No.08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

JENNIFER R. BAGOSY
HOWREY LLP
4 Park Plaza, Suite 1700
Irvine, CA 92614
(949) 721-6900

JERROLD J. GANZFRIED
Counsel of Record
ELIZABETH B. MCCALLUM
HOWREY LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 783-0800
Attorneys for Amicus Curiae

MOTION OF DRI – THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS FOR CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, DRI – The Voice of the Defense Bar ("DRI") hereby moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners for a writ of certiorari. DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its membership and to the judicial system. The Sixth Circuit's decision to become the first and only court in the country to expand the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO") to private plaintiffs suing their employers for denying workers' compensation claims poses a distinct threat to the efficient and fair administration of justice. This unprecedented decision would inject costly private litigation into state workers' compensation systems intended to provide an exclusive remedy for workplace injuries – systems that states developed many years before RICO was enacted to benefit employees and

employers by substituting predictable but limited recovery for expensive and uncertain private tort litigation against employers. It could also lead to consequences in areas other than workers compensation, if the Sixth Circuit's erroneous reasoning is employed to extend the expansive federal RICO remedy to other exclusive and comprehensive remedial systems where it was never intended to apply.

The important legal issues in this case are, accordingly, of substantial concern to DRI. Since its members have first-hand experience with litigation under RICO, the McCarran-Ferguson Act, and in the field of workers' compensation, DRI is well-suited to address the deleterious consequences of the Sixth Circuit's decision.

This motion is necessary because respondents' counsel has not consented to the filing of this brief in response to DRI's timely written request for consent.

Respectfully submitted,

JENNIFER R. BAGOSY
HOWREY LLP
4 Park Plaza, Suite 1700
Irvine, CA 92614
(949) 721-6900

JERROLD J. GANZFRIED
Counsel of Record
ELIZABETH B. MCCALLUM
HOWREY LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 783-0800
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATUTES

MISCELLANEOUS

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

DRI – The Voice of the Defense Bar ("DRI") submits this *amicus curiae* brief in support of petitioners.[1] The interests of the *amicus curiae* are set forth in the accompanying motion.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision to permit Michigan workers' compensation beneficiaries to bring RICO claims would inject broad new federal remedies into an established and longstanding administrative system that provides workers with an exclusive remedy. Michigan's system (like those in other states) is intended to offer predictable and speedy compensation for workplace injuries without reference to fault. It permits no private right of action for damages, except for certain intentional torts committed in the workplace. The Sixth Circuit's decision expanding RICO into this comprehensive and exclusive remedial system is contrary to this Court's decision in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and conflicts with the

[1] Counsel of record received notice at least 10 days prior to the due date of *amicus'* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

reasoning in cases from other Circuits concluding that Congress did not intend RICO to preempt existing exclusive remedial systems.

Certiorari is also warranted to review the Sixth Circuit's incorrect conclusion that workers' compensation does not involve the business of insurance – although the system plainly transfers and reallocates risk and although it requires employers either to purchase workers' compensation insurance or receive state approval to self-insure after meeting specific statutory and regulatory standards. Moreover, the decision below should be reviewed in order to reverse the incorrect holding that employers who choose the self-insurance option are not part of the business of insurance. That distinction posits an anomalous situation where workers hired by companies that self-insure have RICO claims while those who happen to work for companies that buy insurance do not.

Finally, the decision below raises troubling policy and practical implications that go far beyond the particular circumstances of this case. Engrafting RICO remedies onto longstanding state workers' compensation systems would remove a substantial number of workers' compensation claims from the hands of knowledgeable administrative officials and inject them into the courts, where the states have made a policy decision that they do not belong. Among other clear consequences, the decision below would further crowd federal and state dockets, increase the burden and costs on employers, and seriously erode employees' entitlements under workers' compensation plans. Unless it is reversed,

the decision in this case could also impair other self-contained administrative systems designed to provide a limited, but exclusive, remedy.

This Court should grant certiorari to ensure consistency in this important area of the law, to prevent the broad encroachment of a federal remedy where none was intended, to assure correct application of the *Humana* decision, and to protect important and long-standing state policy decisions.

