphasis added).

Capri voluntarily canceled its Policy and terminated its membership with CCRRG effective August 1, 2013, and filed for bankruptcy on August 19, 2013.[1]

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[1] In re: Casa de Capri Enterprises, LLC; Case No.: 2:13-bk-14269-EPB.

Following Capri's cancellation of the Policy and termination of its membership, CCRRG withdrew from defending Capri in the Benson Lawsuit pursuant to the Claims Paid Policy language which only provides coverage for Capri for defense costs and damages that become due while Capri continues to be a member of CCRRG.

On November 29, 2017, Benson obtained a $1,501,069.90 judgment against Capri ("Benson Judgment") and subsequently sought to garnish the Policy's indemnity benefits.

Atty later says not to use the normal (double?) amount of space that we use in between sections—he marked the others but because of re-paging I'm marking this one. His note is on p. 15.

B. Relevant Procedural History

On December 18, 2017, the Bensons sought a writ of garnishment against CCRRG in an attempt to recover the Benson Judgment.

On January 2, 2018, CCRRG removed the garnishment action to the District Court.

On January 9, 2018, CCRRG moved to dismiss, or, alternatively, to stay the litigation and compel arbitration. The motion was premised on three main contentions: (1) the arbitration agreement was valid; (2) the Bensons' claims were fully encompassed within the scope of the agreement; and (3) the Bensons were claiming rights that Capri had, if any, to coverage

under the CCRRG Policy for the Benson Judgment, thus they are subject to the arbitration agreements between CCRRG and Capri.

The Bensons responded on January 20, 2018. They attempted to ignore that no determination had been made as to coverage under the Policy and contended that (1) they were strangers to the arbitration clauses and therefore could not be bound; (2) the clause was contrary to Capri's reasonable expectations; and (3) the clause was procedurally and substantively unconscionable.

On August 17, 2018, the Hon. Steven P. Logan[2] issued an order denying CCRRG's motion. The order stated, among other things, that the Bensons never assumed the insurance contract between the CCRRG and Capri, and CCRRG did not set forth any evidence that the Bensons received any benefit from it.

After that order was issued, the Bensons moved to amend their complaint to add claims for (1) a declaratory judgment regarding coverage for the underlying judgment; (2) breach of contract; and (3) insurance bad faith.

The Bensons thereafter moved for summary judgment on their garnishment claim.

On April 18, 2019, CCRRG filed a Renewed Motion to Compel Arbitration. CCRRG argued that, although

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[2] This case was originally assigned to the Hon. Steven P. Logan, but was transferred to the Dominic W. Lanza on October 31, 2018.

the Bensons asserted in their opposition to the initial motion to compel arbitration that they were not seeking to collect from CCRRG as an assignee of Capri's contract, the Bensons had since made clear their "intent to pursue claims as assignees" by (1) seeking "broad discovery on issues related to the proposed breach of contract and bad faith claims," (2) seeking to add breach of contract and bad faith claims in an amended complaint, and (3) moving for summary judgment seeking to void certain provisions in the CCRRG Policy.

In response, despite the fact that they were clearly claiming rights under the CCRRG policy, the Bensons again asserted the garnishment action was not premised on an assignment of Capri's claims under the Policy, and therefore they, as non-signatories to the contracts between Capri and CCRRG, could not be compelled to arbitrate the garnishment claim.

On May 31, 2019, the District Court requested supplemental briefing regarding the applicability of equitable estoppel under Arizona law in the circumstances of this case. In response, the Bensons withdrew their motion to amend their complaint to add breach of contract and bad faith claims in an effort to avoid application of the arbitration provision.

On July 30, 2019, the Court granted CCRRG's Renewed Motion to Compel Arbitration, concluding that the Bensons, as non-signatories to the contract, were bound by its terms under the Arizona doctrine of direct benefits estoppel. (Appx. 64) Based on this ruling, the

Court also denied, as moot, four other motions that were pending at the time, including the Bensons' pending motion for summary judgment on the core disputed issue in this case—whether the Bensons' negligence claim against Capri is covered by Capri's CCRRG Claims Paid Policy, and by extension whether the Bensons may recover from CCRRG via the law of garnishment.

The Bensons appealed the order compelling arbitration to the Ninth Circuit. On November 23, 2020, the Ninth Circuit, in *Benson I*, certified two questions of law to the Arizona Supreme Court. (Appx. 53)

> 1) In a garnishment action by a judgment creditor against the judgment debtor's insurer claiming that coverage is owed under an insurance policy, where the judgment creditor is not proceeding on an assignment of rights, can the insurer invoke the doctrine of direct benefits estoppel to bind the judgment creditor to the terms of the insurance contract?
>
> 2) If yes, does direct benefits estoppel also bind the judgment creditor to the arbitration clause contained in the insurance policy?

(*Id.*)

In January 2022, the Arizona Supreme Court resolved the first question in the Bensons favor, holding that "the doctrine of direct benefits estoppel can[not] be applied in an Arizona garnishment proceeding."

