No. _____

In the
Supreme Court of the United States

MICHAEL SCOTT ANGLESEY; ELISEO GUTIERREZ;
VERONICA GUTIERREZ,
Petitioners,
v.

ALLIED PROFESSIONALS INSURANCE COMPANY,
A Risk Retention Group, Inc., an Arizona corporation,
Respondent.

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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QUESTIONS PRESENTED

1. As to a risk retention group (RRG), does the federal Liability Risk Retention Act of 1986 (LRRA), 15 U.S.C. §3901 et seq., preempt authority of the individual States to enact laws prohibiting mandatory arbitration clauses in insurance contracts when such contracts are issued within the State's borders?

2. If so, how then may the individual States effectively ensure jurisdiction over its insured residents for purposes of enforcing the State's consumer protection laws, tort laws, and/or have the ability to interpret insurance contracts as contemplated under the LRRA?

3. Does the reverse preemption provision of the McCarran-Ferguson Act ("MFA"), 9 U.S.C. § 1012(b) operate to save the State's law prohibiting arbitration provisions in insurance contracts as applied to foreign risk retention groups?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Michael Scott Anglesey D.C., Eliseo Gutierrez and Veronica Gutierrez. Petitioners are residents of the State of Washington.

The Respondent in this Court is Allied Professionals Insurance Company (APIC), a Risk Retention Group (RRG). APIC is incorporated in Arizona.

RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
Allied Professionals Insurance Company, a Risk Retention Group, Inc. vs. Anglesey, et al.,
No. 18-56513 (Opinion filed March 12, 2020)

United States Eastern District of Washington
Gutierrez and Anglesey vs. Allied Professionals Insurance Company,
No. 4:15-CV-05033-EFS (Order Denying Motion to Lift Stay, October 19, 2018)

United States Central District of California
Allied Professionals Insurance Co., vs. Anglesey, et al.
D.C. No. 8:14-CV-00665-CBM-SH (Order Granting Motion to Compel Arbitration and Certification for Review, August 10, 2018)

Superior Court of the State of Washington County of Benton
Eliseo Gutierrez and Veronica Gutierrez vs. Michael Anglesey
No. 15-2-00770-7 (Stipulated Judgment, April 10, 2015)

Superior Court of the State of Washington County of Benton
Eliseo Gutierrez and Veronica Gutierrez vs. Michael Anglesey
No. 15-2-00770-7 (Order of Dismissal, July 31, 2014)

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PETITION FOR CERTIORARI

Petitioners respectfully seek a Writ of Certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The 9th Circuit's opinion below (Appx. 1-15) is published at 952 F.3d 1131 (2020). The Central District of California's opinion and certification for interlocutory review (Appx. 16-37) is published at 2018 WL 6219926 (2018). The Eastern District of Washington's order denying motion to lift stay is not published (Appx. 38-42).

JURISDICTION

The Ninth Circuit entered judgment on March 12, 2020. Shortly thereafter, on March 19, 2020, the Court extended the time within which to file any Petition for Writ of Certiorari due on or after that date to 150 days from the date of the lower court judgment. The effect of that Order was to extend the deadline for filing a Petition for Writ of Certiorari herein to August 10, 2020. Jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the appendix at Appx. 55-72.

INTRODUCTION AND STATEMENT OF THE CASE

The Respondent, Allied Professional Insurance Company (APIC) is a Risk Retention Group (RRG) incorporated in Arizona. Nevertheless, APIC maintains its principal place of business in the State of California. APIC currently writes coverage

in all fifty states. Primarily, APIC targets 'alternative health care providers' such as acupuncturists, chiropractors, and massage therapists. The Company's mission is:

> "To provide affordable, reliable, professional liability coverage and related general liability coverage for allied and alternative healthcare professionals"[1]

According to its website, APIC markets an effective, experienced defense for all claims against insureds as follows:

> "With twenty-five years of experience defending these providers from a wide range of spurious and exaggerated claims of misconduct, Allied is uniquely equipped to provide its clients with an effective defense should a problem arise. Unlike other kinds of exposures, with professional liability coverage, the ability to effectively defend against a claim is critical to clients. When claims are made, the client's reputation, and in many cases, their livelihood is at risk" Id.

Each policy issued by APIC across the nation, contains a choice of law provision in favor of the application of California law to any dispute. Every policy issued by APIC also contains a mandatory binding arbitration clause and a venue provision which requires all insurance contract disputes to be determined by AAA arbitration in Orange County, California. Should either party need to compel arbitration or enter judgment, the only court vested with jurisdiction pursuant to the insurance contract is the Central District of California federal court.

Along these lines, for an example, when a massage therapist in New York is sued by a patient and improperly denied coverage by APIC, their only remedy is a distant arbitration in Orange County California. In the event coverage is denied, the

[1] http://www.apicinsuranc.com/company

insured is further forced to come up with adequate attorney fees to finance the distant legal challenge if resources exist.[2] Regardless of the residency of the insured, California law shall apply to address any disputes in an expensive AAA arbitration. Court access is not an option under the policies issued by APIC.

This case concerns whether the individual States, like Washington, possess authority to pass laws, to prevent this result, in which arbitration clauses in insurance contracts are prohibited against a Risk Retention Group (RRG) chartered elsewhere. Washington legislature passed RCW 48.18.200 to specifically stop insurers from inserting binding arbitration clauses into insurance contracts in attempt to confiscate jurisdiction from Washington State courts.

