No. 20-166

In The
Supreme Court of the United States

MICHAEL SCOTT ANGLESEY; ELISEO GUTIERREZ; VERONICA GUTIERREZ,

Petitioners,

ALLIED PROFESSIONALS INSURANCE COMPANY, A RISK RETENTION GROUP, An Arizona Corporation,

Respondent.

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

MOTION FOR LEAVE TO FILE AND *AMICUS CURIAE* BRIEF OF THE NATIONAL RISK RETENTION ASSOCIATION IN SUPPORT OF RESPONDENT ALLIED PROFESSIONALS INSURANCE COMPANY, A RISK RETENTION GROUP

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NATIONAL RISK RETENTION ASSOCIATION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT, APIC, REGARDING FEDERAL LAW PREEMPTION OF STATE STATUTE PROHIBITING ARBITRATION CLAUSE IN RISK RETENTION GROUP CONTRACT OF INSURANCE

Pursuant to Supreme Court Rules 21 and 37.2, *amicus curiae*, the National Risk Retention Association (NRRA) respectfully moves the Court to grant it leave to file the attached *amicus curiae* brief in support of Respondent Allied Professionals Insurance Company, RRG (APIC) in its contentions that the federal Liability Risk Retention Act (LRRA) preempts Washington state law prohibiting an arbitration clause in its RRG insurance contract. In support of this motion, NRRA states:

MOVANT'S INTEREST

NRRA is a §501(c)(6) non-profit and non-partisan trade association that is dedicated to the development, education and promotion of U.S.-domiciled alternatives to traditional liability insurance, and specifically risk retention groups and purchasing groups which are enabled pursuant to 15 U.S.C. §§3901 et seq., i.e., the "*Liability Risk Retention Act*" (LRRA) adopted by the congress in 1986.

NRRA represents risk retention groups (RRGs) and advocates the interests of its members before

legislative bodies, regulatory and executive agencies, and the courts. There are 220-plus RRGs currently in operation and doing business in all 50 of the United States. Approximately 98 of those RRGs are offering liability insurance in the State of Washington with additional numbers of RRGs offering liability insurance in the other eight (8) states in the Ninth Circuit.

An RRG is a liability insurance company owned and operated by its members, and those members must be its insureds. RRGs offer commercial liability insurance for the mutual benefit of these owner-insureds, who must be exposed to similar risks and be members of the same industry. RRGs insure over 450,000 owner-members and produce approximately $3.6 billion in annual premiums nationwide.

NRRA has taken a lead role as a participant in litigation affecting its members' interests. It has appeared as either plaintiff or as *amicus curiae* in many important risk retention cases, including *Attorneys Liab. Protection Soc'y, Inc. v. Ingaldsen Fitzgerald, P.C.*, 838 F.3d 976 (9th Cir. 2016) (*amicus brief filed*); *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014) (*same*); *Alliance of Nonprofits for Ins., Risk Retention Grp. v. Kipper*, 712 F.3d 1316 (9th Cir. 2013) (*same*); *Auto Dealers Risk Retention Grp., Inc. v. Poizner*, No. 07-2660 (E.D. Cal. Mar. 7, 2008) (*same*); *Attorneys' Liab. Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp.2d 619 (W.D. Mich. 2001) (*same*); *National Risk Retention Ass'n v. Brown*, 927 F. Supp. 195 (M.D. La. 1996) (Plaintiff); *Courville v. Allied Professionals Ins. Co.*, 174 So.3d 659 (La. Ct. App. 2015), *writ denied*,

179 So.3d 615 (La. 2015) (*same*); *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75 (Neb. Sup Crt., 2014) (*same*); *Restoration Risk Retention Group, Inc. v. Gutierrez*, 880 F. 3d, 339, 2018 U.S. App. LEXIS 868, 2018 WL 388070 (7th Cir. 2018) (*same*); and *Reis, et al v. OOIDA Risk Retention Group, Inc.*, 814 S.E. 2d 338 (GA Sup. Crt., 2018) (*same*); *Allied Professionals Insurance Co, RRG v. Anglesey*, 952 F.3d 1131, 1134-1136 (9th Cir. 2020) (*same*); *Benson vs. Casa de Capri Enterprises LLC, Continuing Care Risk Retention Group, Inc.*, No. 19-16686 (*same*) (9th Circuit, pending).