Benson v. Casa de Capri Enters., LLC, 502 P.3d 461, 465 (Ariz. 2022); (Appx. 43) In its opinion, the Arizona Supreme Court held, without reference to or mention of the LRRA, that where insurance coverage for a particular claim is disputed, Arizona statutory law mandates that the coverage determination be made by the court, sitting without a jury, as required by A.R.S. §12-1584. (*Id.*)

Based on Arizona Supreme Court's ruling, in March 2022, the Ninth Circuit in *Benson I* issued an amended memorandum decision concluding that "the [D]istrict [C]ourt erred in granting CCRRG's motion to compel arbitration under the doctrine of direct benefits estoppel." *Benson v. Casa de Capri Enters., LLC*, No. 19-16686 2022 WL 822126, at *1 (9th Cir., Mar. 17, 2022); (Appx. 36)

However, in footnote one, the *Benson I* Court added,

> CCRRG alternatively argues that the [LRRA] preempts state law governing the operation of risk retention groups, and apparently by extension precludes Arizona from limiting arbitration provisions in insurance policies provided by a risk retention group. The [D]istrict [C]ourt did not address this argument and [Bensons] argue that CCRRG did not adequately raise it below. We leave these matters to the [D]istrict [C]ourt in the first instance, with the benefit of the Arizona Supreme Court's new guidance.

(*Id.* at *2 n.1)

Thereafter, on November 4, 2022, after reviewing post-remand positional statements and briefing by the parties, the District Court issued an Order denying CCRRG's renewed motion to compel arbitration (Appx. 7) holding, in pertinent part, that Arizona's anti-arbitration garnishment laws, are statutes of general applicability and thus despite regulating the business of insurance in this particular case, are not preempted by the LRRA as to *foreign* risk retention groups operating in Arizona. (*Id.*) Additionally, the District Court held that despite the court's earlier determination that that the state's anti-arbitration garnishment laws do in fact violate the FAA (Appx. 80), it was prohibited from enforcing the FAA because the Ninth Circuit's decision in *Benson I* only permitted the court on remand to address issues of LRRA preemption and nothing else. (Appx. 21, fn.3)

In affirming the District Court's Order denying arbitration, the Ninth Circuit refused to address the FAA preemption issue brought on by application of A.R.S. § 12-1584 to these proceedings, mistakenly contending the issue was not before it. (Appx. 4, fn.2). Moreover, the Ninth Circuit also refused to consider the LRRA reverse preemption issue in the context of the case that was before it, i.e., before garnishment of the Policy's benefits could be considered, the insurance carrier (CCRRG) and judgment creditor (the Bensons) had to resolve their insurance coverage dispute by arbitration pursuant to the bargained for terms of the Policy. This panel of the Ninth Circuit unfortunately took the narrow and myopic view that since of A.R.S. § 12-1584

applies in name equally to all judgment creditors, it is a statute of "general applicability" not subject to preemption by the LRRA . (Appx. 3-4)

The instant Petition followed.

REASONS FOR GRANTING THE WRIT

Arbitration is a key component of the loss control and claims administration procedures of any insurance carrier, including risk retention groups ("RRGs") like CCRRG. There is nothing more essential to the resolution of any claim than first determining coverage for it under the policy's terms and conditions. This is a step skipped by both the District Court and this panel of the Ninth Circuit.

The LRRA leaves regulation of RRGs, including their loss control and claims administration procedures, to the state where the RRG is chartered, and broadly preempts any non-chartering state law, rule, regulation, or order to the extent that such law, rule, regulation, or order would make unlawful, or regulate, directly or indirectly, the operation of a risk retention group. 15 U.S.C. § 3902(a)(1).

In the near forty years since passage of the LRRA, this Court has never spoken to the core function and preemptive scope of the LRRA, which are now called into question by the Ninth Circuit's decision and represents a split of authority within the circuit. *Cf., Attorneys Liab. Protection Soc'y, Inc. v. Ingaldsen*

Fitzgerald, P.C., 838 F.3d 976 (9th Cir. 2016) (Alaska statute prohibit on reimbursements of fees and costs incurred by an insurer defending a non-covered claim is preempted by LRRA); *Allied Prof'ls Ins. Co. v. Anglesey*, 952 F.3d 1131, 1135 (9th Cir. 2020) (Washington statute prohibiting arbitration in insurance policies is preempted by the LRRA.)

Moreover, left to stand, this decision would allow Arizona's anti-arbitration garnishment statute A.R.S. § 12-1584 to effectively prohibit arbitration of coverage claims in garnishment actions, something the FAA does not permit. See, *e.g., Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) ("West Virginia's prohibition against pre dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

States like Arizona are not allowed to circumvent the broad preemptive scope of the LRRA through the imposition of statutes that in name are of "general applicability" but in effect impinge uniquely and specifically upon a core function of the business of insurance—its claim administration process. Only by granting certiorari can this Court provide legal certainty to the risk retention industry and the courts of

this nation. *See generally, e.g., Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 (2007) (federal preemption under National Bank Act avoids "rival oversight regimes" by multiple states).

A. Legal Background of the LRRA

Congress passed the Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901-3906 ("LRRA") in order to make liability insurance more affordable. It did so by establishing a new type of small member-owned liability risk insurer, the Risk Retention Group ("RRG").

The entire purpose of the RRG is to function and insure risk on a uniform nation-wide basis. With limited exceptions discussed below, only an RRG's state of domicile is allowed to regulate the RRG as an insurer. The other 49 states in which an RRG may be functioning are not allowed to directly or indirectly regulate that RRG's "insurance business." 15 U.S.C. § 3902(b).