The statute demonstrates Washington's strong public policy desire to ensure Washington courts can protect policyholders from potential bad faith acts of insurers. The law applies equally to every insurance company issuing insurance contracts in Washington. This includes risk retention groups regardless of domicile. Specifically, RCW 48.18.200 provides in relevant part:

> "(1) No insurance contract delivered or issued for delivery in this state and covering subject located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement
>
> (a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or

[2] Alternate health care providers are not the most lucrative professions (as compared to traditional medical providers such as an MD or DO). APIC's coverage is more 'affordable' and therefore attractive to students or young professionals starting careers with less resources. Dr. Anglesey paid less than $500/yr for a malpractice policy.

> (b) depriving the courts of this state of the jurisdiction of action against the insurer; or
>
> (c) …
>
> (2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract." (Appx. 67) (Emphasis added).

In January 2013, the Washington State Supreme Court examined the statute and found the phrase 'jurisdiction of action against the insurer' undeniably "demonstrates the legislature's intent to protect the right of the policyholders to bring an original action against the insurer in the courts of this state." *State Department of Transportation v James River Ins., Co*., 176 Wn.2d 390, 397 (2013). Specifically, the Court concluded that binding arbitration agreements deprived health care provider insureds of the "judicial remedies" intended in the regulation because they prevented the provider insureds from commencing "an action to litigate the dispute." *James River*, 176 Wn.2d at 399 (citing *Kruger Clinic Orthopedics, LLC v Regence BlueShield*, 157 Wn.2d 290, 305, 138 P.3d 936 (2006).

The Washington State Supreme Court also determined, as against the Federal Arbitration Act (FAA), the state statute regulates "the business of insurance" under the meaning of the McCarran-Ferguson Act 15 U.S.C. §1012(b) and therefore 'reverse preempts' the FAA, shielding the statute from invalidation. *James River*, 176 Wn.2d at 401. In reaching this decision, the Washington Court followed a rule articulated by U.S. Supreme Court, that a statute, "aimed at protecting or regulating" the performance of an insurance contract … is a law "enacted for the purpose of regulating the business of insurance," within the meaning of the first clause of 2(b)."

U.S. Dep't of Treasury v Fabe, 508 U.S. 491, 505, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

Accordingly, the Washington Court of Last Resort resolved RCW 48.18.200(1)(b) regulates the "business of insurance" because the statute is in fact aimed at protecting the performance of an insurance contract by ensuring the right of the policyholder to bring an action in states court to enforce the contract. *James River*, 176 Wn.2d at 402. Applying the Washington rule, would directly protect the promises that insurance carriers make to their insureds in their subscriber agreements. *James River*, 176 Wn.2d at 401. This Petition for Certiorari endeavors to protect promise too. Notably, the Washington Highest Court's decision in *James River* was unanimous.

The underlying malpractice event occurred in the instant case shortly before the *James River*, decision came down. At the time, Petitioner Anglesey was a young chiropractor practicing in Washington. Petitioner Gutierrez had just completed military service and was attending school under the GI Bill in Southeastern Washington. Unfortunately, Mr. Gutierrez suffered a significant bilateral vertebral artery dissection during treatment by Dr. Anglesey. At age 33, he was left with permanent vision loss, extensive neurological damage, and unable to work or continue schooling as a result of the ischemic stroke. Thereafter, Mrs. Gutierrez sought an investigation of the event by the Department of Health.

As Dr. Anglesey learned he was being investigated in connection with Mr. Gutierrez' treatment, he notified and requested assistance from APIC. Instead, APIC

advised Dr. Anglesey that 'board investigations' were not covered. Remarkably and armed with knowledge of a significant future claim, APIC fabricated reasons to 'terminate' and 'rescind' both Dr. Anglesey's 2012 and 2013 insurance policies ensuring no coverage would exist during the stroke event. Premium payments were returned. Eventually, the Department of Health investigation was closed without findings of misconduct due to insufficient evidence.

One year later, the Gutierrez retained counsel and contacted Dr. Anglesey to inquire of his professional insurance carrier. In response, Dr. Anglesey retained independent counsel to inform Gutierrez there was no coverage. The two Washington attorneys agreed APIC's actions were designed to unreasonably deny a claim for coverage and/or its escape its fiduciary duty to defend. Consequently, counsel for Dr. Anglesey urged APIC to change positions given an insurer's duties to its insured under Washington law.[3] See Appx. 68-72.

In response, APIC filed suit in Central District of California federal court seeking to compel arbitration in Orange County California pursuant to the policy. APIC thereafter claimed 'first filed' status to gain favor and deference to California in each courtroom. Petitioners opted to voluntarily dismiss the state suit. Later however, they would agree to a consent judgment, covenant not to execute, and an assignment for clams against APIC. The agreement was approved by the Superior Court per Washington law to ensure no collusion between the parties.

[3] RCW 48.30.015 allows a cause of action for a claimant to an insurance policy who is unreasonably denied a claim for coverage or payment of benefits. Further violations are defined Washington Administrative Code which include specific unfair claims settlement practices defined; failure to acknowledge pertinent communications; and standards for prompt investigations.

