No. 23-1066

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

AMICUS CURIAE BRIEF OF THE NATIONAL RISK RETENTION ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST-THE THREE-WAY CONFLICT[1]

The clearly articulated legislative intent of the Congress underlying the *purpose* and *need* for risk retention group insurance companies, the supporting *heretofore* positive current law of the Ninth Circuit, and the uncontradicted majority of equally positive appellate decisions nationwide, are now threatened by a fatally flawed misinterpretation of just one *factually unrelated* sentence of the Liability Risk Retention Act. The result: this is the first federal appellate decision holding that an RRG cannot enforce its arbitration provision.

The National Risk Retention Association ("NRRA") provides this Brief to discuss the background, purpose and significance of the Liability Risk Retention Act of 1986 ("LRRA")[2] and specifically its ingenious enablement of foreign risk retention groups generally (described below) and their intended protection from laws seeking to regulate their businesses in violation of that Federal law.[3]

NRRA, formed in 1987, is a 501(c)(6) non-profit and non-partisan trade association, dedicated to the development, education and promotion of U.S.-domiciled alternatives

1. No party or its counsel authored this brief, in whole or part, nor contributed money that was intended to fund preparing or submitting this brief; and no person other than *Amicus Curiae* or its counsel contributed money that was intended to fund preparing or submitting this brief. All Counsel of Record for the parties herein were served with advance notice of NRRA's intent to file this *Amicus Curiae* Brief in the case, in accordance with Rule 37.

2. 15 U.S.C. §§ 3901 *et seq.*

3. A.R.S. § 12-1570 (Garnishment) § 12-1501, 1502 (Arbitration).

to traditional liability insurance. NRRA directly or indirectly represents more than 240 risk retention groups ("RRGs") and purchasing groups before legislative bodies, executive agencies, and courts throughout the nation. NRRA is uniquely qualified to address the global context of the LRRA and the preemption issues presented by Petitioner, CCRRG, in its Petition following the 9th Circuit's unpublished Memorandum of Decision of November 20, 2023. (The Decision).

NRRA has taken a lead role as a participant in litigation affecting its members' interests. NRRA has appeared as either plaintiff or as *Amicus Curiae* in many important risk retention cases, including, but not limited to, *Speece v. Allied Professionals Insurance Company*;[4] *Courville v. Allied Professionals Insurance Company*;[5] *Alliance of Nonprofits for Insurance, Risk Retention Group v. Kipper*;[6] *Wadsworth v. Allied Professionals Insurance Company*;[7] *National Risk Retention Association v. Brown*;[8] *Attorneys' Liability Assurance Society, Inc. v. Fitzgerald*;[9] *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson*

4. *Speece v. Allied Professionals Insurance Company*, 289 Neb. 75 (2014).

5. *Courville v. Allied Professionals Ins. Co., a Risk Retention Group Inc. et al.*, 174 So. 3d 659 (2015).

6. *Alliance of Nonprofits for Ins., Risk Retention Group v. Kipper*, 712 F.3d 1316 (9th Cir. 2013).

7. *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014).

8. *Nat'l Risk Retention Ass'n v. Brown*, 927 F. Supp. 195 (M.D. La. 1996).

9. *Attorneys' Liability Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001).

Fitzgerald, P.C;[10] *Restoration Risk Retention Grp., Inc. v. Gutierrez*;[11] *Reis v. OOIDA Risk Retention Group, Inc.*;[12] and more recently, *Allied Professionals Insurance Company, RRG v. Anglesey (Anglesey),*[13] and *George v. Terry, OOIDA, et al.* (pending).[14]

SUMMARY OF ARGUMENT

Forty-three years ago, American businesses and professionals were suffering from wildly escalating liability insurance premiums. Congress responded first by enacting the Products Liability Risk Retention Act ("PLRRA") in 1981, and then by expanding the PLRRA's reach to all forms of liability insurance with the 1986 Liability Risk Retention Act ("LRRA").[15]

Congress designed the PLRRA and the LRRA to encourage the formation and growth of risk retention groups ("RRGs"), a creatively unique type of insurance

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10. *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976 (9th Cir. 2016)

11. *Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 2018 U.S. App. LEXIS 868, 2018 WL 388070 (2018).