REASONS FOR GRANTING LEAVE TO FILE *AMICUS* BRIEF

NRRA has a keen interest in preserving the integrity of the LRRA and the availability of affordable, quality insurance to its members-insureds. In the scheme of today's insurance world, RRGs tend to be very small entities which depend heavily on the "preemptive" effect of the LRRA in order to provide affordable liability insurance through the elimination of duplicative and often conflicting regulatory requirements of 50 different states. NRRA believes the attached brief will significantly assist this Court because the legal issues to be decided will have a 9th Circuit, not to mention, *national* industry-wide regulatory impact well beyond the one insurance policy and one state law directly involved in the instant litigation proceeding. Proper resolution of the preemption issue presented in this case is therefore of the utmost importance to NRRA and its members in preserving the

integrity of the congressional intent behind the LRRA legislation.

CONSENT OF THE PARTIES

In accordance with Supreme Court Rule 37.2(a), more than ten (10) days before filing this motion, NRRA sought the consent of the parties to file its *amicus curiae* brief. Attorneys for Respondent APIC consented in writing to the filing and attorneys for Petitioners Anglesey, et al., declined in writing to so consent.

CONCLUSION

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, not to mention the confusion it causes when the LRRA "preemption" is not consistently applied by courts. The attached proposed *amicus curiae* brief is submitted to assist the Court on the question that there exists a compelling reason for the Court to grant certiorari in this instance.

WHEREFORE, NRRA respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of Respondent APIC's Response that Washington state law is preempted by the LRRA.

DATED this 14th day of October, 2020.

Respectfully submitted by:

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I. STATEMENT OF INTEREST[1]

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 its impact, relative to "foreign" risk retention groups, defined below, and the effect of statutory insurance laws in non-domiciliary states which attempt to regulate such risk retention groups.[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 to traditional liability insurance. NRRA represents more than 220 risk retention groups (RRGs) and purchasing groups before legislative bodies, executive agencies, and courts throughout the nation.

NRRA has taken a lead role as a participant in litigation affecting its members' interests. NRRA is uniquely qualified to address the LRRA and the LRRA preemption issues raised in the Petition for a Writ of *Certiorari* herein. NRRA has appeared as either plaintiff or as *amicus curiae* in many important risk

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[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. The parties received timely notice of this filing. Respondent APIC has consented to the filing of this Brief. Petitioners Anglesey et al. have withheld consent.

[2] 15 U.S.C. §§ 3901 *et seq*.

[3] See e.g., Wash. Rev. Code § 48.18.200(1)(b).

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 Fitzgerald, P.C.*;[10] *Restoration Risk Retention Grp., Inc. v. Gutierrez;*[11] *Reis v. OOIDA Risk Retention Group, Inc.;*[12] *Allied Professionals Insurance Company, RRG v.*

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[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 (La. App. 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).

[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).

Anglesey (Anglesey);[13] and most recently, *Benson vs. Continuing Care Risk Retention Group, Inc.*[14]

II. SUMMARY OF ARGUMENT

Thirty-nine 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 unique type of insurance 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 insurance laws of the other 49 states*. Unless expressly exempted, any insurance regulations or statutes that are used to regulate the business or operations of a "foreign" RRG, operating in

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[13] *Allied Professionals Insurance Co., RRG v. Anglesey*, 952 F.3d 1131 (9th Cir. 2020).

[14] *Benson vs. Casa de Capri Enterprises LLC, Continuing Care Risk Retention Group, Inc.,* No. 19-16686 (9th Circuit, pending).