ARGUMENT

I. This Court Should Grant Certiorari to Address the Sixth Circuit's Expansion of RICO Into An Exclusive and Self-Contained Administrative Regime

A. The History of Worker's Compensation Law Shows the States' Intent To Provide Exclusive Remedies for Workplace Injuries

Before states began enacting workers' compensation laws in the early 1900s, employees could obtain compensation for workplace injuries only by winning civil suits for negligence against their employers. Employee victories were few, however, because employers benefited from broad legal defenses such as contributory negligence and assumption of the risk. As a result, workers rarely received any compensation for their injuries, yet they frequently suffered the delays and high costs of litigation. Moreover, in the rare instances when workers won, employers could not reliably predict the timing and amounts of their losses. National

Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, 2006 (Aug. 2008), *available at* http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf. ("NASI Report"), at p. 6; Edward M. Welch & Daryl C. Royal, Worker's Compensation in Michigan: Law and Practice (5th ed. 2007) ("Welch & Royal"), at §1.2 (Michigan Worker's Disability Compensation Act was enacted in 1912; before that, employees could recover only through a successful tort suit).

States created workers' compensation programs, accordingly, to provide injured workers with a reliable, predictable, and speedy source of compensation for medical treatment and lost wages "regardless of who was at fault." NASI Report at 6. The "quid pro quo" for this allocation of risk to the employer is that the "the employer's liability [is] limited." *Id.* "Under the exclusive remedy concept, the injured employee accepts workers' compensation as payment in full and gives up the right to sue." *Id.*

"The exclusivity provision is the bedrock of the workers' compensation system." *Doss v. Food Lion,* 477 S.E.2d 577, 578 (Ga. 1996). As the Michigan Supreme Court has explained, "[t]he 'primordial intent' [of the legislature in enacting the WDCA] was that the quo to be received by the employer in return for his quid would be outright and absolute immunity from liability (except as provided in the act) stemming from each compensable injury.' The exclusivity provision is an example of the importance which the drafters of workers' compensation laws, generally, placed on simple, automatic remedies."

Downie v. Kent Prods., Inc., 362 N.W.2d 605, 613 (Mich. 1984) (quoting *Husted v. Consumers Power Co.*, 135 N.W.2d 370, 375 (Mich. 1965) (emphasis added)). Extending tort liability to employers for denying workers' compensation benefits would ignore the fact that "the employer has already made concessions and assumed liabilities to the employee" and would further "sacrifice[] simplicity and efficiency." *Id.* at 617.

Consistent with the legislature's intent that that workers' compensation provide an exclusive remedy – and with similar laws nationwide – the Michigan Worker's Disability Compensation Act ("WDCA") provides that "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." Mich. Comp. Laws §418.131(1). The WDCA provides a comprehensive scheme that prescribes the types and amounts of benefits available and provides administrative processes for resolution of disputes regarding those benefits. Michigan employers cannot raise defenses of contributory negligence, assumption of risk, or that the injury was caused by a fellow employee. Mich. Comp. Laws §418.141.[2] In exchange,

---

[2] Employees may not, however, recover for injuries arising out of their own willful and intentional misconduct. *Id.* at §418.305. The only exception to the exclusive remedy system is that employees may sue to recover for intentional torts in the workplace, such as harassment by a supervisor or co-worker, and for harm beyond the physical (*i.e.* false imprisonment or intentional infliction of emotional distress). *See* Welch & Royal at §§3.9-3.12.

employers' liability is limited: Michigan workers may recover only lost wages, medical treatment costs, and certain rehabilitation services under the Act. Welch & Royal at §1.2. The WDCA also caps the amount of compensation an injured employee may recover. *See* Mich. Comp. Laws §§418.301, 418.319, 418.321, 418.335, 418.345, 418.351, 418.352, and 418.355.

The sole method to obtain workers' compensation benefits in Michigan is through the administrative process. The WDCA created the Bureau of Worker's Compensation, whose mission is "to efficiently administer the Workers' Disability Compensation Act of Michigan, which includes carrier and employer compliance, timely benefits payment and the prompt and fair adjudication of claims involving Michigan's injured workers." Workers' Compensation Agency 2008 Annual Report at 7, *available at* http://www.michigan.gov/documents/wca/wca_2008_Annual_Report_277025_7.pdf. Under the WDCA, workers' compensation magistrates who initially hear claims (Mich. Comp. Laws §418.206) must either be specially trained – they must pass an examination to demonstrate "(1) knowledge of the Act, (2) fact-finding skills, (3) knowledge of the [Michigan Rules of Evidence], and (4) a basic understanding of human anatomy and physiology" – or they must have practiced as attorneys in the field of workers' compensation for at least five years. Welch & Royal at §17.47. Workers may appeal magistrate decisions to a seven-member Workers' Compensation Appellate Commission ("WCAC"). Mich. Comp. Laws §418.274. In addition, workers may petition for further review of decisions of the

WCAC to the Michigan appellate courts. Welch & Royal at §18.12.