12. *Reis, et al. v. OOIDA Risk Retention Group, Inc.*, 814 S.E. 2d 338 (May 2018).

13. *Allied Professionals Insurance Co, RRG v. Anglesey*, No. 18-56513, 2020 WL 1179772 (9th Cir. Mar. 12, 2020)

14. *George v. Terry, et al., OOIDA RRG,* No. 2022-CW-1303 (LA first Circuit C.A. *Amicus Curiae* Brief accepted 3-6-23; Pending)

15. 15 U.S.C. §§ 3901 *et seq.*

carrier that differs from "traditional" carriers in that they are only allowed to sell insurance to group members, and not to the general public. Rather than create a federal regulatory scheme for RRGs, Congress decided that once an RRG is chartered in one state—its home or "domiciliary" state—the RRG is allowed to operate nationwide exempt from nearly all other laws regulating the business of insurance in the other 49 states.

In its subject Decision of November 20, 2023 (Pet. App 3-4) the Ninth Circuit Panel, in expanding the intent of § 3902(a)(4)'s single sentence prohibiting "***discrimination***" against RRGs or their members, dangerously fails to reconcile how **1)** use of the words "…all state laws generally applicable to 'persons and corporations'" while (probably) intended to include discrimination generally instead of just facially, e.g., "differentiation without an acceptable justification," (*Greenfield*, supra at 1081), nevertheless ignores *Greenfield's* rationale how such did not afford any new exceptions to the exemptions from regulation intended by § 3902(a)(1). **2)** Also, since "*discrimination*" has never been a factual issue in *Benson*, how the Panel believed it could go beyond the analysis of *Greenfield*, which coincidentally was a "discrimination" case, to insert its own spin by converting that analysis into a non-existent interpretation as § 3902(a)(4)'s "savings" clause. Even the *Greenfield* court wrangled with the intent of this language at 1081.

Obviously, any attempt to execute a garnishment of a judgment against an RRG where the existence of coverage has never been determined would not take place in any business other than one involving the insurance industry. Accordingly, therefore, under the express dictates of the statute, "**any**" state laws, regulations or orders that are

used to regulate … **indirectly**, the business or operations of an RRG are categorically *preempted* by the federal LRRA. See Part E below.

Appellant, Continuing Care Risk Retention Group, Inc. (CCRRG) is permitted, as a "foreign" RRG in Arizona, to insure its members within the state, exempt from nearly all Arizona state laws regulating the business of insurance. There are approximately eighty-nine **(89) risk retention groups offering liability insurance in Arizona alone** (either domiciled in or registered as foreign RRGs).[16] This does not include the number of RRGs registered in the other states within the 9th Circuit, which could or would be adversely affected by an erroneous decision.[17] Part of NRRA's role has been to educate courts, regulators and legislators as to the global effect that one incorrect decision can have upon an entire industry, particularly the confusion it causes when the LRRA preemption is not consistently applied by courts.

Not all state laws *affecting* an LRRA insurer are tantamount to *regulating its operations*. Many state laws "affect" a foreign RRG—everything from laws requiring drivers' licenses to minimum wage statutes—but they do not "regulate" the RRG's business or operations *as an insurer*. Laws of general applicability are not preempted, while those *regulating* the "business of insurance" are.[18]

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16. Individual companies can be verified through an official link operated by the National Association of Insurance Commissioners (NAIC), found at: https://sbs.naic.org/solar-external-lookup/

17. See Appendix "A." (Obtained from 2022 reports from the Risk Retention Reporter.)

18. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

The within case therefore presents the conundrum of the conflict between clear and concise Congressional legislative intent versus only one Court's superficially misplaced interpretation of statutory language that is being used to allow a *non-domiciliary* state statute to control a "foreign" RRG (i.e., CCRRG) by indirectly nullifying a key policy condition set forth in its contract of insurance. That Statutory purpose was to reduce the cost and increase the availability of commercial liability insurance and enable "the efficient operation of risk retention groups."[19, 20]

AS TO FOREIGN RRGS, THE LRRA PREEMPTS STATE LAWS REGULATING THE "BUSINESS OF INSURANCE" OF RRGS. THESE WOULD INCLUDE THE USE OF STATE "GARNISHMENT" PROCEEDINGS OR LAWS ALLOWING "NON-PARTIES" TO AVOID "ARBITRATION" CLAUSES IN RRG CONTRACTS.