[15] 15 U.S.C. §§ 3901 et seq.

non-domiciliary state(s) are categorically preempted by the federal LRRA.

Below, NRRA reported to the 9th Circuit in its *Amicus Curiae* Brief filed in support of Respondent, the existence of ninety-eight (98) risk retention groups offering liability insurance in Washington state, along with the RRGs registered in the *other* states within the 9th Circuit, which could or would be adversely affected by an erroneous decision.[16] 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 the entire industry, not to mention 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.[17]

The within case is a prime example of an effort to use a *non-domiciliary* state statute to control a "foreign" RRG (i.e., APIC) including the use of state laws directly or indirectly to change or nullify the terms and conditions set forth in an RRG's contract of insurance,

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[16] See Respondent's Supplemental Appendix at R. Appdx. 31, 55.

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

thereby defeating Congress' stated purpose in passing the LRRA. That purpose was to reduce the cost and increase the availability of commercial liability insurance, and enable "the efficient operation of risk retention groups."[18]

The "compelling reason" for the Court to grant certiorari in this case is succinctly stated in Rule 10(c)— " . . . a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court . . . " The important question of federal law is the extent of the preemption of state law that is accomplished by the LRRA and the correct analysis to be made of a state law to determine whether or not it is preempted by the LRRA. The reason that this question of federal law should be settled by this Court is that the potential confusion generated by the current state of decisional law on this question creates an uncertainty that robs risk retention groups of Congress' stated purpose in enacting the LRRA.

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[18] *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"]).

III. ARGUMENT: AS TO FOREIGN RRGS, THE LRRA PREEMPTS STATE LAWS REGULATING THE "BUSINESS OF INSURANCE," INCLUDING WASHINGTON'S "ANTI-ARBITRATION" STATUTE.

With nine simple exceptions, the LRRA preempts all state laws that "regulate the business of insurance" as applied to foreign RRGs. This broad, preemptive sweep is clearly established by the text of the LRRA, its legislative history, and numerous cases from state and federal courts around the country.

First, Section 3902(a) of the LRRA provides that a foreign RRG is exempt from any state law or order that would "regulate, **directly or indirectly**, the **operation** of a risk retention group. . . ."[19] Section 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**. . . ."[20] (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."[21] As with any preemption

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[19] 15 U.S.C. § 3902(a) (emphasis added).

[20] 15 U.S.C. § 3902(b).

[21] *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

analysis, the ultimate touchstone is Congressional intent.[22] 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** 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**.[23]

Congress stated that it pre-empted state laws in a wide-ranging fashion in order to "eliminate the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] risk retention groups."[24]

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.

In a decision on point with the Ninth Circuit's decision in this case, it previously in 2016 determined that Alaska Statute § 21.96.100(d)'s prohibition on

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the accomplishment and execution of the full purposes and objectives of Congress, federal preemption occurs).

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

[23] 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.

[24] 1981 House Report, at p. 12. (FN 18 supra)

reimbursements of fees and costs incurred by an insurer defending a non-covered claim was preempted by the LRRA. (FN 2). 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.[25]

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.[26] As discussed 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.[27] 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

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[25] *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976, 980 (9th Cir. 2016) (*ALPS*). (Also referenced in FN 15 above.)

[26] *Speece*, 289 Neb. at 87; see also *Wadsworth*, 748 F.3d at 108 (New York's direct action statute preempted by the LRRA, in part, because application of the statute would "make it difficult for a foreign risk retention group to maintain uniform underwriting, administration, claims handling, and dispute resolution processes"), and *Greenfield*, 214 F.3d at 1075.