Initially, APIC's California federal action was dismissed for lack of standing but it was remanded back from the Ninth Circuit. In the interim, Petitioners filed action against APIC in the Eastern District of Washington federal court. Appx. 43-53. Petitioner's asserted Washington claims including the tort of insurance bad faith, violation of the Washington Consumer Protection Act, and violation of the Insurance Fair Conduct Act. *Id*.

The Washington District Court stayed the Washington action given California was the 'first filed' suit which would allow the California court exclusive opportunity to determine all legal issues. Appx. 41. On remand, however Petitioner's Washington claims would never be recognized in California due to the choice of law agreed to in the policy. Appx. 32-33. California found California law to apply as a matter of law given the policy provisions. Likewise, the policy's venue provision caused the California court reason to deny Petitioner's motion to transfer venue to Washington for purposes of applying/interpreting Washington state law. In granting APIC's motion to compel arbitration, the California District Court ruled Petitioners were "bound by the insurance policy's arbitration clause". Appx. 25. The California District Court, however, did appreciate that the order involved a controlling question of law i.e., whether the LRRA preempts RCW 48.18.200(1) as applied to risk retention groups as to which there is a substantial ground for difference of opinion. Thus, the certified question was advanced to the Ninth Circuit for determination of whether the Washington law should yield.

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the Ninth Circuit has questionably decided an issue of significant impact concerning the State's authority to enact law concerning the business of insurance. The ruling is in direct conflict with the Washington State Supreme Court as well as the Seventh and Eleventh Circuits. Additionally, the McCarren-Ferguson's application on this topic and various interpretations of the LRRA's exemptions have caused several state courts around the nation to render polarizing conclusions involving state law which is ultimately enacted to protect insurance policyholders. Indeed, both the States and Circuits require this Court's guidance for conformity in properly interpreting exemptions Congress intended under the LRRA.

1. Federal Preemption and McCarran-Ferguson Act

The McCarran-Ferguson Act was enacted in response to this Court's decision in *United States v South-Eastern Underwriters Assn*., 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to that decision, it had been assumed that the issuance of a policy of insurance was not a transaction of commerce, subject to federal regulation. As such, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v Barry*, 438 U.S. 531, 539, 98 S.Ct. 2923, 2928, 57 L.Ed.2d 932 (1978). In *South-Eastern Underwriters,* infra, this Court famously held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws were applicable to them. The result

was immediately viewed as a threat to state power to tax and regulate the insurance industry. *Id.*

To allay such fears, Congress quickly moved to restore the supremacy of the States in the realm of insurance regulation. *U.S. Dept. of Treasury v Fabe*, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). The McCarran-Ferguson Act was the product of this concern. *Id.* Its purpose was stated quite clearly in the first section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' 59 Stat. 33 (1945), 14 U.S.C.§ 1011. As this Court said shortly afterward, 'Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' *Prudential Insurance Co., v Benjamin*, 328 U.S. 408, 429, 66 S.Ct. 1142, 1154, 90 L.Ed. 1342 (1946). Congress achieved this purpose in two ways. The first "was by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in the future legislation." *Id.*, at 429-430, 66 S.Ct., at 1154-1155. The second "was by declaring expressly and affirmatively that continued state regulation and taxation of this business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.*, at 430, 66 S.Ct, at 1155. Accordingly, the Act provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance….

15 U.S.C. §1012(a), (b). Indeed, Congress passed the McCarran-Ferguson Act to ensure that the states can regulate the business of insurance 'free from the inadvertent preemption by the federal statutes of general applicability. *Autry v Northwest Premium Services*, 144 F.3d 1037, 1040 (7th Cir.1998).

A. Congress has Long Preserved the "Business of Insurance" for the States

In *Securities and Exchange Comm'n v National Sec.*, 393 U.S. 453, 89 S.Ct 564, 21 L.Ed.2d 668 (1969), this Court construed the term "business of insurance" under the McCarran-Ferguson Act. The Court emphasized that it is the relationship between the insurer and the insured that should be the focus in determining what constitutes the "business of insurance," stating:

> But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws governing the "business of insurance.*" Id.* at 460, 89 S.Ct. 564 (emphasis added).

Similarly, in *United States Dep't of Treasury v Fabe*, 509 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), this Court held that an Ohio priority statute was saved from preemption by the McCarran-Ferguson Act as a state statute enacted "for the purpose of regulating the business of insurance" because, significantly, its purpose was to protect policyholders. *Id.* at 2212. This Court gave a broad reading to this

phrase, stating that any law with the "end, intention, or aim of adjusting, managing, or controlling the business of insurance" is a law "enacted for the purpose of regulating the business of insurance" for purposes of the McCarran-Ferguson Act. Id.