With nine simple exceptions, the LRRA preempts all state laws that "regulate the business of insurance" as applied to foreign RRGs.[21] This broad, preemptive sweep is clearly established by the text of the LRRA, its legislative

19. *National Warranty Ins. Co. RRG v. Greenfield*, 214 F.3d 1073, 1075 (9th Cir. 2000) (quoting H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1441 [the "1981 House Report"]).

20. *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976, 980 (9th Cir. 2016)(*ALPS*)

21. As discussed below, there are nine specific, enumerated exceptions in the LRRA to this preemptive sweep. None of them remotely relate to the issues presented by Respondent in this case.

history, and numerous cases from state and federal courts around the country.

First, Section 3902(a)(1) of the LRRA provides that a foreign RRG is exempt from ***"any"*** state law that would "regulate, **directly or indirectly**, the **operation** of a risk retention group . . . ."[22] Importantly, § 3902(b) then clarifies that "[t]he exemptions specified in subsection (a) of this section [i.e., the LRRA's preemption provision] apply to laws **governing the insurance business** . . . [including with respect to] the provision of . . . **loss control and claims administration** . . . ."[23] (Emphasis added.)

Second, the legislative history of the LRRA is equally clear. It is well-settled law that "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way."[24] As with any preemption analysis, the ultimate touchstone is Congressional intent.[25] Congress intended a comprehensive preemption of state insurance laws with respect to foreign RRGs:

> [T]he exemptions specified in [the LRRA] apply to laws governing **the insurance business**

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22. 15 U.S.C. § 3902(a) (emphasis added).

23. 15 U.S.C. § 3902(b).

24. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) (citing U.S. Const., Art. VI, cl. 2); *see also Hines v. Davidowitz,* 312 U.S. 52, 67 (1941) (where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, federal preemption occurs).

25. *Levine v. First Nat. Bank of Commerce*, 948 So.2d 1051, 1059 (La. 2006).

> pertaining to liability insurance coverage, the sale of liability insurance, and the provision of insurance related services, management, **operations**, and investment activities, **or loss control and claims administration**.[26]

Congress stated that it preempted state laws in a wide-ranging fashion in order to "eliminate the need for compliance with numerous nonchartering state statutes that, in the aggregate, would thwart the interstate operation [of] risk retention groups."[27]

Third, the case law under the LRRA overwhelmingly recognizes this preemption of state laws "regulating the business of insurance" with respect to out of state RRGs.

There are two 9th Circuit decisions, *inter alia*, which categorically support LRRA preemption of non-exempted state laws being used to regulate the business of RRGs: The first of these is the recent decision in *Allied Professionals Insurance Company v. Anglesey (Anglesey)*, No. 18-56513, 2020 WL 1179772, at *4 (9th Cir. Mar. 12, 2020) (with procedural similarities to the instant case, the panel succinctly and robustly ruled that the subject Washington statute prohibiting arbitration in insurance policies is preempted by the LRRA).

In another decision on point with the instant case, the 9th Circuit in 2016 determined that Alaska Statute § 21.96.100(d)'s prohibition on reimbursements of fees

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26. H.R. Rep. No. 99-865 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304 (the "1986 House Report"), at p. 6.