[27] *Wadsworth*, 748 F.3d at 108; *Courville*, 174 So.3d at 671-673.

foreign risk retention group by the express act of Congress in the LRRA. 15 USC § 3902(a)(1). . . ."[28]

Petitioners have seemingly become completely lost on the precedentially well-established notion that insurance statutes like Wash. Rev. Code § 48.18.200(1)(b) unequivocally attempt to "regulate" the business of APIC. Their reliance on misplaced reasoning by other courts underscores the reason why APIC and *Amicus* herein, despite having prevailed before the 9th Circuit, feel it appropriate to consent to *certiorari* herein so as to finally secure clarification by this Court as to the simple and concise language of the LRRA, which will help this industry avoid the need to expend huge sums of money and time, over and over again, to have their rights clarified as the Congress intended.[29]

Petitioners essentially seek to dictate the terms of the APIC Policy and "regulate its business of insurance," to effectively insert certain provisions into the APIC contract of insurance that were not previously agreed upon, and nullify other provisions that were agreed upon.[30] This strategy is decidedly at odds with

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

[29] Also see *Nadkos, Inc. v. Preferred Contractors Insurance Company, RRG (PCIC)*, 2018 N.Y. Slip Op. 03242 (Appellate Department of New York Supreme Court absolves RRG from compliance with statute requiring early disclosure of coverage dispute.)

[30] 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").

the text, legislative intent, and general understanding of the LRRA.

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

The PLRRA created RRGs, a new type of self-insurance system.[31] The PLRRA "allow[ed] businesses 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."[32] "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."[33] "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

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[31] *Nat'l Risk Retention Ass'n v. Brown*, 927 F.Supp. 195, 197 (M.D. La. 1996); *Swanco Ins. Co.-Ariz. v. Hager*, 879 F.2d 353, 354 (8th Cir. 1989).

[32] *Id*.

[33] *Courville*, 174 So.3d 659, 670 (2015).

insurance authority of any state could act as a risk retention group nationwide."[34]

A "foreign" RRG is one that is chartered outside of the regulating state, but conducts business within that state.[35] "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.' "[36]

As the Louisiana First Circuit Court of Appeal put it: "Primary regulatory authority and enforcement power over risk retention groups is left to domiciliary, or chartering, states. Only the chartering jurisdiction may directly regulate the formation and everyday operations of a risk retention group."[37]

By drastically reducing the total number of state regulations an RRG has to comply with in order to operate on a national basis, RRGs are able to reduce their expenses and ultimately the cost of insurance to the group's members.[38] According to the House Report accompanying the PLRRA,

> Essentially, the objective of the [PLRRA] is accomplished by facilitating the formation of an

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[34] *Id.*

[35] *Wadsworth*, at 102-104.

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

[37] *Shear v. Champagne*, 22 So.3d 942, 944-945 (La. App. 2009).

[38] *Greenfield*, 214 F.3d at 1075.

> 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 multistate 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.[39]

As the 1981 House Report stated, the PLRRA's preemption of regulation by non-chartering states enables "the efficient operation of risk retention groups by eliminating the need for compliance with numerous non-chartering state statutes that, in the aggregate, would thwart the interstate operation [of] . . . risk retention groups."[40]

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."[41] The reasons why Congress broadened the scope of the act were clearly stated:

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[39] H.R. Rep. 97-190 at p. 4.

[40] *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).

[41] *Brown*, 927 F.Supp. at 197.

BACKGROUND AND NEED FOR THE LEGISLATION

During the 99th Congress, the Country has been shaken by a crisis in the availability and affordability of commercial liability insurance. Congress has been besieged with complaints regarding huge rate increases, mass cancellations of coverage, and entire lines of insurance virtually unavailable at any price. Crucial activities and services have been hard hit. Such activities include, among others, those of municipalities, universities, child daycare centers, health care providers, corporate directors and officers, hazardous waste disposal firms, small businesses generally, and many others.

. . .

Since a risk retention group is simply a group of businesses or others who join together to set up their own insurance company only to issue insurance policies to themselves, it was believed that by encouraging such groups, the subjective element in underwriting could be reduced. The risk retention group would know its own loss experience and could adhere closely to it in setting rates.

. . .

The Committee's hearings indicate the existence of a multi-billion dollar insurance capacity shortage, and the Committee believes that creation of self-insurance groups can provide much-needed new capacity.