Michigan law does not permit tort suits for wrongful, or even bad faith, denial of workers' compensation benefits. *Wright v. DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 845 (E.D. Mich. 2002) ("the denial of workers' compensation benefits, even in bad faith, is not tortious.") (emphasis added). *See also Lisecki v. Taco Bell Restaurants, Inc.*, 389 N.W.2d 173, 174-76 (Mich. Ct. App. 1986) (employer's alleged collusion with the insurance company to terminate workers compensation benefits would be "bad faith" and would "call into serious question the business practices of the defendants," but would not warrant a remedy outside the WDCA); *Hajciar v. Crawford & Co.*, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985) (employer's alleged termination of an amputee's benefits to induce him to take a lump sum payment he had previously refused did not constitute intentional infliction of emotional distress and thus plaintiff had no remedy outside the WDCA)

B. Under This Court's Jurisprudence, RICO Should Not Be Expanded To Interfere With Exclusive Remedial Regimes Like The Michigan Workers' Compensation System

There was no indication when Congress enacted RICO in 1970 that it intended to supplant century-old workers' compensation systems by imposing a RICO remedy in place of remedies created by the states to provide exclusive recovery for workplace injuries. Michigan's longstanding administrative

system for compensating workers for workplace injuries was carefully structured to provide the "quid" of predictable recovery in return for the "quo" of limited remedies. That regime is exclusive – no private right of action for damages is allowed. A worker's recourse for "wrongful" or bad faith denial of benefits – which necessarily includes fraud – is to pursue a claim through the system. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 861. Indeed, that is apparently what several of the plaintiffs here have done, ultimately pursuing and obtaining their claimed benefits. *See* Pet. 28, n. 9.

Accordingly, in the parlance of the McCarran-Ferguson Act, permitting a RICO remedy for Michigan workers' compensation claimants would "impair" the business of insurance by imposing a broad set of remedies that are inconsistent with the carefully-considered existing regime. The Sixth Circuit, however, ignored the careful consideration of state remedies and intent mandated by this Court's decision in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and held to the contrary. *Humana* established that the meaning of "impair" under McCarran-Ferguson is "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Id.* at 309-10 (quoting Black's Law Dictionary 752 (6th ed. 1990). In so defining "impair," this Court expressly rejected the view "that Congress intended a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Id.* at 309.

The Nevada insurance regime in *Humana* specifically permitted both statutory and common-law damages for insurance fraud, and encompassed punitive damages – up to treble the actual damages – within the state regulatory regime. In such circumstances, this Court carefully considered the specific parameters of the state system to hold that RICO remedies would complement, rather than impair, the state's regime. *Id.* at 313-14.

Here, the state system is different in dispositive ways. None of the Nevada-specific factors that supported permitting RICO claims in *Humana* is present in the Michigan system:

(1) The Michigan workers' compensation regime does not permit a private right of action either in federal or state court, for wrongful or bad faith denial of workers' compensation benefits. Pet. App. 30a. *See also Lisecki.*, 389 N.W.2d at 174-76; *Hajcia*r, 369 N.W.2d at 864; *Wright*, 220 F. Supp. 2d at 845 n.9 (granting summary judgment dismissing claim for tortious denial of workers' compensation benefits because [n]o such cause of action exists"). *Humana* specifically cited the availability of private rights of action under Nevada law as a factor weighing in favor of extending the RICO remedy. *See* 525 U.S. at 312.

(2) Likewise, there is no a common law right of action in Michigan for wrongful or bad faith denial of benefits, necessarily including fraud, connected to the denial of workers' compensation benefits. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174.76; *Hajciar*, 369 N.W.2d at 864. This, too, is

an important factor under *Humana*. 525 U.S. at 312 (citing availability of common law right of action under Nevada law).