27. 1981 House Report, at p. 12.

and costs incurred by an insurer defending a non-covered claim was preempted by the Liability Risk Retention Act of 1986 15 U.S.C. §§ 3901-3906. The panel determined that the Alaska statute placed a restriction on Alaska insurance contracts and therefore the statute could not be applied to a Montana RRG.[28]

Other examples follow. The Nebraska Supreme Court in 2014 reasoned that *because* Nebraska's statute prohibiting arbitration clauses in insurance contracts "regulates the business of insurance," it *therefore* "regulates the 'operation of a risk retention group'" and is preempted by the LRRA.[29] Below, the Second Circuit Court of Appeals and the Louisiana First Circuit Court of Appeals have both determined that state "*direct action*" statutes "regulate the business of insurance" and are thereby preempted by the LRRA as to foreign RRGs.[30] In 2018, addressing Georgia's "direct action" statute, the Georgia Supreme Court unanimously held that, "while this type of regulating may be permissible with respect to traditional insurance carriers, it is not allowed in the case of a foreign risk retention group by the express act of Congress in the LRRA. 15 U.S.C. § 3902(a)(1). And, we cannot disregard Congress's command."[31] See *Anglesey,* supra.

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28. *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976, 980 (9th Cir. 2016)(*ALPS*)

29. *Speece*, 289 Neb. at 87; and *Greenfield,* 214 F.3d at 1075.

30. *Wadsworth*, 748 F.3d at 108; *Courville*, 2015 WL 3536119, at *11.

31. *Reis v. OOIDA,* 814 S.E. 2d 338 at 343 (2018)

To underscore the potential danger when a misplaced analysis of a statutory provision collides with its clear and concise legislative intent, here the Respondents had attempted to utilize a veritable litany of mostly inconsistent litigation "strategies" and legal theories before the state and district courts to ultimately avoid what is the seminal issue of this case: the requirement that they arbitrate the existence of liability coverage pursuant to the terms and conditions under CCRRG's policy of insurance. To the contrary, Congress dictated that "***any***" state law, rule, regulation or order …that would make unlawful, or attempt to directly or ***indirectly*** regulate the operation of an RRG is preempted. They argued to be able to "rewrite" the policy to reinstate coverage and thereby effectively insert certain provisions into the CCRRG contract of insurance that were not previously agreed upon, and nullify other provisions that were agreed upon.[32] These contentions are decidedly at odds with the text, legislative intent, and general understanding of the LRRA.

A. Background: In Passing The LRRA And Its Predecessor PLRRA, Congress Intended To Make Liability Insurance More Affordable By Exempting Foreign RRGs From The Vast Majority of State Laws Regulating their Operations.

The PLRRA created RRGs, a new type of self-insurance system.[33] The PLRRA "allow[ed] businesses

32. c.f. *Quinlan v. Liberty Bank & Trust Co.*, 575 So.2d 336, 352 (La. 1991) (where the Direct Action Statute is "read into and becomes part of a policy").

33. *Nat'l Risk Retention Ass'n v. Brown*, 927 F. Supp. 195, 197 (M.D. La. 1996).

to purchase insurance at more favorable rates either by forming self-insurance pools called risk retention groups or by forming purchasing groups, which purchase group insurance from an existing insurer."[34] "RRGs are different from normal insurance companies. A risk retention group is a liability insurance company owned and operated by its members, and those members are its insureds. Risk retention groups . . . do not sell insurance to the general public; they only sell insurance to members of the RRG who are exposed to similar risks and are members of the same industry."[35] "Rather than creating a federal regulatory scheme for risk retention groups, the [PLRRA] provided that a risk retention group which had been approved by the insurance authority of any state could act as a risk retention group nationwide."[36]

A "foreign" RRG is one that is chartered outside of the regulating state, but conducts business within that state.[37] "Under the PLRRA, an RRG is permitted to provide product liability insurance in all states, free of insurance regulation by those states, if it complies with the insurance laws of the state it chooses as its 'chartering jurisdiction.'"[38]

By drastically reducing the total number of state regulations an RRG has to comply with in order to

34. *Swanco Ins. Co.-Ariz. v. Hager*, 879 F.2d 353, 354 (8th Cir. 1989).

35. *Courville* 174 So. 3d 659 at *8. (2015)

36. *Id.*

37. *Wadsworth*, at 102-04.

38. *Greenfield*, 214 F.3d at 1075 (citing 15 U.S.C. § 3901(4)(C)(i)).

operate on a national basis, RRGs are able to reduce their expenses and ultimately the cost of insurance to the group's members.[39] According to the House Report accompanying the PLRRA:

> Essentially, the objective of the [PLRRA] 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.[40]

The PLRRA was designed precisely to preempt these state laws and regulations as to foreign RRGs. As the 1981 House Report stated, the PLRRA's preemption of regulation by nonchartering states enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous nonchartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups."[41]

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39. *Greenfield*, 214 F.3d at 1075.