1. Through the LRRA, Congress intended to make liability insurance more affordable by exempting "foreign" RRGs from most state laws "governing the insurance business"

During the 1980s, American businesses and professionals were suffering from a crisis caused by wildly escalating liability insurance premiums. The health care profession was particularly affected, as malpractice carriers either left the industry or charged prohibitively high premiums. Congress addressed the problem in 1981 by enacting the Products Liability

Risk Retention Act ("PLRRA"), which was subsequently amended in 1986 to become the Liability Risk Retention Act, 15 U.S.C. §§ 3901-3906 (the "LRRA"). *Swanco Ins. Company-Arizona v. Hager*, 879 F.2d 353, 354 (8th Cir. 1989).

A broad preemption of non-chartering state insurance laws and regulations is the core of the LRRA's legislative purpose. *Swanco*, 879 F.2d at 357. As stated in the 1981 House Report, the LRRA enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups." H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981) ("1981 House Report"), reprinted in 1981 U.S.C.C.A.N. 1432, 1441.

The 1981 House Report further commented:

> Essentially, the objective of the bill is accomplished by facilitating the formation of an insurance entity able to provide coverage to members in any state. **Under existing laws and regulations in the several states, it is extremely difficult to create a small specialized insurance carrier that can operate on a multi-state basis. These [state] laws and regulations, which may be appropriate for commercial insurers dealing with the general public, create an almost insurmountable burden to an insurer seeking to provide specialized coverage to a limited number of risks.**

1981 House Report, 1981 U.S.C.C.A.N. at 1432, 1452 (emphasis added).

In 1986, Congress expanded the PLRRA by enacting the LRRA. 15 U.S.C. §§ 3901-3906. The LRRA extended "the scope of the preemption to enable risk retention and purchasing groups to provide not only product liability insurance but all types of liability insurance." *Swanco*, 879 F.2d at 354.

The reasons why Congress expanded the scope of the Act were clearly outlined:

> BACKGROUND AND NEED
> FOR THE LEGISLATION
>
> During the 99th Congress, the Country has been shaken by a crisis in the availability and affordability of commercial liability insurance. Congress has been besieged with complaints regarding huge rate increases, mass cancellations of coverage, and entire lines of insurance virtually unavailable at any price. Crucial activities and services have been hard hit. Such activities include, among others, those of municipalities, universities, child daycare centers, health care providers, corporate directors and officers, hazardous waste disposal firms, small businesses generally, and many others.
>
> . . .
>
> Since a risk retention group is simply a group of businesses or others who join together to set up their own insurance company only to issue insurance policies to themselves, it was

> believed that by encouraging such groups, the subjective element in underwriting could be reduced. The risk retention group would know its own loss experience and could adhere closely to it in setting rates.
>
> . . .
>
> The Committee's hearings indicate the existence of a multi-billion dollar insurance capacity shortage, and the Committee believes that creation of self-insurance groups can provide much-needed new capacity.
>
> . . .
>
> **It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above.**

H.R. Rep. No. 865, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5303, 5304-06 ("1986 House Report") (emphasis added).

2. With enumerated exceptions, the LRRA exempts foreign RRGs from state laws and regulations governing an insurer's "business of insurance"

The intent of Congress, to bar non-chartering states from regulating the operation of RRGs (with specific exceptions), is apparent in the LRRA's text. Section 3902 of the LRRA provides, in pertinent part:

> (a) Exemptions from State laws, rules, regulations, or orders
>
> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would—
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group. . . .

15 U.S.C. § 3902(a).

The scope of preemption under section 3902(a) is further defined by section 3902(b), which clarifies that the LRRA preempts "laws governing the insurance business" of foreign RRGs, including (among other categories) the "**loss control and claims administration**" procedures of those foreign RRGs. 15 U.S.C. § 3902(b) (emphasis added).

The LRRA's enumerated exceptions to this sweeping preemption language allow a non-chartering state, like Arizona in this case, to "require risk retention groups to comply only with certain basic registration, capitalization, and taxing requirements, as well as various claim settlement and fraudulent practice laws." *Wadsworth v. Allied Prof'ls Ins. Co.*, 748 F.3d 100, 106 (2d Cir. 2014) (citing 15 U.S.C. § 3902(a)(1)(A)-(I)); *see also* 15 U.S.C. § 3902(d)-(h); 15 U.S.C. § 3905 (a), (c), (d).

Aside from these "enumerated" exceptions, non-chartering states may not impose additional regulations on RRGs. *Swanco*, 879 F.2d at 357. As the Second Circuit concluded: "In short, as compared to the near plenary authority it reserves to the chartering state, the [LRRA] sharply limits the secondary regulatory authority of nondomiciliary states over risk retention groups to specified, if significant, spheres." *Wadsworth*, 748 F.3d at 104.

3. Through the LRRA, Congress intended to make liability insurance more affordable by exempting "foreign" RRGs from most state laws governing an insurer's "business of insurance"

The Second, Eighth, and Ninth Circuits have examined the LRRA's preemptive effect relating to state insurance laws, as applied to foreign RRGs, and repeatedly characterize this effect as "broad," "expansive," and "sweeping." *Anglesey*, 952 F.3d at 1135 (citing cases); *Wadsworth*, 748 F.3d at 103 (citing cases); *Swanco*, 879 F.2d at 357.

The LRRA allows an RRG to provide liability insurance in all states, free of regulation by those states, if it complies with the insurance laws of the state it chooses as its chartering jurisdiction. *Greenfield*, 214 F.3d at 1075. "A major benefit extended to risk retention groups by the LRRA is the ability to operate on a nationwide basis according to the requirements of the law of a single state, without being compelled to

tailor their policies to the specific requirements of every state in which they do business." *Wadsworth*, 748 F.3d at 108. In short: "The very purpose of the LRRA was to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty-one jurisdictions." *Soyoola v. Oceanus Ins. Co.*, 986 F.Supp.2d 695, 703 (S.D. W.Va. 2013).