. . .

> **It is necessary to exempt risk retention and purchasing groups from State law, in the respects specified in the Risk Retention Act, in order to achieve the beneficial effects of such groups referred to above**.[42] (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."[43] Other courts concur. "The very purpose of the LRRA was to allow risk retention groups to operate nationwide under the regulation of one jurisdiction, rather than fifty-one jurisdictions."[44]

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

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[42] 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").

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

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

> 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*. . . . [45] (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. Non-chartering states, like Washington, may only regulate the operations of foreign RRGs in the nine highly specific ways enumerated by Congress, none of which even arguably apply here.

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**. . . ."[46] (The "exemptions" referred to above are a foreign RRG's exemptions from state insurance 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

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[45] 15 U.S.C. § 3902(a).

[46] 15 U.S.C. § 3902(b) (emphasis added).

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.' "[47] 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."[48] As the Eleventh Circuit put it, the LRRA's "sweeping preemption language" provides for "broad preemption of a non-domiciliary state's licensing and regulatory laws."[49]

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[47] 1986 House Report, at p. 6.

[48] *Wadsworth*, 748 F.3d at 102-103; 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 (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, 356-358 (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, 1318-1319 (9th Cir. 2013) (LRRA "broadly preempts" non-domiciliary state laws).

[49] *State of Fla., Dept. of Ins. v. Nat'l Amusement Purchasing Group, Inc.*, 905 F.2d 361-363 (11th Cir. 1990).

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

The LRRA contains nine (9) distinct exceptions to its sweeping preemption provision. 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.[50]

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."[51] "[T]he Act authorizes nonchartering states to require risk retention groups to comply only with certain (very) basic registration, capitalization, and taxing requirements, as well as various claim settlement and fraudulent practice laws."[52] 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.[53]

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[50] *Swanco*, 879 F.2d at 356-358.

[51] *Wadsworth*, 748 F.3d at 104.

[52] *Id.* at 106.

[53] E.g., *Swanco*, 879 F.2d at 356-358; *Wadsworth*, 748 F.3d at 104-106.

Non-chartering states, like Washington in this case, are limited to the nine exceptions listed in 15 U.S.C. § 3902(a)(1)(A)-(I)[54] which allow a non-chartering 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;
>
> (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—

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[54] *Wadsworth*, 748 F.3d at 106.

(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.' "[55]

[55] 15 U.S.C. § 3902(a)(1)(A)-(I).

Washington's Risk Retention Group Statute (Wash. Rev. Code 48.92.010 et seq.) follows the LRRA.[56] None of the exceptions above, under the LRRA or under Washington law, have anything to do with regulating the terms of insurance policies offered by the risk retention groups.[57] In the instant case, APIC was chartered in Arizona, so Washington is a non-chartering state. Because the Appellants' arguments do not fit within any of the nine LRRA exceptions—or within Washington's laws regulating foreign RRGs—they cannot be imposed on APIC.

D. Under Controlling Case Law, Non-Domiciliary State Laws, Including "Anti-Arbitration" Provisions in State Insurance Statutes, Cannot Be Applied To Foreign RRGs.

This Court has specified what it means to "regulate the business of insurance."[58] 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.[59]

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[56] Wash. Rev. Code 48.92.010 et seq.

[57] See *ALPS* discussion above.

[58] *Pireno*, 458 U.S. at 119.

[59] *Speece*, 289 Neb. at 87.

In *Pireno*, this 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. . . .[60]

This three-part *Pireno* test remains the standard analysis defining the "business of insurance."[61]

Sturgeon, which is cited by the Petitioners, erroneously focused on the "anti-discrimination" provisions of the LRRA, rather than the "regulation" preemption.[62] The case does not provide any compelling basis to reverse all the contrary authorities pertaining to LRRA preemption. See Respondents' Brief. *Sturgeon* and another case called *King* have been decisively rejected based upon their erroneous reasoning as articulated by

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[60] *Pireno*, 458 U.S. at 129.