40. H.R. Rep. No. 97-190 at p. 4.

41. *Greenfield*, 214 F.3d at 1075 (quoting H.R. Rep. No. 190, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S.C.C.A.N. 1432, 1441).

In 1986, Congress amended the PLRRA by enacting the LRRA "to expand the scope of coverage which could be provided by risk retention groups to include all types of liability coverage."[42] The reasons why Congress broadened the scope of the act were clearly stated:

> 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

42. *Brown*, 927 F. Supp. at 197.

> 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.**[43] (Emphasis added.)

In the words of the Nebraska Supreme Court: "A major benefit … 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."[44] Other courts concur. "The very purpose of the LRRA was to allow risk retention groups to operate

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43. H.R. Rep. No. 99-865 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304, at pp. 1 – 2 (the "1986 House Report").

44. *Speece*, 289 Neb. at 87 (quoting *Wadsworth*, 748 F.3d at 108).

nationwide under the regulation of one jurisdiction, rather than fifty- one jurisdictions."[45]

B. The LRRA's Preemption Provision

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 . . . .[46] (Emphases added.)

The nine enumerated exceptions to this sweeping preemption provision referenced in the language "[e]xcept as provided in this section"—are discussed below, in Part III. C. Nonchartering states, like Arizona, may only regulate the operations of foreign RRGs in the nine highly specific ways enumerated by Congress, none of which even remotely apply here.

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45. *Soyoola v. Oceanus Ins. Co.*, 986 F. Supp.2d 695, 703 (S.D. W. Va. 2013).

46. 15 U.S.C. § 3902(a)(1)

The LRRA does not expressly define the term "operation" as used in § 3902(a). However, § 3902(b) then explains that "[t]he exemptions specified in subsection (a) of this section [i.e., the LRRA's preemption provision] apply to laws **governing the insurance business** . . . [including with respect to] the provision of . . . **loss control and claims administration** . . . ."[47] (The "exemptions" referred to above are a foreign RRG's exemptions from state laws.)

The 1986 House Report elaborated further. "An important issue in construing the [LRRA], however, is from what laws of the nonchartering State a risk retention group is exempt. Because this raises sensitive issues of Federalism, the Committee wished to be as clear as possible. Accordingly, the bill adds to Section 3(b) of the Act the statement clarifying that the exemption from nonchartering State laws is from those 'governing the insurance business.'"[48] Although the LRRA ultimately used the word "operation," the 1986 House Report used the term "business." The terms are essentially interchangeable and help to define each other.

The Second, Third, Eighth, Ninth, and Eleventh Circuits have examined the LRRA's preemptive effect, and repeatedly characterized it as "broad," "expansive," and "sweeping."[49] As the Eleventh Circuit put it, the

47. 15 U.S.C. § 3902(b) (emphasis added).

48. 1986 House Report, at p. 6.

49. *Wadsworth*, 748 F.3d at 102-03; see also *Ins. Co. of State of Pa. v. Corcoran*, 850 F.2d 88, 89 (2d Cir. 1988) (LRRA preemption is "sweeping"); *Am. Millennium Ins. Co. v. First Keystone Risk Retention Group, Inc.*, 332 Fed.Appx. 787, 788

LRRA's sweeping preemption language" provides for "broad preemption of a non- domiciliary state's licensing and regulatory laws."[50]

C. With Nine Specific, Enumerated Exceptions, The LRRA Expressly Exempts Foreign RRGs From All Other State Laws. None of The Nine Exceptions Apply Here.