By reducing the state regulations an RRG must comply with to operate on a national basis, RRGs are able to reduce their expenses and ultimately the cost of liability insurance for the group's members, per the LRRA's original design. *Greenfield*, 214 F.3d at 1075.

Following decisions such as *Wadsworth* and *Greenfield*, the Nebraska Supreme Court similarly concluded that "in the LRRA, Congress explicitly declared an intent to preempt state law regulating the operation of foreign risk retention groups except in certain enumerated instances not applicable here." *Speece v. Allied Prof'ls Ins. Co.*, 289 Neb. 75, 84 (2014) ("*Speece*"). *Speece* held that a Nebraska law voiding arbitration clauses in policies of insurance, was preempted by the LRRA as to an RRG domiciled in another state. *Id.* at 88.

The Supreme Court of Georgia concurred. "The clear goal of the LRRA is to streamline the operations of risk retention groups . . . by subjecting them to consistent regulation overseen by their chartering state." *Reis v. OOIDA Risk Retention Group, Inc.*, 303 Ga. 659, 666 (2018) ("*Reis*") (citing *Wadsworth*, 748 F.3d at 108). "[C]ourts across the country have concluded that the

LRRA's preemption is sweeping and covers most state insurance laws." *Id.* at 665 n.13 (quoting *Mora v. Lancet Indem. Risk Retention Group, Inc.*, No.-PX 16-960, 2017 WL 818718, at *5 (D. Md. Mar. 1, 2017)). *Reis* held that the LRRA preempts, as to foreign RRGs, Georgia statutes authorizing a "direct action" by an injured party against an alleged tortfeasor's insurer. *Id.* at 665-66.

4. State statutes regulating foreign RRGs are designed to remain within boundaries set by the LRRA

In recognition of the LRRA's preemption language, and the majority case law recognizing its "sweeping" effect (e.g., *Wadsworth*, 748 F.3d at 103), states have adopted statutes and regulations recognizing their limited regulatory powers over foreign RRGs. *E.g.*, *Wadsworth*, 748 F.3d at 104.

As the Second Circuit described, with respect to New York law governing domestic and foreign RRGs:

> New York Insurance Law, as it pertains to risk retention groups, largely mirrors the structure of federal law. Article 59 of the New York Insurance Law expressly recognizes the limits imposed by the LRRA, noting that its purpose is "to regulate the formation and/or operation . . . of risk retention groups . . . formed pursuant to the provisions of the federal Liability Risk Retention Act of 1986, to the extent permitted by such law." N.Y. Ins. Law § 5901 (internal citation omitted). In keeping with those

> limits, New York cleanly distinguishes between the broad regulatory authority it exercises over those risk retention groups that seek to be chartered in New York, and the more limited regulations it is permitted to adopt with respect to nondomiciliary risk retention groups. Section 5903, entitled "Domestic risk retention groups," commands that such groups "shall comply with all of the laws, regulations and orders applicable to property/casualty insurers organized and licensed in this state," *id.* § 5903(a) (emphasis added). In contrast, § 5904, applicable to "[r]isk retention groups not chartered in [New York]," requires that such groups "comply with the laws of [New York]" set out in ten subsequent subsections, largely tracking the powers reserved to nondomiciliary states by 15 U.S.C. § 3902(a)(1)(A)-(I).

Wadsworth, 748 F.3d at 104.

Like New York, Arizona expressly subjects foreign RRGs to only a specific subset of Arizona insurance laws and regulations. *See* A.R.S. § 20-2403 ("Risk retention groups not chartered and licensed in this state"). Like New York's statute, Arizona's statute governing foreign RRGs largely tracks the LRRA's enumerated exceptions to preemption. A.R.S. § 20-2403; N.Y. Ins. Law § 5904, subparts (a) through (j); 15 U.S.C. § 3902(a)(1), subparts (A) through (I). Nowhere does Arizona's risk retention laws allow or require

arbitration agreements in an insurance policy issued by a foreign RRG to be struck down.[3]

B. The LRRA works in tandem with the Mccarran-Ferguson act to clarify insurance regulation

The McCarran-Ferguson Act, enacted in 1945, ensures the primacy of state laws regulating insurers' business *qua insurers* against federal preemption. The McCarran-Ferguson Act provides that, with a few exceptions, no federal Act may preempt laws governing insurers' conduct "unless such [federal] Act specifically relates to the business of insurance." 15 U.S.C. § 1011. However, "[t]he LRRA is, without question, a federal statute that specifically relates to the business of insurance." *Wadsworth*, 748 F.3d at 109. Therefore, the LRRA is not "reverse preempted" by the McCarran-Ferguson Act, and it preempts application of most state laws governing insurers' conduct of insurance functions to *foreign* RRGs. *Id.*

The LRRA parallels the McCarran-Ferguson Act, insofar as it preempts state laws "governing the insurance business" as applied to foreign RRGs. 15 U.S.C. § 3902 (b). Thus, if a state law regulates an RRG's "business of insurance," such state law is *generally* shielded from federal preemption under the

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[3] See, Ariz. Rev. Stat. § 20-2402 (requiring domestic RRGs to comply with all state laws applicable to insurers chartered and licensed in Arizona); Ariz. Rev. Stat. § 20-2403 (requiring foreign RRGs to comply only with enumerated state laws and specific LRRA provisions.)