B. The FAA vs. the McCarran-Ferguson Act

The Federal Arbitration Act (FAA) provides the general rule:

> A written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. Under this federal rule, arbitration provisions in contracts involving commerce will be enforced and generally preempt state law to the contrary. *Volt Info. Sciences, Inc. v Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989). In the certain circumstances, however, the McCarran-Ferguson Act provides an exception to the general rule of arbitration under the FAA. If the state has an anti-arbitration law enacted for the purpose of regulating the business of insurance, and if enforcing, pursuant to the FAA, an arbitration clause would invalidate, impair, or supersede that state law, a court should refuse to enforce the arbitration clause. *Standard Sec. Life Ins. Co. of New York v West*, 267 F.3d 821, 823 (8th Cir.2001) (stating and applying this exception). As provided in *Department of Transportation v James River Ins., Co.*,

176 Wn.2d 390, 397 (2013), the McCarran-Ferguson Act operates to reverse preempt any arguments of the FAA's application.

Based on authority derived from this Court, both federal and state courts have held that state statutes that invalidate arbitration clauses specifically as to insurance contracts are indeed "enacted for the purpose of regulating the business of insurance" and thus, not preempted by the FAA by virtue of the McCarran-Ferguson Act. See *Standard Security Life Ins. Co. v West*, 267 F.3d 821, 823-24 (8th Cir.2001) (holding that FAA was reverse-preempted under McCarran-Ferguson Act by provision of Missouri Arbitration Act prohibiting arbitration clauses in insurance contracts); *Stephens v American Int'l Ins. Co.*, 66 F.3d 41, 45-45 (2nd Cir.1995) (holding that anti-arbitration provision of Kentucky Liquidation Act was exempt from preemption by FAA under McCarran-Ferguson Act); *Mutual Reinsurance Bureau v Great Plains Mutual Ins. Co., Inc.,* 969 F.2d 931, 934-35 (10th Cir.) (holding that Kansas statute providing that written agreement to arbitrate is invalid if contained in contract for insurance was enacted for purpose of regulating business of insurance and thus McCarran-Ferguson Act precluded application of FAA), *cert denied*, 506 U.S. 1001, 113 S.Ct. 604, 121 L.Ed.2d 540 (1992); *Friday v Trinity Universal of Kansas*, 262 Kan. 347, 939 P.2d 869, 872-73 (1997) (holding that McCarran-Ferguson Act prevented FAA from preempting Kansas statute invalidating arbitration clauses in insurance contracts; homeowners could not be compelled to arbitrate dispute with insurer).

The statutes at issue in the Eighth and Tenth Circuit cases cited above provide a general rule of enforceability as to arbitration agreements but specifically exclude

insurance contracts from their scope. In Washington, RCW 48.18.200 is contained within the insurance code[4] to specifically protect policy holders by providing a cause of action against insurers[5]. Thus, the rationale employed by the Eighth and Tenth Circuits applies equally here: the Washington legislature has enacted a statute that is directed at the relationship between the insurer and the insured with the aim of protecting policyholders from mandatory arbitration agreements reached in the context of an adhesion contract or that of an unequal bargaining power.

Of course, as courts have noted, "if there is a doubt regarding whether Congress intended to preempt a particular state insurance law, there is a presumption against preemption." *Ophthalmic Mutual Ins. Co., v Musser*, 143 F.3d 1062 (7th Cir.1998). Such is the lens by which courts begin to evaluate preemption. The next step in this analysis is interpretation of the LRRA.

2. <u>Federal Preemption and the Liability Risk Retention Act</u>

The Products Liability Risk Retention Act (PLLRA) was enacted by Congress in 1981 to encourage the formation of risk retention groups, because of the lack of product liability insurance at affordable rates. *Mears Transp. Group v State*, 34 F.3d 1013, 1016 (11th Cir.1994), cert denied, 514 U.S. 1109, 115 S.Ct. 1960, 131 L.Ed.2d 852 (1995). The PLRRA sought to "reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis at more favorable rates or to self-insure through insurance cooperatives

[4] Title 48 RCW constitutes the insurance code. RCW 48.01.010.
[5] All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code. RCW 48.01.020.

called risk retention groups." H.R.Rep. No. 190 at 4 (1981), reprinting in 1981 U.S.C.C.A.N. 1432. The Act as adopted permitted manufacturers to pool their resources into risk retention groups to provide those members of the group with coverage. *Ophthalmic Mut. Inc. Co. v Musser*, 143 F.3d 1062, 1064 (7th Cir.1998). The Act preempted certain state laws and regulations that tended to inhibit a nationwide distribution of liability insurance for this type of coverage. *Id.*

In 1986, Congress enacted the Liability Risk Retention Act (LRRA) to broaden the PLLRA and allowed professional groups, including health care providers, to form risk retention groups. *Id.* Under the LRRA, Congress was effectively attempting to preclude most state regulation of risk retention groups. The LRRA provides:

> (a) Except as provided int his 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 [excepting regulation by the State in which the risk retention group is chartered and certain limited regulation by non-domiciliary states];
> >
> > (4) 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 States laws generally applicable to persons or corporations.

15 U.S.C. 3902(a)(1), (4). (Appx. 59).

For an RRG to operate under federal law, the law requires that the group must be domiciled in at least one state and be subject to that state's insurance regulatory laws, including adequate rules and regulations allowing for complete financial examination of all books and records, including but not limited to proof of solvency. 15 U.S.C. §3901(a)(4)(C), (Appx. 59). Indeed, Congress placed primary responsibility

for regulating the formation and operation of risk retention groups on the State in which the risk retention group is chartered. Yet while the Act precludes most non-domiciled regulation risk retention groups, it allows for a limited number of exceptions to the preemption rule. See 15 U.S.C. §3902(a)(1)(A)-(I), (b), (f) (Appx.59-62). Thus, the preemptive effect of the LRRA is not unlimited.