[61] E.g., *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501-503 (1993); *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir. 1992).

[62] *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205 (Mo. App. 2011).

the Second Circuit Court of Appeals and the Nebraska Supreme Court.[63] [64]

The Nebraska Supreme Court pinpointed the flaws in the reasoning of *Sturgeon*, and the way that *Sturgeon* ignored the key prohibition from § 3902(a) on "regulat[ing]" the "operations" of a foreign RRG.

> The Missouri court basically reasoned that the purpose of the LRRA was to prevent states from discriminating against risk retention groups vis-a-vis other types of insurance companies. . . . We disagree with the reasoning of the court in *Sturgeon* and its interpretation of the LRRA. Such reasoning focuses on the portion of § 3902 exempting risk retention groups from state laws making their operations unlawful *without recognizing or giving adequate emphasis to the additional exemption from laws that regulate their operation.* Instead, we agree with the reasoning and interpretation of the Second Circuit Court of Appeals in *Wadsworth*. . . .[65] (Emphasis added)

The LRRA is far more than an anti-discrimination statute, as *Sturgeon* would have it. On the contrary, the basic thrust of the LRRA is to ***discriminate*** or ***treat differently*** foreign RRGs on the one hand, and

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[63] *Wadsworth*, 748 F.3d at 109; *Speece*, 289 Neb. at 85.

[64] The other case distinguished by the *Wadsworth* and *Speece* courts based on the same reasoning was *National Home Ins. Co. v. King*, 291 F.Supp.2d 518 (E.D. Ky. 2003) (*King*). *Amicus* counsel intentionally does not analyze the *King* decision as it is addressed in detail in Respondent's Brief.

[65] *Speece*, 289 Neb. at 84-85.

domestic RRGs and traditional insurance companies on the other hand.[66]

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."[67] 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.[68] 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 insurance language to nullify the terms and conditions of an "arbitration clause" in the policy of a foreign RRG is clearly preempted.[69]

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[66] 15 U.S.C. § 3902(a); *Wadsworth*, 748 F.3d at 102-109; *Speece*, 289 Neb. at 84-85.

[67] *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, Dept. of Transp. v. James River Ins. Co.*, 176 Wash.2d 390, 402 (2013); *Speece*, 289 Neb. at 88.

[68] *Central Claims Serv., Inc. v. Claim Prof'ls Liability Ins. Co.*, Civil Action No. 10-4672 (E.D. La. Aug. 30, 2011).

[69] The other inapposite case called *Ziegler*, also analyzed by Respondent, is virtually dominated by the reasoning in *Courville*. (*Ziegler v. Housing Auth. of New Orleans*, 192 So.3d 175 [La. App. 2016]). *Ziegler* is simply bad law. After spending <u>*one-half*</u> of its 9-page decision justifying its conversion of the matter from that of an appellate review to that of a "discretionary supervisory"

As noted by the 10th Circuit, "To expressly invalidate an agreement contained in the insurance contract touches the core of the 'business of insurance'. . . ."[70]

E. Not All State Laws *Affecting* A Foreign RRG Are Preempted.

The LRRA's "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***

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opinion, the Fourth Circuit panel ignored the case law cited herein, and rendered the same misplaced analysis seen in *Sturgeon* and *King, both of* which had been distinguished as clearly erroneous in the comprehensive analyses of *Wadsworth* and *Speece*. The *Ziegler* panel also rendered its opinion in knowing conflict with its sibling First Circuit Panel in *Courville, id*. Thereafter, during the pending subsequent *Writ of Certiorari* filed before the Louisiana Supreme Court hoping to settle the conflict, wherein NRRA was again *amicus curiae*, sadly the case "settled" before the Supreme Court could rule on the Writ and clarify the issue in Louisiana.

[70] *Mutual Reinsurance*, 969 F.2d at 933, citing to *Securities and Exch. Comm'n v. National Sec.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969).