McCarran-Ferguson Act—but is simultaneously preempted by the LRRA as applied to *foreign* RRGs, who must comply with the insurance laws of their states of domicile. 15 U.S.C. § 1012; 15 U.S.C. § 3902; *Wadsworth*, 748 F.3d at 105-06; *Speece*, 289 Neb. at 82-83.

To put it simply, the McCarran-Ferguson Act generally ensures primacy of state insurance laws against federal preemption, and the LRRA then divides that regulatory authority between the state where an RRG is domiciled and the state where it is doing business. In the present case, the LRRA has specified that regulation of CCRRG's "business of insurance" may only be done by its state of domicile (South Carolina)[4], and not by the state in which it is conducting that business (Arizona).

C. Under the McCarran-Ferguson Act and the LRRA, only state laws applying to the "insurance business" of a foreign RRG are preempted

As noted above, the LRRA works in tandem with the McCarran-Ferguson Act. The McCarran-Ferguson Act ensures that state laws which regulate an insurer's "business of insurance" (15 U.S.C. § 1012 (b)) are not preempted by federal laws that are of general applicability and do not specifically regulate insurance. The

[4] CCRRG was originally chartered in the State of South Carolina. On December 31, 2015, CCRRG was re-domiciled in Vermont. At the time of issuance of the CCRRG Policy at issue herein, CCRRG was domiciled in South Carolina.

LRRA, on the other hand, ensures that state laws which regulate the "insurance business" of a foreign RRG are preempted. *Wadsworth*, 748 F.3d at 109; 15 U.S.C. § 3902 (b).

The McCarran-Ferguson Act has no effect whatsoever on the LRRA, because "[t]he LRRA is, without question, a federal statute that specifically relates to the business of insurance." *Wadsworth*, 748 F.3d at 109; *Speece*, 289 Neb. at 83; *Greenfield*, 214 F.3d at 1077.

The question, then, is what it means for a law to regulate an insurer's "*insurance business*" as opposed to laws regulating that insurer's *general conduct* within the state—i.e., the vast number of state employment laws, local zoning ordinances, etc., which do not regulate the insurer's conduct *qua insurer*.

CCRRG acknowledges, and does not dispute, that it must conduct itself in compliance with Arizona state and local laws not governing its conduct *as a liability insurer*. **But on the other hand, if a law "directly or indirectly," by name or in effect, regulates its "operation" as an "insurance business," the law is preempted by the LRRA (as applied to a foreign RRGs like CCRRG).** 15 U.S.C. § 3902 (b).

D. The Arizona garnishment statute, as applied to a foreign RRG, is preempted because it regulates an RRG's "business of insurance" by regulating the RRG's policy provisions.

This Court has addressed and defined what it means to regulate an insurer's "business of insurance" within the context of the McCarran-Ferguson Act. See 15 U.S.C. § 1011; *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

Courts addressing the scope of LRRA preemption draw directly upon McCarran-Ferguson Act authorities to understand how a state might regulate a liability insurer's "business of insurance." For example, the Nebraska Supreme Court reasoned that because a state law affects an insurer's "business of insurance" for purposes of the McCarran-Ferguson Act, it *therefore* "regulates the operation of a risk retention group" and is preempted by the LRRA. *Speece*, 289 Neb. at 87.

In the instant matter, the issue revolves around how, where, and under what circumstances a dispute over *coverage*, *performance*, and *enforcement* of an insurance contract will be resolved. This Court has specifically found that the *performance* and *enforcement* of an insurance contract are necessarily part of the "business of insurance." *Fabe*, 508 at 503-04. "There can be no doubt that the actual performance of an insurance contract falls within the 'business of insurance,' as we understood that phrase in *Pireno* and *Royal Drug*. **To hold**

otherwise would be mere formalism." *Id.* at 503. (Emphasis added.)

In *Pireno*, this Court specified three criteria relevant to determining whether a particular practice is part of an insurer's "business of insurance." The Court noted that "[n]one of these criteria is necessarily determinative in itself" (458 U.S. at 129), which strongly implies that meeting two of the three criteria is sufficient.

The relevant practices of insurers, i.e., those which are part of the insurer's "business of insurance," are those which:

- **"[H]ave the effect of transferring or spreading a policyholder's risk"**
- **"[A]re an integral part of the policy relationship between the insurer and the insured"**
- **"[Are] limited to entities within the insurance industry"**

Id. (Emphases added.)

The three *Pireno* factors remain the standard analysis defining the "business of insurance" engaged in by insurers. *E.g.*, *Lifewatch Servs., Inc. v. Highmark, Inc.*, No. 21-1142, 2021 WL 5492811, at **1-2 (3d Cir. 2021); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 355-58 (3d Cir. 2010).

In this case, regarding the Arizona anti-arbitration garnishment statutes which void the Policy's arbitration provision, all three factors of the *Pireno* test are satisfied. In fact, the first two factors are indisputably

satisfied—and it has long been recognized that the first factor (the underwriting and spreading of risk) constitutes the core of the "business of insurance." *In Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220-21 (1979).