All preemption analysis commences with a determination of the Congressional intent in enacting the legislation. *DeHart v Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir.1994). Courts look to the very language used by Congress and assume that the ordinary meaning of the language used by Congress and assume that the ordinary meaning of the language accurately reflects the legislative purpose. *Id.* Where Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose, preemption is compelled. See, e.g. *Time Warner Cable v Doyle*, 66 F.3d 867, 875 (7th Cir.1995).

However, courts do not lightly attribute to Congress or to a federal agency the intent to preempt state or local laws. See *DeHart*, 39 F.2d at 22. In fact, in fields traditionally occupied by the states, like insurance, courts start with the presumption that the historic police powers of the states were not to be superseded by federal law unless Congress has enacted legislation enunciating that preemption was the "clear and manifest" purpose of Congress. *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct.1146, 1152, 91 L.Ed. 1447 (1947). Coupled with wisdom from this Court, "state laws enacted for purposes of regulating the business of insurance do not yield to conflicting federal statutes unless federal statutes specifically provide otherwise"

courts should carefully examine the LRRA. *U.S. Dep't of Treasury v Fabe*, 508 U.S 491, 507, 113 S.Ct. 2202, 2211, 124 L.Ed2d 449 (1993).

A. LRRA Preemptive Provisions

Specifically, in the first section of the LRRA, "definitions", 15 U.S.C. §3901(b) reminds us:

> "Nothing in this chapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State…." 15 U.S.C. §3902(b).

The provision appears to expressly authorize States to enforce the insurance contract utilizing its tort and insurance contract interpretation laws. Should all RRGs have binding arbitration provisions in the policy, the only way a State could ensure enforcement of this provision is to enact a law like Washington's which prohibits arbitrations in effort to keep jurisdiction in its borders. Allowing an RRG to confiscate jurisdiction by an arbitration clause effectively thwarts the state's ability to protect its resident insureds. Case in point is the instant case, in which Washington was given no opportunity make a ruling by a Washington court of law nor under the contract/tort laws of Washington. The result is guaranteed to repeat since the Ninth Circuit unilaterally determined the Washington statue preempted under a broad interpretation of the LRRA.

The LRRA provisions in which preemption is explicitly found is in 15 U.S.C. §3902(a)(1) and (a)(4). Namely, §3902(a)(1) prevents states from unlawfully regulating RRGs (directly or indirectly); §3902(a)(4) prevents states from discriminating against RRGs "except as otherwise provided in this section." Yet

these exemptions must be understood in proper context and with an eye toward the reservation principles articulated in the McCarran-Ferguson Act. Namely, 15 U.S.C. §3902(a)(1) provides in relevant part:

> (a) 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 (excepting formation and operation regulation by the state in which the group is chartered) and any State may require such a group to - -
>
> A. Comply with the unfair claims settlement practices law of the state;
>
> …
>
> G. Comply with any state law regarding deceptive, false, or fraudulent acts or practices… (Appx. 59-60) (emphasis added).

Additionally, in 15 U.S.C.A. §3902 (f)(1), Congress expressly added, "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 exempt under this chapter." (Appx. 62). Indeed, this language suggests the States may enact laws like Washington's.

B. Congressional Insight

Congress was aware of the significance of its language and mounting federalism concerns when crafting amendments to the Act. To this end, it was stated:

> "An important issue in construing the Act, 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.'* As an insurance company operating under this Act, a risk retention group could engage in a range of activities, but the Committee wished to be clear that the *scope of the exemption is defined by the laws governing the issuance business*. It would not extend, for example, to the laws of nonchartering states which establish regulatory regimes for businesses and industries *other than insurance*."

H.R. REP. 99-865, 14-15, 1986 U.S.C.C.A.N. 5303, 5311-12 (emphasis added). As expected, the comments are consistent with the purpose and objectives set forth in the McCarran-Ferguson Act.

Further important comments concerning the LRRA amendments and the States retention of consumer protection authority include as follows:

> It is necessary here to clarify how the new Subparagraph 3(a)(1)(G) fits into the structure of State and Federal laws dealing with consumer protection and antitrust. Most State insurance codes contain provisions administered by the State insurance commissioner regulating what are called 'trade practices.' Typically, these provisions prohibit 'unfair methods of competition and unfair and deceptive acts or practices' in the insurance industry. *Subparagraph 3(a)(1)(G) preserves the authority of the nonchartering States to require compliance with the portions of the insurance trade practices acts dealing with deceptive, false, or fraudulent acts or practices…in addition to insurance trade practices laws, the States have general consumer and antitrust laws, including so-called 'little FTC' and 'little Sherman acts,' applicable to all persons and corporations*. The authority of all States to apply those laws to risk retention groups is preserved under Section 3(a)(4) of the Act which provides that the exemptions created in Section 3 do not 'affect the applicability of State laws generally applicable to persons or corporations.' (Other examples of 'generally applicable' laws would be civil rights and general criminal laws.) It should be noted that chartering States retain all of their authority to deal with commercial abuses. Additionally, the Federal Trade Commission retains such jurisdiction as it may have under the McCarran-Ferguson Act.

H.R. REP. 99-865, 15-16, 1986 U.S.C.C.A.N. 5303, 5312-13 (emphasis added). Such powerful comments do not result in 'sweeping' and 'broad' LRRA preemption favoring RRGs as determined by the Ninth Circuit. Instead, courts should attempt to interpret the LRRA considering Congress's purpose expressed in the McCarran-Ferguson Act. "When two statutes are capable of co-existence … it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct.2322, 132 L.Ed. 2d 462 (1995) (quoting *Morton v Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 2d 290 (1974). Thus, when two federal statutes, each with its own scope and purpose and imposing different requirements and protections, complement each other, "it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v Coca-Cola Co*., 573 U.S. 102, 115, 134 S.Ct. 2228, 189 L.Ed. 2d 141 (2014).