The Eighth Circuit Court of Appeals unequivocally held that except for these limited powers reserved to nonchartering states, the LRRA prohibits those states from regulating foreign RRGs.[51]

Other federal circuits agree. "In short, as compared to the near plenary authority it reserves to the chartering state, the Act sharply limits the secondary regulatory authority of nondomiciliary states over risk retention groups to specified, if significant, spheres."[52] "[T]he Act authorizes nonchartering states to require risk

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(3d Cir. 2009) ("The LRRA protects the existence of RRGs by largely preempting state regulation of such entities."); *Swanco Ins. Co. Ariz. v. Hager*, 879 F.2d 353, 356-58 (8th Cir. 1989) (other than the nine exceptions at 15 U.S.C. § 3902 (a)(1)(A)-(I), the LRRA prohibits states from regulating the "operation" of a foreign RRG); *Alliance of Nonprofits for Ins., Risk Retention Group v. Kipper*, 712 F.3d 1316, 1318-19 (9th Cir. 2013) (LRRA "broadly preempts" non-domiciliary state laws) Anglesey, supra (fn 14); Alps supra (fn 22).

50. *State of Fla., Dep't of Ins. v. Nat'l Amusement Purchasing Group, Inc.*, 905 F.2d 361-63 (11th Cir. 1990).

51. *Swanco*, 879 F.2d at 356-58.

52. *Wadsworth*, 748 F.3d at 104.

retention groups to comply only with certain (very) basic registration, capitalization, and taxing requirements, as well as various claim settlement and fraudulent practice laws."[53] As all the federal circuits to examine this issue have concluded, these nine exceptions provide the *only* ways for a state to regulate the operations or "business of insurance" of a foreign RRG.[54]

Nonchartering states, like Arizona in this case, are limited to the nine exceptions listed in 15 U.S.C. § 3902(a)(1)(A)-(I)[55] which allow a nonchartering state to require a foreign RRG to:

> (A) comply with the unfair claim settlement practices law of the State;
>
> (B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;
>
> (C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;

53. *Id.* at 106.

54. *E.g.*, *Swanco*, 879 F.2d at 356-58; *Wadsworth*, 748 F.3d at 104-06.

55. *Wadsworth*, 748 F.3d at 106.

(D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;

(E) submit to an examination by the State insurance commissioners in any State in which the group is doing business to determine the group's financial condition [under certain circumstances];

(F) comply with a lawful order issued—

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging

> that the group is in hazardous financial condition or is financially impaired; and
>
> (I) provide the following notice, in 10-point type, in any insurance policy issued by such group: '**NOTICE** 'This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group."[56]

Moreover, Arizona's Risk Retention Group Statute (A.R.S. § 20-2401 *et seq.*) follows the LRRA.[57] None of exceptions above, under the LRRA or under Arizona law, have anything to do with regulating the terms of insurance policies offered by the risk retention groups.[58] In the instant case, CCRRG was originally chartered in South Carolina, so Arizona is a nonchartering state. Since the Bensons' procedural or substantive "garnishment" arguments or claims of statutory or common law exemption as a so-called "non-party" from compliance with the obligation to arbitrate under the CCRRG policy, their arguments do not fit within any of the nine LRRA exceptions—or within Arizona's laws regulating foreign RRGs. They therefore cannot be imposed on CCRRG.

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56. 15 U.S.C. § 3902(a)(1)(A)-(I).

57. Ariz. Rev. Stat. Ann. §§ 20-2403, 2409.

58. See *ALPS* discussion above.)

D. Under Controlling Case Law, Non-Domiciliary State Laws, Including "Garnishment" or Arbitration Compliance Arguments Predicated Thereon, Cannot Be Applied To Foreign RRGs.

The U.S. Supreme Court has specified what it means to "regulate the business of insurance."[59] Courts addressing the scope of LRRA preemption draw directly upon this Supreme Court case law to understand which state laws regulate "the business of insurance." For example, the Nebraska Supreme Court reasoned that because a state law "regulates the business of insurance" as defined by the Supreme Court, it *therefore* "regulates the operation of a risk retention group" and is preempted by the LRRA.[60]

In *Pireno*, the U.S. Supreme Court identified three criteria relevant to determining whether a particular practice is part of the "business of insurance":

> *[F]irst,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself . . . .[61]

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59. *Pireno*, 458 U.S. at 119.

60. *Speece*, 289 Neb. at 87.

61. *Pireno*, 458 U.S. at 129.