When state laws are applied to control *what insurance coverage matters may be determined in arbitration* (versus in court proceedings), this necessarily: (1) affects the "transferring or spreading [of] a policyholder's risk"; and (2) affects an "integral part of the policy relationship between the insurer and the insured". Moreover, a primary task of professional liability insurers is to manage the complex (and unique) legal, ethical, and economic conflicts between insurers, insureds, third-party claimants, and their counsel. *See, e.g., R.C. Wegman Const. Co. v. Admiral Ins. Co.*, 629 F.3d 724 (7th Cir. 2011) (discussing many potential conflicts of interest involving insurers, insureds, and counsel in the professional liability context, including an insured's professional reputation). Serving this primary mission, using a panoply of tools (including arbitration, which serves confidentiality and reputational interests) is "limited to entities within the insurance industry."

1. Overriding an arbitration term impacts an insurer's "transferring or spreading [of] a policyholders' risk"

When insurance coverage disputes are required to be resolved by a court, rather than by an arbitrator,

this has a major impact on the insurer's "transferring or spreading [of] a policyholder's risk".

In the professional liability insurance context, a policyholder contracts with the insurer to transfer and spread that policyholder's risks (of liability to third parties, who are often their own clients and customers). Part of that risk involves the expenses that must be incurred when disputes are ultimately resolved through court litigation rather than through a faster and more-efficient arbitration process. This is exactly why an insurer such as CCRRG may include an arbitration provision in its policy—because it helps to minimize the collective risks that must be spread among all policyholders, and thereby lowers premiums. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 358 (actions having "the direct effect . . . of driving up premium prices necessarily affect risk spreading").

There can be no doubt that the Policy's arbitration provision has a significant impact on the "transferring or spreading" policyholder risk. Thus, the first *Pireno* factor is amply satisfied—and this Court has recognized that this factor constitutes the essence of "business of insurance" as understood by Congress when it passed the McCarran-Ferguson Act. *Royal Drug*, 440 U.S. at 220-21.

2. Overriding an arbitration term affects an "integral part of the policy relationship between the insurer and the insured"

"It has long been established that the policy relationship between the insurer and insured relates to the 'type of policy which could be issued, its reliability, interpretation, and enforcement.'" *Lifewatch*, 2021 WL 5492811, at *2 (quoting *SEC v. Nat'l Sec. Inc.*, 393 U.S. 453, 460 (1969)).

By agreeing on the policy terms (including arbitration), both the insurer and the insured commit to resolving all their disputes or obligations to one another through the arbitration mechanism, rather than through years of trial court (and potentially appellate) litigation. This arbitration term relates to the "enforcement" of the policy, and in addition, it entrusts all matters of "interpretation" to the arbitrator. *See SEC*, 393 U.S. at 460.

The insurance field, by its nature, is one in which insureds will naturally (and understandably) seek to have an insurer cover as many costs as possible when a claim arises. *See generally, e.g., Employers Ins. of Wausau v. Albert D. Seeno Const. Co.*, 945 F.2d 284, 287 (1991) ("[W]hen coverage is an issue, the [insurance] adjustor's loyalty is divided.") A policy term that specifies *exactly* how such conflicts would ultimately be resolved necessarily shapes the "policy relationship between the insurer and the insured," the mechanism for "interpretation" of the policy, and how the policy

will be "enforced." The second *Pireno* factor is thus satisfied. *SEC*, 393 U.S. at 460.

3. Managing the sensitive legal, ethical, privacy, and reputational interests of professional liability matters is "limited to entities within the insurance industry"

Professional liability insurers must navigate the unique and complex issues of their "business of insurance." These include potential conflicts of interest between the insurer and the insured, as well as the ethical responsibilities and dilemmas of an insurer and its counsel. *See generally, e.g., Farmers Ins. Co. of Ariz. v. Vagnozzi*, 138 Ariz. 443 (1983) (discussing manifold ethical and economic conflicts among insurer, insured, and counsel representing the insured). "[T]he potential for conflict between insurer and insured exists in every case. . . ." *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146, 151 (2001).

In addition, the privacy and reputational interests of insureds (often professionals who have been accused of malpractice) as well as claimants (who may have suffered medical injuries) are also at stake. *See, e.g., R.C. Wegman Const. Co. v. Admiral Ins. Co.*, 629 F.3d 724, 728 (7th Cir. 2011) (identifying "loss of reputation" as a concern for an insured).

There are many tools and methods that liability insurers use to handle these sensitive, distinctive, and complex issues. They include recognizing the

professional responsibilities of their own counsel. *See Paradigm*, 200 Ariz. at 150-51 (regarding Arizona State Bar opinions analyzing the loyalties of an insurer's counsel). Using confidential arbitration, in which arbitrators frequently have specialized knowledge and experience in insurance matters and these unique conflicts, is simply one among many such tools.

Removing a procedure designed to apply insurance coverage expertise, in an efficient manner, also affects the "policy relationship," the transfer of a "policyholder's risk," and the interests of all parties by reducing expenses. Removing a procedure designed to maintain confidentiality affects the "policy relationship" and the transfer of a "policyholder's risk" by exposing insureds to public litigation and harming the privacy and reputational interests of all. Removing or limiting any such procedures creates harms that are distinctive to the "insurance industry."

In sum, the management of all such delicate legal, ethical, economic, privacy, and reputational interests, through all available tools, is "limited to entities within the insurance industry" and satisfies the third *Pireno* factor. Conversely, removing any of the tools and methods for addressing these issues involves a unique set of harms to "entities within the insurance industry" and satisfies the third *Pireno* factor for this reason as well.