3. <u>There is a Split in Authority between Circuits Which Requires This Court's Attention and Definitive Resolution</u>

A. The Ninth and Second Circuit Observe the LRRA's 'Broad and Sweeping' Preemption and Take Exception to Involving the McCarran-Ferguson Act.

The Ninth Circuit opinion below rejected the Petitioner's understanding of the LRRA as "mistaken" because the statute's preemption provision was considered "broadly worded" lending the LRRA an interpretation which included "broad preemptive effect". See Appx 8. This "broad effect" of the LRRA compelled the Ninth Circuit to opine the term "operation" be "read generously". *Id*. The Circuit's earlier

precedent involved an Alaska statute which prohibited insurance providers from seeking reimbursement of fees incurred in defending a non-covered claim. *Attorney's Liability. Protection Society Inc. v Fitzgerald*, 838 F.3d 976, 980 (9th Cir.2016). With a generous reading of the term, the Circuit Court concluded the law regulated the "operation" of a foreign risk retention group such that the policy provision allowing reimbursement was enforced and the state law invalidated. See *Attorneys Liab. Prot. Soc'y, Inc.*, 838 F.3d at 980. The Court held the Alaska statute placed a restriction on Alaska contracts that is not permitted by the LRRA. *Id.* Therefore the law was found to have regulated the RRG's operations in conflict with the LRRA. *Id.* Similarly, the Circuit Court concluded the Washington law prohibiting arbitration clauses in insurance contracts constituted a statute which "regulate[s], directly or indirectly, the operation of a risk retention group." 15 U.S.C. § 3902(a)(1), See Appx. 9.

The Ninth Circuit was further persuaded by the RRG that Petitioner's reading of the LRRA would jeopardize the purpose of the statute and thwart the interstate operation of RRGs. *Id.* In other words, "[a]llowing a state such as Washington to force foreign risk retention groups to alter their contracts would threaten this goal." *Id.* As a result, the Ninth Circuit held that Washington law prohibiting arbitration clauses in insurance contracts "offends the LRRA's broad preemption language" and may only be saved if an exception in 15 U.S.C. §3902(a)(1) or 3905 applies. See Appx 9.

The Circuit went on to reiterate that such exceptions generally "authorize nonchartering states to require risk retention groups to comply only with certain basic registration, capitalization, and taxing requirements, as well as various claims

settlement and fraudulent practice laws. See Appx 11; see also *Wadsworth v APIC*, 748 F.3d 100, 106 (2nd Cir.2014). The Circuit dismissed Petitioner's contention that the Washington law in operation, was necessary to achieve the result identified in two exceptions which require RRGs to 'comply with the unfair claim settlement practices of the state' and/or 'regarding deceptive, false, or fraudulent acts or practices' designated by the state. See Appx.11; 15 U.S.C. §3902(a)(1)(A)&(G). Without enforcement of such anti-arbitration law, Washington could not practically ensure fair consequence should an RRG fail to comply. *Id*. Regardless, the Ninth Circuit held Washington's anti-arbitration statute for insurance contracts offends the LRRA and warranted preemption.

In part, the Ninth cited and relied upon Second Circuit precedent set forth in *Wadsworth v Allied Professionals Insurance Co*. 748 F.3d 100 (2nd Cir.2014). Notably, the Second Circuit case involved the same Respondent insurer as the instant case, APIC. As indicated in the introductory example, the *Wadsworth* case involved a New York resident tort victim who was inappropriately sexually touched by a chiropractor without her consent. *Id*. The chiropractor pled guilty to third-degree assault. *Id*. The tort victim filed civil charges against the chiropractor and received a judgment for $101,175 *Id*. Invoking New York Ins. Law §3420, the tort victim sued APIC (chiropractor's insurer), registered in New York as a federal risk retention group, domiciled in Arizona, with over 4,000 insureds in New York including chiropractors, acupuncturists, and massage therapists. *Id*.

APIC removed the case to United States District Court for New York and moved for summary judgment. *Id.* The District Court granted APIC's motion concluding that New York law would impose §3420's direct action requirement on foreign risk retention groups and such result was preempted by the LRRA. *Wadsworth,* 748 F.3d at 104. The tort victim, Wadsworth, notably relied on non-binding decisions which ruled the LRRA did not preempt state law in question. *Wadsworth,* 748 F.3d at 109. The Second Circuit confidently declared, "[i]nsofar as those decisions relied on an interpretation of the LRRA that differs from ours, we disagree." *Id.* Instead, it found the "LRRA is, without question, a federal statute that specifically relates to the business of insurance" and therefore the McCarran-Ferguson Act does not save §3420(a)(2) from the LRRA's preemptive sweep." *Id.*