(3) No Michigan law provides a similar ground for suit. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 864. *Compare Humana*, 525 U.S. at 312 (citing Nevada Unfair Insurance Practices Act expressly prohibiting the type of insurance fraud that the *Humana* plaintiffs challenged).

(4) Michigan employees cannot receive any tort damages for denied workers' compensation benefits, let alone punitive damages. Thus, a private action under RICO, with its treble damages, would permit plaintiffs to seek greater recourse than that available under the WDCA. *See Wright*, 220 F. Supp. 2d at 845; *Lisecki*, 389 N.W.2d at 174-76; *Hajciar*, 369 N.W.2d at 864. *Compare Humana*, 525 U.S. at 313 (citing availability of punitive damages for insurance fraud under Nevada law).

(5) Michigan employees seeking workers' compensation benefits through the administrative appeals process cannot obtain the treble damages and attorneys' fees permitted by RICO, as the district court below explained. Pet. App. 63a. Rather the legislature has provided them with a certain and predictable but smaller recovery for workplace injuries. Employees who are injured but not completely unable to work are entitled to weekly benefits of 80% of the difference between the pre- and post-injury pre-tax wages. Mich. Comp. Laws §418.305(b). Employees who are totally

incapacitated are entitled to 80% of the employee's after-tax average weekly wage. *Id.* at §418.351(1). If an employer fails to begin paying benefits within 30 days of the due date (where benefits are not in dispute), the employer must pay the employee a $50 per day penalty for each day the benefits are late, which is capped at $1500. *Id.* at §418.801(2). *Compare Humana*, 525 U.S. at 313 (citing fact that damages for insurance fraud already available under Nevada law include damages equal to, or potentially even greater than, RICO's treble damages).

(6) Michigan has articulated a strong policy supporting its exclusive administrative regime, through statements in several state supreme court cases regarding exclusivity and its importance to the goals of workers compensation, and by expressly precluding private judicial rights of action. *See Simkins v. General Motors Corp.*, 556 N.W.2d 839, 844 (Mich. 1996) (WDCA's purpose "is to provide…not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate") (citation and internal quotation marks omitted); *Downie*, 362 N.W.2d at 617 (rejecting the notion that "principle[s] of fairness, alone, should operate to allow abrogation of the employer immunity provided by the WDCA" because this would ignore "that the employer has already made concessions and assumed liabilities to the employee, for which his immunity was the quid pro quo") (citation and internal quotation marks omitted); *accord Husted*, 135 N.W.2d at 375. *Compare*

Humana, 525 U.S. at 313-14 (citing fact that Nevada had taken no position on the question presented).

Nor is it correct, as the Sixth Circuit found, that the fact that Michigan workers' compensation law sanctions employers for wrongfully denying benefits means that a RICO remedy is consistent with state policy or the administrative system. Pet. App. 25a (citing Mich. Comp. Laws §§418.631, 418.801). The availability of some in-system remedy for wrongful denial does not justify exposing employers to expansive liability outside the closed system contrary to the legislature's intent. And it would be particularly deleterious to extend such liability through a private right of action (currently unavailable to employees) that would vastly exceed employers' liability under the current administrative regime.

Accordingly, this Court should grant certiorari to ensure that *Humana* is correctly applied. The consequences of the Sixth Circuit's erroneous decision, if uncorrected by this Court, will be far-reaching. As discussed *infra* at 21-22, RICO remedies would be injected immediately into workers' compensation regimes in Michigan, Ohio, Kentucky, and Tennessee[3] contrary to state

---

[3] *See, e.g., Sanek v. Duracote Corp.*, 539 N.E.2d 1114, 1116-17 (Ohio 1989) (tort suits generally not allowed for workplace injuries, with a very limited exception where the employer commits an intentional tort that results in an employee's injury); *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 342 (Ky. 1986) (exclusive liability provisions of the Kentucky workers' compensation law cannot be waived except where the employer fails to secure insurance or commits willful and unprovoked

legislative intent. The same result could potentially occur nationwide.