4. Conclusion: Overriding an arbitration term regulates an insurer's "business of insurance" and is thereby preempted as applied to a foreign RRG

As common sense dictates, overriding an arbitration term within an insurance policy does affect the "business of insurance" of that insurance company. For that very reason, A.R.S. 12-1584 cannot control the "business of insurance" of a foreign RRG (such as CCRRG) operating within Arizona. *Wadsworth*, 748 F.3d at 109; 15 U.S.C. § 3902(b).

In the underlying District Court proceedings, the Bensons admitted that the Arizona garnishment statutes as applied in the instant case, regulate CCRRG's conduct as an insurer operating within the State of Arizona. Indeed, the Bensons could hardly do otherwise. It is obvious that the *only* link between CCRRG and the Bensons is created by CCRRG's business as an insurer. Under the LRRA (and under the McCarran-Ferguson Act), such garnishment laws simply cannot regulate the "business of insurance" of a foreign RRG.

However, the Ninth Circuit concluded that the Arizona Supreme Court's decision in *Benson I* announced a rule that falls within the exemption set forth at 15 U.S.C. § 3902(a)(4), which provides that states may not "otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to

persons or corporations." This interpretation of course defeats the entire pre-emptive purpose and "sweeping" pre-emptive text of the LRRA. *See Wadsworth*, 748 F.3d at 103. It also destroys the fundamental structure of the McCarran-Ferguson Act. Adopting this panel's position would also mean that federal laws that are "generally applicable to persons or corporations" would also be applied to regulate an insurance company's conduct of its "business of insurance." This would mean either a sweeping federal pre-emption of state laws regulating insurers' business (i.e., the exact opposite of the intent behind the McCarran-Ferguson Act), or an unworkable quagmire of contradictory state and federal regulations. The Ninth Circuit's position should not be allowed to remain as to undermine the McCarran-Ferguson Act—the fundamental system of insurance regulation within the United States.

E. The highly specific terms of Section 3902(b) further define the general language of Section 3902(a)(4)

By enacting Section 3902(b) of the LRRA, Congress precisely delineated the scope of preemption applicable to a foreign RRG's practices—i.e., the foreign RRG's role as an insurer and the conduct of its "insurance business," and particularly with respect to its "loss control and claims administration" practices. 15 U.S.C. § 3902(b)(3). On the other hand, in Section 3902(a)(4), Congress has provided that a non-domiciliary state may "generally" regulate a foreign RRG outside the context of its "insurance business," in the same

way that it regulates all "persons or corporations" within that state. 15 U.S.C. § 3902(a)(4).

Thus, under the LRRA, a non-domiciliary state (here, Arizona) may still regulate a foreign RRG's **non-insurance roles and practices**, which are vast and manifold for any business operating within a state. These practices include matters such as a company's employment practices, its observance of local zoning ordinances, its compliance with state health and safety standards, etc. CCRRG does not remotely suggest here that it is immune from the vast array of Arizona laws regulating its general operations. Indeed, it must comply with all such laws. **However, the LRRA specifically provides that when it comes to regulating CCRRG's "business of insurance," only its domiciliary state (here, South Carolina) may impose such regulation.**

In general, barring a specific legislative intention to the contrary, specific statutes prevail over general statutes. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton*, 417 U.S. at 550-51 (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)). "[I]t is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.'" *Id.* (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

No legislative intent appears in the LRRA to the effect that Section 3902(a)(4) (ensuring that states may "generally" regulate foreign RRGs as they would other "persons or corporations" operating in that state) should prevail over Section 3902(b) (which specifies that a state may not regulate a foreign RRG's "loss control and claims administration" practices).

Thus, it is the duty of the courts to regard each section enacted by Congress as effective. *Morton*, 417 U.S. at 550-51. Both Section 3902(a)(4) and Section 3902(b) address the same subject, i.e., the scope of a non-domiciliary state's powers over a foreign RRG. **The difference is obvious: Section 3902(b) is far more specific, and even provides that a foreign RRG's "loss control and claims administration" practices (which clearly include arbitration of claims) cannot be regulated by a non-domiciliary state.** The courts must give effect to both sections, and in this case, the specific language of Section 3902(b) ensures that a non-domiciliary state (like Arizona) may not regulate a foreign RRG's "loss control and claims administration" practices.

Thus, and for this reason as well, any Arizona law which effectively regulates CCRRG's "loss control and claims administration" practices (which clearly include arbitrating claims) is preempted by the LRRA. Here, Arizona's anti-arbitration garnishment laws require a trial court, not an arbitrator, resolve all factual and legal issues regarding insurance coverage. *Benson, supra*, 502 P.3d at 465, *citing*, Ariz. Rev. Stat. § 12-1584

(E) ("[t]he court, sitting without a jury, shall decide all issues of fact and law.") *See also*, Ariz. Rev. Stat. § 12-1584 (A) ("[O]n application by the judgment creditor the court shall enter judgment on the writ. . . ."); Ariz. Rev. Stat. § 12-1584 (B) ("[T]he court, after hearing evidence and argument, shall determine whether the writ is valid against the judgment debtor, what amount is presently due and owing on the underlying judgment . . . and the court shall enter judgment. . . ."). Thus, both the Supreme Court of Arizona's decision in *Benson I*, as well as Arizona's underlying anti-arbitration garnishment statutes, are preempted by the highly specific statutory terms of the LRRA.