B. The Seventh and Eleventh Circuit Observe the States' Augmented Authority Under the LRRA

In the Seventh Circuit's decision of *Ophthalmic Mut. Ins. Co. v Musser*, 143 F.3d 1062 (7th Cir.1998), an RRG sued the Wisconsin Insurance Commissioner seeking to declare §655.23 Wis. Stats., was preempted by the LRRA. The Circuit court started with the concept that "[i]nsurance is one of those areas which Congress has for the most part steered clear of and traditionally left to be controlled by the states as explicitly clear with the McCarran-Ferguson Act. *Ophthalmic Mut. Inc.*, 143 F.3d at 1066. In accordance with policy directives Congress elucidated in the McCarran-Ferguson Act, if there is a doubt regarding whether Congress intended to preempt a state insurance law, there is a presumption against preemption. *Ophthalmic Mut. Ins.*, 143 F.3d 1062, 1067 (1998). The Circuit Court acknowledged "the Act's

legislative history … notes that preemption of state laws that inhibit the formation and continued operation of risk retention groups is 'central' to the Risk Retention Act's objective of facilitating the development of risk retention groups" however, the "preemptive effects of the LRRA are not unlimited." *Id*. Along these lines, "[t]o ensure that the 1986 amendments did not drastically alter the states' traditional role in regulating insurance, Congress sought to "augment[ ] the authority of nonchartering states to regulate solvency, trade practices and other matters" and "contemplated that States may enact statutes and issue regulations to protect the public to the extent such action is not exempt by th[e] Act." *Id*. (citing H.R.Rep. No. 865 at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304, 5315). Ultimately, the Seventh Circuit held the Wisconsin legislature's enactment of §655.23, Wis. Stats., is in accord with Congressional intent in formulating §3905(d). Thus, the exception to the preemption provisions in the LRRA based upon the clear and unambiguous language of the statue, the statute's legislative history, and the longstanding presumption against preemption of insurance statutes. *Id*.

The Eleventh Circuit in *Mears Transportation Group* similarly involved a Florida state law that the Court found to be "aimed at protecting the public" and not at discriminating against risk retention groups; as such, "it is exactly the type of statute that Congress had in mind when it added subsection 3905(d)" to the LRRA. *Mears,* 34 F.3d 1013, 1019 (11th Cir.1994). The Circuit Court stated that "Congress intended to grant to the states the authority to regulate certain businesses affected within the public interest." *Id*. Hence, the Eleventh Circuit concluded Georgia's anti-

arbitration clauses in insurance contracts statute at Ga.Code. Ann. 9-9-2(c) to be one that affects the relationship between insurer and insured. See *McKnight v Chicago Title Ins. Co.,* 358 F.3d 854, 858 (11th Cir.2004). Like the Washington Court in *James River*, infra, the Eleventh Circuit found Georgia, speaking through one of its courts, has itself characterized §9-9-2(c) as a law enacted to regulate the business of insurance. *Id*. Thus, the McCarran- Ferguson Act excepted §9-9-2(c) from preemption under the FAA.

C. A District Court within the Eight Circuit Boldly Ruled the LRRA did not exempt an RRG from complying with the Kentucky Anti-Arbitration statutory provision in insurance contracts.

For good reason, the Second Circuit direct action case of *Wadsworth*, supra, had to distinguish authority set forth in *National Home Ins. Co., v King*, 291 F.Supp.2d 518 (2003) as it did not conveniently find a 'sweeping preemption' effect of the LRRA. *National Home* is significant as it involved a substantially similar law to Washington's. The Kentucky anti-arbitration provision in insurance contracts found at KRS 417.050, was challenged against the LRRA and the district court validated the state law, reasoning:

> "Consistent with the protection afforded risk retention groups under this Act, the Kentucky statutes regulating risk retention groups exempt such groups from various requirements related to their formation and operation that would otherwise apply to insurance companies. See generally KRS 304.45-010 to 304.45-150…
>
> As noted, Congress enacted the LRRA to remove barriers to the 'formation and operation' of risk retention groups, which otherwise might be illegal under state law. *Kentucky, like other states, has*

> *complied with its obligation under the Act by expressly exempting risk retention groups such as NHIC from regulatory requirements otherwise imposed on insurance companies. Prohibiting the enforcement of an arbitration clause does not "make unlawful" the formation or operation of such a risk retention group*.
>
> Moreover, *application of KRS 417.050(2) to NHIC does not offend the non-discriminating principle underlying the LRRA*. To the contrary, requiring NHIC to abide by this statute puts it on equal footing with all other insurers in Kentucky who are prohibited from enforcing arbitration clauses in agreements with their insureds."

National Homes Ins. Co. v King, 291 F.Supp.2d 518, 531 (2003) (emphasis added).

4. A Significant Divisions Exist in the State Courts as to Whether State Law Prohibiting Binding Arbitration Clauses in Insurance Contracts is a Match for the LRRA Exceptions

Another case involving respondent APIC, which didn't fare so well for the RRG is *Sturgeon v APIC*, 344 S.W.3d 205 (2011). In this case, a licensed massage therapist and resident of Missouri was sued when her massage table collapsed on a patient and severe injury resulted. *Id*. Not surprisingly but like the Washington case at issue, APIC denied coverage and refused to defend the massage therapist. *Id*. Consequently, the massage therapist hired her own counsel and resolved the injury suit by dismissal. *Id*. Later the massage therapist sued APIC for breach of contract and failure to defend. *Id*. The ever consistent APIC motioned to compel arbitration per the insurance policy to Orange County, California. *Id*.