This three-part *Pireno* test remains the standard analysis defining the "business of insurance,"[62] and literally controls what should be decided in this instance.

Contrary to what some courts in error have erroneously concluded, the basic thrust of the LRRA is to ***discriminate*** or ***treat differently*** foreign RRGs on the one hand, and domestic RRGs and traditional insurance companies on the other hand.[63]

All federal circuits that have addressed this issue, as well as the Washington and Nebraska Supreme Courts agree that state laws banning or regulating arbitration provisions in contracts of insurance regulate "the business of insurance."[64] The Eastern District of Louisiana determined that Louisiana's statute banning arbitration provisions in insurance contracts was preempted by the LRRA as to out-of-state RRGs.[65] The Nebraska Supreme Court also concluded that because such a law regulates the "business of insurance," it was preempted by the

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62. *E.g.*, *U.S. Dep't of Treasury v. Fabe,* 508 U.S. 491, 501-03 (1993); *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir. 1992).

63. 15 U.S.C. § 3902(a); *Wadsworth*, 748 F.3d at 102-09; *Speece*, 289 Neb. at 84-85.

64. *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir. 1992); *Standard Sec. Life Ins. Co. of NY v. West*, 267 F.3d 821, 823 (8th Cir. 2001); *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 858 (11th Cir. 2004); *State Dep't of Transp. v. James River Ins. Co.*, 176 Wash.2d 390, 402 (2013); *Speece*, 289 Neb. at 88.

65. *Central Claims Serv., Inc. v. Claim Prof'ls Liability Ins. Co.*, 2011 WL 3898047, at *4 (E.D. La., Sept. 2, 2011).

LRRA. Thus, these authorities consistently support the proposition that state laws which "regulate the business of insurance," are therefore preempted as to foreign RRGs. Accordingly, the use of any statutory language to nullify the terms and conditions of an insurance policy as urged in this case, is clearly preempted.

The Bensons seek to have this Court revise and rewrite The CCRRG Policy.[66] "To expressly invalidate an agreement contained in the insurance contract touches the core of the 'business of insurance' . . . ."[67]

In the end, there is no reasonable debate about what is going on here. Denial of arbitration is rewriting the policy and regulation of the business of an RRG. Nevertheless, the key to this case rests upon the Decision Panel's interpretation of § 3901(a)(4) and how it could be used to wreak havoc on RRGs.

E. Not All State Laws Affecting A Foreign RRG Are Preempted: the "Real" Savings Clause in the LRRA was Overlooked in the Decision by the Ninth Circuit.

As stated in our Summary of Argument above, the most fatal feature of the Decision's misconstruction of § 3902(a)(4)'s sentence as a "savings clause" is that it is not a saving's clause at all in the context of the general legislative intent preempting activity that "regulates" the business of an RRG. The Panel somehow expanded the context of the entire analysis in *Greenfield*, supra at 1081,

66. *Quinlan*, 575 So.2d at 352.

67. *Mutual Reinsurance*, 969 F.2d at 933 (emphasis added).

which itself wrangled with the language. Importantly, from the factual perspective, *Greenfield* was a discrimination case, unlike Benson here, rendering it also factually distinguishable. *Greenfield,* id. in fact, clarified its findings consistent with the majority of opinions cited herein.

On the other hand, however, the LRRA's intended "savings clause" reads as follows:

> (f) State powers to enforce State laws
>
> (1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2) [also relating to injunctions], ***nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter***.[68] (Emphasis added).

Put another way, the "savings clause" simply states that if a state law does not regulate, directly or indirectly, the "operation" or "business of insurance" of a foreign RRG, it is not preempted by the LRRA.[69]

Considering normal sentence structure analysis, therefore, the Panel looked at the wrong part of the statute.

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68. 15 U.S.C. § 3902(f).

69. We note, with interest, that CCRRG thoroughly briefs this issue in Point E of its Brief.

F. Why Certiorari Should be Granted. The Decision's Conflict with the line of authorities not just within its own (Ninth) Circuit, but potentially with the majority opinions on this subject across the Country, and the opportunity for other Courts, state and federal, to seize upon this misplaced analysis of § 3901(a)(4) to undermine the documented intent of the Congress.