C. The Sixth Circuit's Reasoning is Inconsistent with Cases from Other Circuits Declining to Expand RICO into Comprehensive and Exclusive Remedy Regimes

Other circuits have recognized that RICO was never intended to create a private right of action for damages that would substantively expand the remedies available in exclusive administrative regimes. In *Danielsen v. Burnside-Ott Aviation Training Ctr.,* 941 F.2d 1220, 1227 (D.C. Cir. 1991), for instance, the D.C. Circuit held that employees of service corporations contracting with the United States could not sue their employers under RICO, because the Service Contract Act ("SCA") provided an exclusive administrative remedy. The D.C. Circuit reasoned that "the [SCA] envisions a comprehensive administrative rubric for the protection of federal service workers." *Id.* at 1227 (quoting *Miscellaneous Service Workers, etc. v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981)) (internal quotation marks omitted). Where Congress has established such a regulatory scheme, "the specification thereof normally excludes duplicative judicial jurisdiction." *Id.* (citations and internal quotation marks omitted). Courts should be

---

physical aggression); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239 (Tenn. 2003) (workers' compensation is the exclusive remedy except where the employer's intentional tort caused the injury).

especially vigilant to avoid such duplication "in a scheme such as the SCA where Congress provided the statutory right for a limited and governmental cause of action for underpayment." *Id.* Accordingly, the court refused to "undercut the specific remedy prescribed by Congress." *Id.* at 1228.

In similarly holding that RICO should not be expanded into an area where Congress created an exclusive administrative remedy, the Eleventh Circuit explained that "there is a presumption" Congress "provided precisely the remedies it considered appropriate." *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1222-23 (11th Cir. 2002) (finding that the Higher Education Act of 1965 does not confer a private right of action; therefore plaintiffs may not sue under RICO for HEA violations). That court rejected the plaintiff's argument that a private remedy was warranted because the administrative regime was inadequate, reasoning that "it is not up to this Court to create a statutory remedy based on the notion that Congress could have done a better job of legislating the statutory scheme. As the Supreme Court has made clear, 'the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.'" *Id.* at 1223 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement") (internal citations omitted).

The reasoning in these cases is incompatible with the Sixth Circuit's. In *Danielsen* and similar cases, courts declined to inject RICO into administrative systems designed to provide a certain and exclusive set of remedies to claimants. In this case, in contrast, the Sixth Circuit found RICO remedies appropriate in just such an exclusive administrative regime. That this case arises in the context of federal incursion upon a state's exclusive administrative regime makes the issue all the more compelling for certiorari. This Court should grant review to ensure consistency among the lower courts on these vital issues and to prevent the application of the Sixth Circuit's erroneous reasoning to other states and to other administrative regimes.

II. This Court Should Grant Certiorari to Address The Sixth Circuit's Holding That Workers' Compensation Is Not Insurance

Another incorrect aspect of the Sixth Circuit's decision that warrants review is the determination that RICO may be extended into Michigan workers' compensation regime because: (1) worker's compensation regimes were not enacted to regulate the business of insurance within the meaning of McCarran-Ferguson and (2) even if they were, "self-insurance" does not count as insurance. These conclusions are contrary to precedents of this Court and others, and have far-reaching ramifications that support a grant of certiorari.

Workers' compensation "is an important part of American social insurance." NASI Report at 1. *Accord Lauder v. Paul M. Weiner Foundry*, 72

N.W.2d 159, 172 (Mich. 1955) (workers compensation is "insurance of a social character") (internal citation omitted). At bottom, the system spreads and transfers risk from the worker – who previously had to cover all expenses for work-related injuries unless she succeeded in expensive and hard-to-win tort litigation – to the employer – which now must cover such expenses regardless of fault.[4] That is the essence of insurance.[5]

Moreover, the system expressly requires risk reallocation via insurance – the employer must either obtain workers' compensation insurance or it may self-insure after proving to state regulators that it is financially able to do so. NASI Report at 6, 14. The Sixth Circuit recognized that "there are several provisions of the WDCA that directly relate to the terms of the insurance contract and thus to the

---

[4] Whether a practice is the "business of insurance" depends on three factors, none by itself determinative. First, whether the practice "has the effect of transferring or spreading a policyholder's risk." Second, whether the practice is an integral part of the relationship between insurer and insured. Third, whether the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

[5] The Sixth Circuit also suggested that because the workers' compensation system was a replacement for tort liability, the statute could not have been "enacted" to regulate the business of insurance. Pet. App. 16a, 24a. That is incorrect. It is neither impossible nor inconsistent for a statute like the WDCA to have multiple purposes, including both replacing a tort system that was not working for either employer or employee and spreading and transferring risk in a manner that constitutes the business of insurance.