APIC argued the FAA applied to preempt state law additionally Missouri's state law could be set aside since the policy had a California choice of law provision. *Sturgeon*, 344 S.E.3d at 209. Lastly, APIC would assert the LRRA preempts the state

anti-arbitration law as a law 'directly or indirectly regulating their operation' as an RRG. *Id.* Intelligently, the Missouri appellate court immediately found "the application of California law would allow the arbitration clause in an insurance policy to be enforced" however, "[s]uch a result would be contrary to Missouri public policy, because Section 435.350 of the Missouri Arbitration Act prohibits mandatory arbitration provision in insurance contracts." *Sturgeon*, 344 S.E.3d at 210. Thus, the California choice of law provision was void and unenforceable. Missouri law would apply to the case. *Id.*

Although not dispositive, the Sturgeon court conducted a 'conflict of law analysis' to bolster its opinion. *Id.* at 211. Section 188 of the Restatement employed the most significant relationship test, accordingly:

> Section 188(2) identifies five potentially significant contacts to be considered in a contract case when determining which state has the most significant relationship to the transaction and parties: (a) the place of contracting, (b) the place of negotiating of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.*[6]

Most importantly, in an action between parties to an insurance contract, the principal location of the insured risk is given greater weight than any other single contract in determining the state of applicable law. Restatement (Second) of Conflict of Laws Section 193. When applying these factors, the *Sturgeon* court easily concluded, Missouri had the most significant relationship to the insurance contract

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[6] citing *Armstrong Business Services, Inc. v H&R Block*, 96 S.W.3d 867, 872 (Mo.App. W.D.2002); *Am. Country Co. v Palumbo*, 25 S.W.3d 484, 487(Mo.App.E.D.2000).

as APIC was domiciled in Arizona, conducted business in California, but all communications relating to the contract's formation occurred in Missouri. *Sturgeon*, 344 S.E.3d at 211.

The court further noted that common sense suggests Section 435.350 regulates the 'business of insurance' because it exempts insurance contracts. *Id* at 214. The law was also an integral part of the policy relationship between the insurance company and the insured because it addresses the forum where all disputes concerning the public policy will be resolved. See *Standard Sec. Life Ins. Co.*, 127 F. Supp.2d at 1068. Where and by a contractual dispute is resolved may have an effect on the substantive outcome of the litigation. *Id.* see also generally *Erie Railroad v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). "The fact that Section 435.350 addresses an arguably procedural aspect of the relationship between the insured and the insurer does not prevent it from being an integral part of their relationship." *Standard Sec. Life Ins Co.*, 127 F.Supp.2d at 1068. This Court has held that a state law regulates the business of insurance even though it addresses only the administration of an insurance policy, and not its substantive terms. See *UNUM Life Ins. Co. of America v Ward*, 526 U.S. 358, 374-75, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999). Thus, the McCarran-Ferguson Act would preempt the FAA in *Sturgeon*, infra.

In regards to LRRA preemption, the *Sturgeon* court relied on this Court's instruction as "[t]he core of the business of insurance includes the insurer-insured relationship and the interpretation and enforcement of the insurance policy" set forth in *US Dep't of Treasury* v *Fabe*, 508 U.S. 491, 501, 113 S.Ct. 2202, 124 L.Ed.2d 449

(1993). Missouri's Section 435.350, which is in fact an arbitration statute, applies to the processing of disputed insurance claims in the insurance industry as a whole. *Sturgeon*, 344 S.W.3d at 216. Thus, APIC cannot complain when its being treated like every other insurance group in Missouri, e.g. subject to Missouri's prohibition against arbitration clauses in insurance contracts. *Id*. Indeed, the state law had nothing to do with APIC's status as an RRG. In the end, the court reasoned Missouri has decided along with many other states[7] that mandatory arbitration clauses in *any* insurance contract are void and against public policy. *Sturgeon*, 344 S.W.3d at 216.

Similarly, a Louisiana appellate court declined to follow its sister division in *Courville v Allied Professionals Ins. Co*., 174 So.3d 659, 673 (La.App. 1 Cir. 6/5/15) (another case involving Respondent APIC) which adopted an expansive and overly broad interpretation of the LRRA as set forth in *Wadsworth v APIC*, 748 F.3d 100 (2nd Cir.2014). See *Zeigler v Housing Authority*, 192 So.3d 175, 179 (La.App. 4 Cir. 3/23/16). In *Zeigler*, an RRG claimed the Louisiana Direct Action Statute regulates the operations of RRG and therefore it should be exempt from that particular state law. *Id*. The rationale was consistent with *Courville*, infra, but expressly rejected *in Zeigler*. *Id*. The *Zeigler* court declined to follow the 1st Circuit because it found the Louisiana direct action statute did not 'directly or indirectly regulate the operations of the RRG. Instead, *Zeigler* agreed with the reasoning set forth in *Sturgeon*, 344 S.W.3d 205 (Mo.App.2011) and *Nat'l Homes v King*, 291 F.Supp.2d 518 (E.D.Ky.2003). Thus, state courts also require proper guidance only this honorable

[7] Kentucky (KRS 417.050(2); Georgia (OCGA §9-9-2(c)); Kansas (KSA §5-401; Washington RCW 48.18.200

court can provide to put an end toward inconsistent results nationwide. Without this Court's assistance, the lack of conformity in precedent is a significant problem that is likely only to grow with time.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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