> ***not*** ***exempt under this chapter***.[71] (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.[72]

Unless the state law fits within one of the nine exceptions to LRRA preemption discussed above, all state laws that *specifically* regulate the business or operations of a foreign RRG *as an insurer*—are preempted.

F. Under Washington's Own Risk Retention Group Statute, this Court Should Not Dictate the Terms of the APIC Policy

Citing to Wash. Rev. Code 48.92.010, 040 et seq., NRRA educated the 9th Circuit on this very point. See Respondent's Brief incorporating this argument that is cited above.[73] Indeed, the Washington RRG statute follows the LRRA such that foreign RRGs would be subject only to a discrete handful of state insurance laws, i.e., those that the LRRA allows a state to impose on foreign RRGs.

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[71] 15 U.S.C. § 3902(f).

[72] The Court will note an extensive analysis of *Leonberger v. Missouri United Sch. Ins. Council*, 501 S.W.3d 1, at 13 (Mo. Ct. App. 2016) that will appear in Respondent's Brief.

[73] See R. Appdx. 53.

G. Why Certiorari Should Be Granted. 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

As set forth in more detail in NRRA's *Amicus* Brief before the 9th Circuit,[74] 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. Without LRRA preemption, RRGs will no longer be able to develop uniform and streamlined policies, including cost-saving measures such as arbitration provisions, which would apply in each of the states where they conduct business. The result would be catastrophic to RRG members, all of whom are "*owner-insureds*" who opt for RRG programs precisely because this is the type of liability coverage they have contracted for and specifically want.

The LRRA addressed a profound need, and helped rescue the insurance industry from a crisis of unavailability, indeed making affordable liability coverage available.

The 220 RRGs in existence collectively wrote $3.6 billion dollars in gross written premium in 2019.[75] Risk

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[74] R. Appdx. 53-57.

[75] Risk Retention Reporter, September 2020 Edition, Volume 34, Number 9. The Risk Retention Reporter is the key

retention groups nationwide provide liability protection for about a half million insured professionals, businesses, public entities and health care providers. If foreign (non-domiciled) RRGs were required to comply with each state's public policy, laws and complex regulations imposed upon their domestic insurers, they would be met with severe financial and operational burdens and would have to fundamentally change the way they do business. With LRRA preemption, RRGs are able to both provide nationwide insurance and to provide it at affordable rates *because* they are exempt from the complex restrictions imposed by each of the states. Congress clearly intended it this way.

As demonstrated by Respondent APIC in its brief, not to be "reanalyzed" here, the *OMIC* decision followed *Mears*.[76] *Sturgeon* followed *Mears*. *Leonberger* followed *Sturgeon*,[77] and *Ziegler* followed *Sturgeon* and *King*. At the risk of oversimplification, each of those courts made two (2) fundamental errors in their reasoning. First, they mistakenly relied upon the incorrect portion of the statute (the anti-discrimination provision). Second, they then compounded that error by finding "no discrimination" where "discrimination" was not the issue to begin with!

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independent publication for the industry, *not* owned or operated by NRRA herein.

[76] *Opthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062, 1067-1070 (7th Cir. 1998) ("*OMIC*"); *Mears Transp. Group v. State of Fla.*, 34 F.3d 1013, 1016-1017 (11th Cir. 1994) ("*Mears*").

[77] *Leonberger*, *id.* FN 74.

On the other hand, while *Wadsworth* and *Speece* cogently articulated how *King* and *Sturgeon* simply got it wrong, such does not provide much solace as the industry faces other courts, regulators, associations, etc., perennially attempting to seize upon those cases as legitimate "authority." The reason they get away with this is because they know that the LRRA provides a "right" but does *not* include any practical "remedy" to enforce its *anti-regulation* provision.

IV. CONCLUSION

The compelling reason for this Court to grant certiorari in this instance is the need for a uniform analysis of preemption under LRRA that can be relied upon by risk retention groups, state regulators, and the trial courts throughout all the United States in order to realize the congressional purpose of enacting the LRRA.

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