'business of insurance,'" but held that the "crucial" point in this case was that the employer self-insured. Pet. App. at 23a. Self-insurance, the Sixth Circuit concluded, "does not relate to the 'business of insurance' under the McCarran-Ferguson Act…." *Id.*

The Sixth Circuit disregarded the reality of Michigan's treatment of its self-insured employers to impose a broad and unrealistic rule that self-insurance is never insurance. Under the regime at issue here, "self-insured" does not equal "uninsured," as the Sixth Circuit seemed to assume. Welch & Royal at §2.17. Rather "self-insurance is not automatically available to anyone who does not have insurance." *Id.* Employers wishing to self-insure must be approved by the Worker's Compensation Agency. *Id.* There is a detailed and precise set of requirements for employers who choose to self insure, including requirements for demonstrating solvency and liquidity. Mich. Comp. Laws §418.611. The workers' compensation bureau may deny or revoke permission to self-insure based on factors including: operating results, financial trends, economic conditions, management quality, liabilities, litigation, and payroll size. Mich. Admin. Code R. 408.43c (2009). Self-insured employers must adhere to certain requirements, including providing a letter of credit or surety bond upon request by the bureau and retaining a claims service company. *Id.* at 408.43a.

The Sixth Circuit's faulty assumption that "self-insured" means "uninsured" leads to unfair and inconsistent results. There is no rational reason why workers who happen to work for an employer that

chooses the "self-insurance" option should have a RICO remedy while those employed by companies that purchase insurance will not. But that is a necessary consequence of the Sixth Circuit's opinion.

Moreover, employers who self-insure are typically not personally liable for all claims, but rather have some kind of outside or excess insurance for clams. Michigan has about 30 "group self-insurance funds, or pools," in which employers who meet state requirements to self-insure spread risk among themselves. Welch & Royal at §2.13. Also, most self-insured employers purchase "specific excess insurance" from an insurance company that agrees to cover the employer in the event a large disaster kills or injures a large number of people at once. *Id.* at §2.17.

Even employers who buy insurance for workers' compensation claims generally are personally liable for some portion of the claim, up to the deductible on their policies. "Employers who have policies with deductibles are, in effect, self-insuring up to the amount of the deductible. That is, they are bearing that portion of the financial risk." NASI Report at 15-16, *quoted in* Cert. Pet. at 23, n. 7. Employer-paid benefits under these policies with deductibles totaled $8.205 million in 2006. *Id.* at 15. If the Sixth Circuit is correct that self-insurance is not "insurance," does that mean that employees may bring RICO actions if their claims were paid before the employer met its deductible for the year, but that they lose the RICO right if their claims were paid by the insurance carrier? And how would any employee know whether it had a RICO claim under this rule?

Finally, the Sixth Circuit's erroneous rule that self-insurance is not insurance would have broadly harmful effects, both in the workers' compensation area and beyond. Self-insurance is hardly a rare practice. All but two of the states expressly permit self-insurance for workers' compensation claims. NASI Report at 14. In 2006, self-insured employers paid 24% of workers' compensation benefits (or $13.114 billion) in the United States. *Id.* Many large corporations choose to self-insure. *Id.* In Michigan, 650 of the state's 200,000 employers choose to self-insure, yet these are such large companies that they account for about 45% of all benefits. Welch & Royal at §2.17. In the wake of the Sixth Circuit decision in this case, what rational employer will choose to self-insure and render itself ineligible for the limited liability provisions that workers' compensation was designed to provide?

The decision below could also adversely affect other self-insurance schemes outside the workers' compensation context. For example, "[a]ccording to a 2000 report by the Employee Benefit Research Institute (EBRI), approximately 50 million workers and their dependents receive benefits through self-insured group health plans sponsored by their employers. This represents 33% of the 150 million total participants in private employment-based plans nationwide." *See* Self Insurance Institute of America, "Self Insured Group Health Plans," http://www.siia.org/i4a/pages/Index.cfm?pageID=4546. If self-insurance is no longer insurance, the Sixth Circuit's decision could alter the rights and

responsibilities of those who participate in other self-insurance programs.