F. The District Court failed to address how the LRRA preempts the *Benson I* ruling in addition to the underlying garnishment statute

The District Court and Ninth Circuit's analysis of LRRA preemption was erroneously and improperly truncated. The District Court bypassed the entire question of whether the Supreme Court of Arizona's decision in *Benson I* (that insurers are estopped from applying "direct benefits estoppel" to third-party claimants in garnishment proceedings) itself regulates an insurer's "business of insurance."

In order to apply the Arizona garnishment statute to CCRRG, the District Court was required to find *both*: (1) that the underlying garnishment statute does not regulate a foreign RRG's conduct of its "business of insurance" within Arizona; *and* (2) that the Supreme

Court of Arizona's rule articulated in *Benson I* (that insurers are estopped from using "direct benefits estoppel" to bind third-party claimants to insurance policy terms in garnishment proceedings) also does not regulate a foreign RRG's conduct of its Arizona-based "business of insurance." Both findings are required, because if the *Benson I* rule does regulate an insurer's "business of insurance," then it is preempted as to CCRRG. The District Court skipped part (2) of the analysis, and thus presents a distinct error requiring reversal.

Pursuant to all the authorities discussed above, the question is whether the *Benson I* rule constitutes an Arizona law regulating a foreign RRG's "business of insurance" within the state. The answer is self-evident: a rule that in its application bars insurers from holding third-party claimants to the terms of an insurance policy does in fact regulate an insurer's "business of insurance."

Additionally, however, it was erroneous for the District Court (and Ninth Circuit) to extract a single sentence of dicta from *Benson I*, read it out of context, and interpret the Supreme Court of Arizona's opinion as extending far beyond the insurance field. This required the District Court to ignore the actual questions presented by the Ninth Circuit in *Benson I*, the Supreme Court's analysis in its entirety, the authorities discussed by the Supreme Court, and even the *concluding holding* of *Benson I* which stated: "For the foregoing reasons, we answer the Ninth Circuit's first certified question as follows: In a garnishment proceeding, an insurer cannot invoke the doctrine of direct

benefits estoppel to bind a judgment creditor to the terms of the insurance contract. Because the answer to the first question is no, we do not reach the second question." *Benson v. Casa De Capri Enters., LLC*, 252 Ariz. 303, 305 (2022). (Appx. 52)

The only questions certified by the Ninth Circuit to the Supreme Court of Arizona were, in their entirety, questions of Arizona insurance law:

> **1) In a garnishment action by a judgment creditor against the judgment debtor's insurer claiming that coverage is owed under an insurance policy, where the judgment creditor is not proceeding on an assignment of rights, can the insurer invoke the doctrine of direct benefits estoppel to bind the judgment creditor to the terms of the insurance contract?**
>
> **[and]**
>
> **2) If yes, does direct benefits estoppel also bind the judgment creditor to the arbitration clause contained in the insurance policy?**

Benson v. Casa de Capri Enters., LLC, 980 F.3d 1328, 1333 (9th Cir. 2020) (bold and underlining added). (Appx. 61-62)

Throughout its opinion, answering the first question in the negative, the Supreme Court of Arizona relied upon, and quoted, its own precedents regarding garnishment of insurance policy proceeds. *Id.* at 307.

"With these principles in mind, we now turn to the question before us. It is undisputed that insurance loss obligations can be garnished." *Id.* (underlining added) (quoting *Sandoval v. Chenoweth*, 102 Ariz. 241, 245 (1967) ("It seems to be settled that after recovering a judgment against an insured under a liability policy, the injured third person may collect such judgment by instituting garnishment proceedings against the liability insurer.") and *Kepner v. W. Fire Ins. Co.*, 109 Ariz. 329, 332 (1973) (regarding the "testing of the insurer's liability" through "proceedings on garnishment") (underlining added throughout).

The District Court, however, ripped one sentence from the court's opinion out of context (i.e., "The Ninth Circuit asks whether the doctrine of direct benefits estoppel can be applied in an Arizona garnishment proceeding as an exception to the general rule that nonparties are not bound by the terms of a contract"), and determined that this stray dictum extended the *Benson I* rule far beyond the Arizona Supreme Court's analysis, and far beyond the field of insurance. This was improper and unreasonable, however, because: (1) the single sentence quoted is thoroughly inaccurate (the Ninth Circuit in fact certified questions of Arizona insurance law only); and (2) the single sentence stretches far beyond the rest of the *Benson I* opinion in its entirety (which is directed to an insurer's binding of liability claimants to insurance policy terms).

A single-sentence dictum, implying a rule extending far beyond the court's analysis and holding, cannot reasonably be taken as a fair and accurate statement

of that opinion. *See Kastigar v. United States*, 406 U.S. 441, 454-455 (1972) ("The broad language in [prior precedent] relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority."). Indeed, were it otherwise, phrases lacking a single word (such as, in this case, the single word "insurer," "claimant," or "policy") would then govern a potentially vast area of law, far beyond the questions a court actually reviewed, analyzed, and decided.

Most importantly, the District Court overlooked the second part of the analysis—i.e., whether the *Benson I* rule regulates an insurer's conduct of its "business of insurance." It clearly does. It prevents the insurer from holding a third-party liability claimant to the terms of the insurance policy. Thus, and pursuant to all the above authorities, it is clearly preempted by the LRRA as applied to a foreign RRG. 15 U.S.C. § 3902(b).

CONCLUSION

For all the foregoing reasons, CCRRG respectfully requests that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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