The majority decisions outlined in this Brief underscore two key points:

First, the clearly articulated congressional intent that no foreign state law (regardless of how characterized) that is being used to regulate the insurance business or operations of a foreign RRG, particularly *indirectly*, can be allowed to circumvent that legislative intent.

Second, on a nationwide basis and without exception as to jurisdiction or venue (state or federal) the majority of courts that read the statute correctly in this context, have categorically concluded that the *existence* of coverage under any insurance policy is part of the business of insurance, and is therefore a condition precedent to recovery or execution of a judgment. In all the relevant cases involving RRGs, coverage can be determined by arbitration.

G. Risk Retention Groups Are For The Most Part Very Small Companies and Allowing States To Impose Their Own Laws In Areas That Are Preempted Would Have A Profound Impact On The RRG Industry.

If each state were permitted to pick and choose which of their own laws they could impose on foreign RRGs, it would not only thwart the entire legislative purpose of the LRRA, but would also greatly harm the viability of the RRG marketplace. As stated in a report by the Congressional Research Service, "[u]nder normal circumstances, an insurer who wishes to operate outside of its domiciliary state must receive a license and submit to regulation from every state in which it wishes to do business. This means complying with 51 different sets of state or district laws and regulations in order to do business across the country. The impact of this multiplicity of regulation is particularly high in insurance...."[70]

By 2023, gross written premium (GWP) of risk retention groups has grown to about $5 billion dollars, demonstrating the void these ingeniously created companies fill.[71]

Without LRRA preemption, RRGs would no longer be able to develop uniform and streamlined policies,

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70. Baird Webel, Cong. Research Serv., RL 32176, The Risk Retention Acts: Background and Issues 1 (2003).

71. Risk Retention Reporter 2023 Reports. Financials Totals not reported yet. The Risk Retention Reporter is the key independent publication for the industry, not owned or operated by NRRA herein.

including cost-saving measures such as arbitration provisions agreed to by their members. Ultimately, the result would be catastrophic to RRG members, as about a half-million insureds could lose their ability to obtain affordable liability coverage.

The collateral benefit of the RRG is that the RRG is allowed to create the structure and nature of its operations, including the form of its policy, the rates charged, the claims administration process, and the method and means for dispute resolution regarding policies issued with members and third parties. The RRG can then operate in the other 49 states with limited regulation. This allows the RRG to develop its own unique manuscripted policy, frequently incorporating provisions designed to simplify and accommodate the homogenous business interests of the members (normally all of the same trade, profession or business). Homogeneity is a primary feature that distinguishes RRGs from other traditional carriers.

Congress clearly intended it this way. The RRG industry has grown and met a profound need, and continues to help rescue the insurance industry from a crisis of unavailability.

CONCLUSION

Imposing state garnishment laws or other legal procedures obviously foreclosing the ability to arbitrate contractual issues such as presented herein on *foreign* RRGs like CCRRG would improperly regulate their business operations, in violation of the LRRA.

Importantly, the foregoing cases and authority do absolutely nothing to change Arizona law relative to traditional insurance carriers or RRGs chartered in Arizona.

DATED this 1st day of May, 2024.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — STATE - REGISTRATION VERIFICATION LOCATION LINKS

ALASKA:
https://sbs-ak.naic.org/Lion-Web/jsp/sbsreports/CompanySearchLookup.jsp

ARIZONA*:*
https://sbs.naic.org/solar-external-lookup/

CALIFORNIA*:*
https://interactive.web.insurance.ca.gov/webuser/ncdw_alpha_co_line$.startup

HAWAII*:*
https://insurance.ehawaii.gov/hils/

IDAHO*:*
https://doi.idaho.gov/licensing/search

MONTANA*:*
https://sbs.naic.org/solar-external-lookup/

NEVADA*:*
http://di.nv.gov/ins/f?p=licensing:search

OREGON*:*
https://sbs.naic.org/solar-external-lookup/

WASHINGTON:
https://fortress.wa.gov/oic/consumertoolkit/Search.aspx