III. The Substantial Practical Effects Created By Grafting RICO Onto State Workers' Compensation Systems Also Support Review

In practice, expanding RICO into the exclusive remedial systems that states have set up to provide compensation for workplace injuries will create a variety of adverse effects that further justify this Court's review of the Sixth Circuit's decision. RICO's treble damages and attorneys fees, as well as the possibility of class certification and far more extensive discovery, will operate as a strong incentive for claimants and their lawyers to challenge denials of workers' compensation benefits under RICO rather through the existing – and no longer exclusive – state administrative regime. As the D.C. Circuit explained in *Danielsen,* 941 F.2d at 1227-28, when plaintiffs have the option through RICO of seeking three times the remedy otherwise available to them, and when their "attorneys would be extracting their fees not from their clients but from the other side," those plaintiffs are likely to choose RICO claims rather than the comprehensive administrative system.

Such a result would plainly "undercut the specific remedy prescribed" (*id.*) in state workers' compensation regimes, thereby "frustrat[ing] declared state policy" and "interfere[ing] with a State's administrative regime." *Humana*, 525 U.S. at 310. *See supra* at 9-13.

In practical terms, there would be a variety of effects. Determination of the merits of workers' compensation claims would be removed from the state workers' compensation magistrates who have specialized expertise and experience in the area, and whom the state legislature has designated as the appropriate officers to adjudicate these claims. The issue of whether workers' compensation benefits were due in the first instance is a necessary prerequisite to a finding of fraudulent denial of those benefits. If RICO claims are permitted, workers' claims of entitlement to benefits under state workers' compensation law will either be litigated for the first time in federal or state court or re-litigated there even though a state workers' compensation magistrate has already determined them.

Those who practice in this area recognize that such intrusions will undermine the existing system. As a direct result of the decision below, "[a] federal trial judge now must determine whether certain medical evidence and opinions have relevance in denying workers comp benefits." *See* Roberto Ceniceros, "Court Allows RICO Suit Over Comp Claim Denial." Business Insurance, Nov. 3, 2008, *available at* http://www.businessinsurance.com/article/20081102/ISSUE01/100026368. As explained *supra* at 6-7, "such determinations have statutorily been the domain of Michigan workers compensation magistrates, who have experience with such matters." *Id.*

Permitting a federal or state court in the context of a RICO action to determine the merits of workers'

claims raises numerous practical issues, in addition to removing those claims from those with specialized knowledge and experience in the area. Complicated questions of finality and claim and issue preclusion could arise if a worker brought a RICO claim after receiving a determination she did not agree with in the state system. There would be questions of exhaustion of administrative remedies, and application of federal abstention doctrines, arising if a worker sought relief through RICO before adjudicating the claim through the state's system.

Engrafting RICO remedies onto state workers' compensation systems also could lead to substantially increased costs – both litigation costs and increased liability – further doing violence to the state policies of predictable but limited recovery expressed in the existing exclusive remedial systems. These limited-liability systems are especially important since the scope of workers' compensation in this country is enormous. Workers' compensation covered 130.3 million workers (who collectively earned $5.5 trillion in wages) in 2006. NASI Report at 2, 8. Employers across the United States spent $88.9 billion in 2005 and $87.6 billion in 2006 on workers' compensation insurance. *Id.* at 2. For every $100 of covered wages in the United States, $.99 in benefits were paid, and employer costs were $1.58. *Id.* at 2.

An increase in employers' costs could have adverse effects on the continued viability of large and small businesses – a real concern in these times of economic hardship – as well as potentially lowering employee wages. NASI Report at 6 (citing economist

conclusions that the costs imposed on business by even the existing workers' compensation system results in lower wages) (citing Leigh, *et al.*, 2000). Finally, because employers inevitably pass workers' compensation costs on to consumers, *Simkins*, 556 N.W.2d at 843-44, the Sixth Circuit's decision could also cause consumer costs to rise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JERROLD J. GANZFRIED
Counsel of Record
ELIZABETH B. MCCALLUM
HOWREY LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 783-0800

JENNIFER R. BAGOSY
HOWREY LLP
4 Park Plaza, Suite 1700
Irvine, CA 92614
(949) 721-6900

Attorneys for Amicus Curiae

JUNE 2009